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 1

ORAL HEARING

Monday, July 29, 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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C O N T E N T S

PAGE

PRELIMINARY
MATTERS.....10

OPENING STATEMENTS

ON BEHALF OF THE UNITED STATES:

By Ms. Thornton.....18

ON BEHALF OF THE CLAIMANTS:

By Mr. Kho.....28

By Ms. Hyman.....32

By Mr. Williams.....50

By Ms. Kepchar.....121

ON BEHALF OF THE RESPONDENT:

By Ms. Silberman.....134

By Ms. Gehring Flores.....213

By Mr. Debevoise.....259

WITNESS:

THOMAS R. KINGSBURY

Direct examination by Ms. Hyman.....265
Cross-examination by Mr. Debevoise.....277
Redirect examination by Ms. Hyman.....358

CONFIDENTIAL PORTION 1.....110-112

P R O C E E D I N G S

PRESIDENT PHILLIPS: Well, good morning, ladies and gentlemen. I think we might start very promptly.

This is the principal hearing of the arbitration between Bridgestone Licensing Services and Bridgestone Americas against the Republic of Panama.

Might I invite the Parties to introduce themselves?

MR. WILLIAMS: So, my name is Justin Williams from Akin Gump, and I'm starting on my right. We have Stephen Kho, Karol Kepchar, Katie Hyman, and Johann Strauss to my left. And sitting behind me is the former Chief Justice of Panama, Mr. Arjona.

PRESIDENT PHILLIPS: Thank you.

MR. DEBEVOISE: Good morning, Mr. Chairman and Members of the Tribunal. This is Whitney Debevoise of Arnold & Porter on behalf of the Republic of Panama, and here with me as co-counsel are Ms. Gaela Gehring Flores, Mallory Silberman, Katelyn Horne, Brian Vaca, Michael Rodríguez, Natalia Giraldo-Carrillo, and our legal assistants Kelby

Ballena, Gabriela Guillen.

I wanted to let the Tribunal know that a new administration took office in Panama on the 1st of July of this year following elections in Panama at the beginning of May, and the unit responsible for this type of case is being reorganized, and they did not yet make any arrangements for anyone to attend this week, but if someone does get authorized to come then, we will let you know. But it's not for lack of interest in the case that they're not here. It's just this administrative moment of the transition.

Also with us here today are Panama's expert witnesses: Ms. Marissa Lasso de la Vega Ferrari, who is right here; Mr. Jorge Federico Lee, former Justice of the Panamanian Supreme Court right here; Nadine Jacobson, who is our trademark expert; and Matt Shopp, who is back here as the damages expert. And also from his office his colleague, Yelena.

I think that's everyone from our side.

PRESIDENT PHILLIPS: Thank you.

And I think we have representatives from the United States.

MS. THORNTON: Yes, good morning, Mr. President, Members of the Tribunal. My name is Nicole Thornton. I'm here from the United States Department of State, also with John Blanck from the Department of State, Katherine Gibson from the Office of the U.S. Trade Representative and Mr. John Rodríguez from the U.S. Patent and Trademark Office. Thank you.

PRESIDENT PHILLIPS: This is an open hearing, but there may be occasions when the Hearing has to become closed to receive protected or confidential information. I think when that happens, it will be appropriate that the representatives of the United States will withdraw with any other persons present who are not representing the Parties. Is that your understanding?

MS. THORNTON: We confirm we will withdraw. Thank you.

PRESIDENT PHILLIPS: Thank you very much.

Some matters of housekeeping, I've received, as I'm sure my colleagues did, a very late request for two further items to be added to the record. I'm not

sure that we formally agreed to that.

But we do.

Are there any other matters of housekeeping at this point?

SECRETARY TORRES: Mr. President, if you allow me, this is an administrative reminder for all participants with the microphones to remember to turn them on when you're speaking for the Court Reporters and Interpreters in particular, and to please turn them off when you're not. If you leave them on, whatever you say to your neighbor is going to be in the public recording, so please be mindful of that.

And second, I have discussed with both Parties and they're aware of how the stream to the public is working. Be mindful, that when that light on both our sides is off, that means we are being streamed to the public. If that light is red, that is when the public is not seeing the information that's being conveyed at the Hearing. So, whenever we're discussing protected or restricted information, just wait until the light is red before addressing it.

MR. WILLIAMS: Mr. President, so an initial

housekeeping matter on our side, is that, as you've observed then, further material has been added to the record on both sides, but there are two issues of authorities, Legal Authorities, where there is not agreement that those be added to the record. And if I may, I wanted to address the Tribunal in relation to that question.

PRESIDENT PHILLIPS: Very well.

MR. WILLIAMS: So, the first item of authority is a two-page extract from a treaties on Panamanian law by Mr. Fábrega, who is the leading Panamanian jurist, and it relates to a provision of Panamanian Law which is Article 1194 of the Judicial Code, which relates to the Cassation Recourse Procedure, and the Treaty explains, then, how Article 1194 is to be interpreted. And in short, Mr. Fábrega, in his treatise, explains that the interpretation is broader than the strict wording of 1194 might suggest.

The Tribunal will be aware that the Supreme Court Judgment in issue in this case makes a decision in relation to Muresa's cassation recourse; so, that

the Supreme Court in the first part of its Judgment, allowed the cassation recourse from Muresa. And on that basis, then, the Supreme Court went on to consider the substantive appeal by Muresa.

Now, the Respondent, of course, the most recent submission in the arbitration was that the Rejoinder from Panama; and, attached to the Rejoinder the Respondent put on the record the entire chapter of the Judicial Code that relates to the Cassation Recourse Procedure, and also filed with Panama's Rejoinder was the Second Report of Mr. Lee, who is Panama's Panamanian Law expert, and he describes in his Second Report the Cassation Recourse Procedure, at Paragraphs 25 and 30. He sets out the specifics of Muresa's Cassation Recourse Petition, which is at Paragraph 84. He sets out the Supreme Court's finding in relation to that Petition at Paragraph 86, and he then opines on the Cassation Recourse Judgment, and he opines that its compliant with the Judicial Code, and you'll see that at Paragraph 90 of his Report.

Now, the Claimant and its experts, of course, have not had an opportunity to respond to any of that

because it was submitted with the Rejoinder and, amongst other things, the Claimant disputes Mr. Lee's conclusions in relation to that matter.

And, of course, our intent is to explain in this Hearing, amongst other things, the basis for that, and why we disagree with Mr. Lee's conclusion on that; and, as part of that, the interpretation of Article 1194 of the Judicial Code, we say, is relevant.

Now, the Tribunal, of course, permitted new expert reports filed with the Rejoinder from Professor Paulsson and Mr. Fried on behalf of the Respondent, and that was on the basis that the Claimants would then have the opportunity to deal with any new points raised by them at the Hearing; and on the same point, the Claimants--on the same basis, the Claimants will need to respond on the cassation recourse issues that I have outlined.

Now, Mr. Fábrega, as I said, is the leading jurist on Panamanian Law, I think that's uncontroversial. He's quoted in a different context in the relevant Supreme Court Judgment. We don't

think that his treatise is controversial, but, of course, the Respondent will have an opportunity to respond to it and to put any points to Mr. Lee in direct or any points to Mr. Arjona in cross-examination. And the Claimants, we say, then will just have a normal opportunity to address the treatises on any issues that may arise in relation to the treatises.

As it stands, we're not clear as to the basis for the objection, but nevertheless there does appear to be a dispute between the Parties as to whether this two-page extract from Mr. Fábrega's treatise should be permitted on the record.

The second--I mentioned there were two questions of Legal Authority for there is a dispute as to whether it was to go on to the record, but the second area are some, what we consider, to be some very uncontroversial U.S. and English authorities which are domestic court decisions simply relating to questions of due process, and the very obvious and uncontroversial principle that due process requires that a party needs to have adequate opportunity to

deal with evidence submitted.

And we say that this is relevant because the TPA under which this arbitration proceeds embodies in relation to denial of justice that the principle of due process embodied in the principal legal systems of the world, and that is in the text of the TPA; and, so for those reasons, it seems to us that, whilst everyone recognizes such principles, nevertheless it may be of assistance to the Tribunal to have authority on the record in relation to those matters. So, for that reason, it seemed to us sensible for those very uncontroversial authorities to be on the record.

The Respondent's objection, as we understand it, is that these authorities are irrelevant, but we say that's simply a question for submission and the authorities, therefore, should be allowed to put on the record.

Mr. President, so that is our application.

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

The Republic of Panama does object to the request to submit these late-coming documents. There

is a provision in the First Procedural Order in this case which governs these circumstances. It is Section 17.4 of the Procedural Order, which states: "Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party."

As you've just heard from Claimants' counsel, it appears that Claimants would like to submit these new documents based on perhaps some evolving legal argument that they have that has not otherwise been disclosed in their previous written pleadings.

And by the way, Claimants' written submissions were the Memorial, which was submitted on May 11th, 2018, and their Reply on March 22nd of 2019.

The fact of the matter is that the Republic of Panama is the Respondent in this dispute. The Republic of Panama had the last written submission. Claimants do not have an opportunity, according to ICSID procedure and according to this Procedural

Order, to submit some form of Sur-Reply. That's not allowed. Claimants are allowed, in the context of this Hearing, to respond to arguments that the Republic of Panama included in its Rejoinder submission, but Claimants do not have the opportunity nor do they have the right under the Procedural Order that governs this proceeding to submit new documents that support new arguments that no one has yet seen.

Section 17.4 of Procedural Order Number 1 as well as hundreds of other Procedural Orders on which it is modeled is designed to prevent against precisely this type of attempt to alter the record and to surprise the Tribunal and opposing counsel with new arguments just before the Hearing or on the first day of the Hearing; and we, therefore, respectfully request that the Tribunal reject Claimant's request. We do not hear any sort of request that sets forth exceptional circumstances in this case. We hear a request to submit a Sur-Reply and to respond to our arguments. Claimants had their opportunities to submit their written submissions; that passed a while ago. They're not allowed to submit some sort of

responsive pleading in this Hearing.

So, Panama has not agreed to the submission of these documents. Claimants have not demonstrated the existence of exceptional circumstances under the Procedural Order that governs this case, and we request that the Tribunal reject their admission.

PRESIDENT PHILLIPS: Do you wish to respond?

MR. WILLIAMS: Very briefly, only to say that this is not an attempt to introduce a Sur-Reply; it is simply a request that very brief and, we believe, very, and we believe, uncontroversial authority, Legal Authority, be put on the record. That is it.

(Tribunal conferring.)

PRESIDENT PHILLIPS: We think the best course is that we will discuss this between ourselves at the break. It doesn't need an immediate response, so we will then proceed to invite the United States to make their oral submissions.

OPENING STATEMENT BY COUNSEL FOR THE UNITED STATES

MS. THORNTON: Good morning, Mr. President, Members of the Tribunal. My name is Nicole Thornton, and I'm the Chief of Investment Arbitration in the

Office of International Claims and Investment Disputes within the Office of the Legal Adviser at the Department of State.

I would like to thank the Tribunal and the disputing parties for the opportunity to make the following brief oral submission pursuant to Paragraph 2 of Article 10.20 of the U.S.-Panama Trade Promotion Agreement, or "TPA."

Specifically, the United States offers interpretations on three issues: The fair-and-equitable-treatment obligation, including the obligation not to deny Justice; the burden of proof for such a claim; and damages. The United States does not take a position on how these interpretations apply to the facts of this case. As we have also stated in our written submissions, no inference should be drawn from the absence of comment on any issue not addressed in either our written or oral submissions.

The first issue I will address is the minimum-standard-of-treatment obligation, which includes fair and equitable treatment, as provided in Paragraph 1 of Article 10.5. That obligation is

circumscribed by the customary international law minimum standard of treatment of aliens and does not require treatment in addition to or beyond that standard.

Two provisions of the TPA address this explicitly:

First, Paragraph 2 of Article 10.5 explicitly prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. That paragraph additionally provides that 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.

Additionally, Annex 10-A of the TPA, entitled "customary international law," explains that the Parties view the customary international law obligations referenced in Article 10.5 as resulting from the general and consistent practice of States that they follow from a sense of legal obligation. Thus, the fair-and-equitable-treatment obligation in

the TPA is the customary international law obligation.

Turning to denial of justice, as noted by Paragraph 2(a) of the Article 10.5, the obligation not to deny justice is included as part of the concept of fair and equitable treatment. Because the obligation not to deny justice is subsumed within fair and equitable treatment, it is also therefore a customary international law obligation. And this is made clear by Annex 10-A, which, as I just noted, refers to the customary international law obligations in Article 10.5.

The obligations in Paragraph 1 of Article 10.5 apply to covered investments rather than to investors. That is in contrast with other obligations of Section A of Chapter 10, the Investment chapter of the TPA. For example, the obligation to accord national treatment found in Article 10.3 applies to both investors and covered investments, as explicitly provided in Paragraphs 1 and 2 of that Article. Similarly, the obligation to accord most-favored-nation treatment found in Article 10.4 also applies to both investors and covered

investments, and likewise the obligation in Article 10.6 Paragraph 1 regarding treatment in case of strife explicitly applies to both investors and covered investments.

So, the Parties to the TPA made deliberate decisions to require that some obligations apply to both investors and covered investments. However, for Article 10.5, the TPA Parties made the decision to extend the obligation only to covered investments. The obligations contained in Paragraph 1 of Article 10.5 including the obligation not to deny justice only apply to treatment accorded to covered investments.

And I note that in Paragraph 3 of our Third Submission, dated December 7, 2018, we always address this point.

This means that a denial of justice claim, just like any claim alleging a violation of Paragraph 1 of Article 10.5, may not be arbitrated pursuant to Chapter 10 of the TPA if the Claim is for treatment accorded to an investor rather than a covered investment. It may only be arbitrated if the Claim is for treatment accorded to the Investor's

covered investment.

And that's made clear by Article 10.16, which is the provision which authorizes claims to be submitted to arbitration. And there are two provisions in Article 10.16 which authorize claims to be submitted to arbitration, the first being Paragraph 1(a) and the second being Paragraph 1(b).

Paragraph 1(a) authorizes a Claimant to bring a claim on its own behalf for a breach of Section A of Chapter 10. Section A of Chapter 10 includes Articles 10.1 through 10.14 and no other articles. Paragraph 1(b) of Article 10.16 authorizes a Claimant to bring a claim not on its own behalf but on behalf of an enterprise of the Respondent that is a juridical person that the Claimant owns or controls, directly or indirectly. Again, these claims are authorized for a breach of Section A of Chapter 10. This means that an alleged breach of the minimum standard of treatment, including a denial of justice claim, may only be submitted to arbitration under Article 10.16 to the extent that it would constitute a breach of the customary international law obligations incorporated

in Section A of Chapter 10.

In the context of a denial of justice claim, a Claimant therefore must establish that the treatment accorded through an adjudicatory proceeding was treatment accorded to the covered investment. In addition, a Claimant must establish that this treatment failed to meet the standards for denial of justice, which the United States discussed in more detail in its Third Submission in this matter, dated December 7th, 2018, in Paragraphs 2 to 4.

The question then, is how a covered investment is accorded treatment in an adjudicatory proceeding for the purposes of a denial of justice claim. For a claim submitted under Article 10.16, Paragraph 1(a), a Claimant, investor, alleging that the treatment accorded to its covered investment amounted to a denial of justice must establish that the Claimant was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for that treatment to result in a denial of justice by virtue of that proceeding.

Alternatively, for a claim submitted under

Article 10.16 Paragraph 1(b) on behalf of its covered investment that is an enterprise of the Respondent State that the Investor owns or controls directly or indirectly, a Claimant must establish that the enterprise was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for the treatment accorded to result in a denial of justice by virtue of those proceedings.

The United States has also explained this in its recent non-disputing party submission under the U.S.-Peru TPA in Gramercy Funds Management versus Republic of Peru, which has an ICSID Case Number of UNCT/18/2. That submission is dated June 21, 2019, and it is available on the ICSID website. The discussion at issue is at Paragraph 43 of that submission.

The second issue I will address briefly is the burden of proof for a claim of denial of justice under Article 10.5 of the TPA and applicable rules of international law. Of course, Article 10.22 of the TPA states that the Tribunal shall decide issues in dispute in accordance with the TPA and applicable

rules of international law, subject to Paragraph 3 of that Article, which provides for binding FTC Commission interpretations.

General principles of international law concerning the burden of proof in international arbitration provide that a Claimant has the burden of proving its claims, and if a Respondent raises any affirmative defenses, the Respondent must prove such defenses. And the standard of proof is generally a preponderance of the evidence. However, when allegations of corruption are raised, either as part of a claim or part of a defense, the general principles of international law applicable to international arbitration require that the Party asserting that corruption occurred must establish the corruption through "clear and convincing" evidence.

An example of a tribunal that has ruled that the clear and convincing evidence standard is required for findings of corruption is EDF Services Limited versus Romania at Paragraph 221 of its Award dated October 8, 2009. And that case is ICSID Case Number ARB/05/13.

The third and last issue I will address is the issue of monetary damages, as that term is used in Paragraph 1(a) of Article 10.26. An investor may recover damages only to the extent that damages are established on the basis of satisfactory evidence that is not inherently speculative. Further, an investor may only recover for loss or damage that the Investor incurred in its capacity as an investor of a party. That means that the Investor may only recover for damages it incurred in its capacity as an investor-seeking to make, making or having made an "investment" in the territory of the other Party. In Article 2.1 of the TPA further defines "covered investment" as an investment within the territory of the other Party. The United States has made a comparable submission on this issue in the context of the NAFTA as an intervenor in Mexico's action to partially set aside a NAFTA Award in the Court of Appeals for Ontario. That was the case of Cargill versus Mexico.

Mr. President, Members of the Tribunal, that concludes the Fourth Submission on behalf of the

United States pursuant to Paragraph 2 of Article 10.20 of the TPA. The United States stands by the interpretations we made in our previous three submissions, and we thank you very much for your time and attention.

PRESIDENT PHILLIPS: Thank you. The Tribunal is grateful for your submissions.

So, we shall now proceed to the Claimants' opening.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. KHO: Good morning, Mr. Chairman, Members of the Tribunal. My name is Stephen Kho. On behalf of the Claimants Bridgestone Americas and Bridgestone Licensing Services, we want to thank you and the ICSID Secretariat for your time and dedication to serving in this important matter.

I would like to make some short introductory remarks before turning to my colleagues for a more detailed assessment of the Claimant's case and responses to Panama's arguments. As you know, the Claimants have not brought this case lightly. This is a matter that the Claimants have sought to resolve

over a number of years through a variety of means, including exhausting all local remedies. But after several years of fruitless efforts, the Claimants had no choice but to pursue arbitration under the U.S.-Panama Trade Promotion Agreement.

Why is it that the Claimants feel it must go this route? Because this arbitration is about important systemic legal issues for the investor-State arbitration mechanism. It is about matters that very few prior arbitrations have tackled before, and it is about the single most important asset for the Claimants who are part of a large multinational company that has spent over 100 years investing in and building up its brand and reputation around the world. Their brand and reputation are embodied in their undeniably world-famous and well-known trademarks BRIDGESTONE and FIRESTONE. For these Claimants, this case has significant impact on the value and utility of their well-known marks in Panama and around the world.

Panama, however, would have you treat this case as if it's a normal investor-State arbitration

case. They want you to treat intangible property the same as if they were tangible properties, as if there are no differences between the two, as if there is little or no value or use for intellectual properties being on the goods that are being sold in limited territories. Their approach belies their understanding of the uniqueness and purpose of "intellectual property" rights and trademark rights in particular.

There is a reason why the United States have insisted that all of their bilateral investment treaties and Free Trade Agreements specify "intellectual property" rights as investments worthy of stand-alone coverage and protection under investor-State arbitration. The United States has consistently prioritized "intellectual property" rights in all of their trade and investment agreements and negotiations, and the U.S.-Panama TPA is no different.

By entering into this TPA with the United States, Panama has agreed to this prioritization. It cannot now be allowed to minimize such investments.

Yet this is what Panama is trying to do.

Let's be one hundred percent clear about one thing: The underlying decision that the Panama Supreme Court took against the Claimants in this case is a decision that no court in Panama, no court in the Latin American Region, in fact, no court in any country around the world has ever taken, ever. The decision undercuts one of the fundamental rights of trademarks, that is the right to oppose the registration of potentially confusingly similar marks. 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, no court that is, except the Supreme Court of Panama in this one decision, and it did so by contorting itself into ignoring certain facts on the record while making other factual findings on the basis of false or no evidence. It found against the Claimants for the exact same actions and strategies the Claimants have employed in every jurisdiction it operates around the world for decades, including previously in Panama.

Thus while the Claimants found it surprising

that Panama's own investors in the United States would immediately and without prompting in their one meeting suggest that the reason for this Supreme Court Decision is corruption, given the global anomaly of this decision, this rationale certainly ran true.

Mr. Chairman and Members of the Tribunal, we look forward to further confirming all of these facts with you this week. This is not a run-of-the-mill investor-State case that Panama would have you believe. There are important issues at stake here involving the Claimants' intellectual property investments which are very different from tangible property investments and must be recognized as such. In fact, this Decision could be used to erode the Claimants' very valuable and very well-known trademarks, not just in Panama, but throughout the region and around the world.

Again, we thank you for your time and appreciate your efforts in exploring these groundbreaking issues with us. Thank you.

MS. HYMAN: Good morning.

The Tribunal disposed of a number of the

Respondent's Jurisdiction Objections by its Decision of December 2017. The Respondent has two objections remaining. Both are based on the point that the Parties to the Muresa litigation were BSLS and BSJ but not BSAM. On that basis, the Respondent says that BSAM has no standing to bring a claim for denial of justice.

ARBITRATOR GRIGERA NAÓN: Speak more loudly.

MS. HYMAN: Okay.

The Respondent's argument is that a claimant delict under customary international law for denial of justice can only be brought by a person that was Party to the proceedings in which the denial of justice is said to have occurred. Panama acknowledges that there are circumstances in which a non-party can claim denial of justice such as a claim by a parent company in relation to legal proceedings to which its subsidiary was party. However, the Respondent says this can only be under an autonomous fair-and-equitable-treatment standard pursuant to an investment treaty. The Respondent says that the references to "customary international law" at

Article 10.5 of the TPA mean that the customary-international-law approach applies here and that the FET standard in the TPA is not an autonomous standard; hence, BSAM, which was not a party to the Muresa litigation, cannot bring a claim for denial of justice.

Looking at the TPA at 10.5, it's clear that there are a number of references to "customary international law," first at Paragraph 1: "Each Party shall accord to covered investments treatment in accordance with customary international law." And then in Paragraph 2, the customary-international-law minimum standard, and that the concepts of fair-and-equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by that standard.

But you can also see that in 2(a): "'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 principal legal systems of the world."

So, it's notable that while the TPA says that concept of FET does not require treatment in addition to or beyond that which is required by the customary-international-law minimum standard, it also says that the obligation is not to deny justice in accordance with the principle of due process embodied in the principal legal systems of the world. That's a modifier to the customary-international-law standard, so it appears that the standard of treatment in the TPA is not just the customary-international-law standard.

The authority on these questions is Arif and Moldova, which is at RLA-63. In that case, the Claimant brought a claim for denial of justice both in delict under customary international law and under the FET standard in the France-Moldova BIT. The France-Moldova BIT referred to public international law in the context of the FET standard but denial of justice was not specifically referred to. The tribunal noted that neither party had raised the issue of whether this language limited the minimum standard to that under customary international law but that

this question was in any case only of historic significance.

However, the tribunal did draw a distinction between the claimants denial-of-justice claim under customary international law and that under the fair-and-equitable-treatment standard at paragraph 438 of the award. The Tribunal said there: "Conversely, to a free-standing claim for denial of justice which can only be brought by a person that has participated in the national court proceedings, the standard of fair and equitable treatment also protects the foreign shareholder in a local company. If the standard is breached by a denial of justice, the State will be held responsible towards the indirect investor for a breach of fair and equitable treatment."

The Tribunal in Arif explained the difference of approach by reference to the history of these obligations. Denial of justice as an international delict predates investment treaties in which states decided to set out a package of rights and obligations of investors and host states in order to encourage foreign investment.

On 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 it did not have standing, but BSAM is claiming for breach of the FET standard under the TPA. And the TPA specifies the criteria for qualifying investments in Article 10.1 and by reference to the definitions at 10.29. Those criteria are not qualified or subject to Article 10.5.

Article 10.5 expressly relates to "covered investments; and, for those, requires that the minimum standard of treatment shall be that under customary international law as modified by Article 10.5(2)(a). Therefore, the gateway requirement for and FET claim under the TPA is to satisfy the qualifying investor and investment criteria at Article 10.29. Having done so, the reference to customary international law dictates the required standard of treatment for a qualifying investment. It does not dictate standing to bring a claim which has already been established. This arises as a matter of construction of Article 10.5, i.e., the reference to the "qualifying

investment" and of the TPA as a whole, standing is determined by the stated criteria for a qualifying investor and qualifying investment.

The Arif Tribunal said that the FET standard in the France-Moldova BIT was an autonomous standard at Paragraph 529. The Respondent says that an autonomous FET standard is an FET standard that is independent of the customary-international-law standard. But the reference to the autonomous standard in Arif is to the debate as to whether the FET standard is meeting an overarching principle that embraces the other standards of treatment typically found in investment treaties or whether it is an autonomous standard. The Arif Tribunal found for reasons such as the title of Article 3 which was fair and equitable treatment, the FET standard was autonomous and not just an overarching principle. So, we agree with Panama then that the FET standard in the TPA is autonomous. It's an independent standard that does not merely encompass the other principles and protections in Chapter 10 of the TPA. It is an autonomous standard, but contrary to what the

Respondent says, a denial-of-justice claim for breach of the FET standard is not a denial-of-justice claim brought under customary international law; rather, the minimum standard under the TPA will be no greater than the minimum treatment under customary international law. That doesn't mean that only those who might have a claim under customary international law can bring a claim under the TPA because the TPA expressly deals with questions of standing elsewhere.

The Arif Tribunal determined that Mr. Arif, who had not been involved in the impugned proceedings, did not have standing to bring a claim for denial of justice under customary international law, but he could bring a claim for denial of justice under the FET standard because he did have standing to bring a claim under the applicable BIT as an investor. That's the same position that BSAM finds itself in.

BSAM's investment has a right to the protections of Article 10.5 of the TPA. If that standard is breached, as we say it was, by denial of justice by Panama, then BSAM has a right to be compensated for it. There is no need for BSAM to have

been personally denied justice. It's sufficient for denial of justice to have taken place which has deprive BSAM of its rights.

Second, Panama's expert, Professor Paulsson, accepts that a parent company might have standing to bring a denial-of-justice claim if a subsidiary was a party to a local proceeding. But Panama says that the reverse, that is a subsidiary claiming on the basis of its parent's treatment, could not work and would be a slippery slope. It makes sense that a parent company may suffer loss and denial of justice by reason of the treatment of its subsidiary in legal proceedings, and it also makes sense that a subsidiary may not suffer loss by reason of the treatment of its parent. But again, BSAM is not asserting its claim as a subsidiary. It claims because BSLS and BSJ have licensed certain IP rights to it; and therefore, a denial of justice affecting BSLS's trademark rights and BSJ's trademark rights directly affect BSAM because it's the licensee of those rights. BSAM stands in the shoes of BSLS and BSJ as the party that enjoys the fruits of the exploitation of the

trademarks owned by BSLS and BSJ, and this matter has been already decided by the Tribunal.

Panama does not contest that BSLS has standing to bring a claim under Article 10.5 of the TPA, and the Tribunal has already decided that BSAM has a dispute that arises out of its investment. Its dispute is for breach of Article 10.5. And as the Tribunal found in its Decision at Paragraph 242, BSAM and BSLS's claim stand and fall together, each is claiming in respect of its interest in the trademarks. If BSLS has a claim under 10.5, then so does BSAM.

Moving to denial of justice, the starting point for denial of justice in this case is, of course, Article 10.5 of the TPA, which contains the fair-and-equitable-treatment standard and includes specific reference at subparagraph (2)(a)to the obligation not to deny justice. The TPA, therefore, specifically refers to the customary-international-law standard for denial of justice and it also says that the obligation is not to deny justice in accordance with the principle of due process embodied in the principal legal systems of the world. This language

appears in most of the U.S. free trade agreements, and the purpose of this language must, therefore, be to set a baseline for the meaning of the term "due process."

For example, in the United States, procedural due process is enshrined in the 14th Amendment to the Constitution and includes the opportunity for confrontation of the evidence and cross-examination of it.

The United States sets out its understanding of the standard at paragraph 4 of its Third Submission, and we are in general agreement with this. In fact, the Parties appear essentially to agree on what a denial of justice under international law is. Indeed, the Respondent has put in an expert report from Professor Paulsson and the Claimants agree with much of what he says as to public international law. Of course, the Respondent also gave him factual assumptions and asked him to apply these, and, of course, the Claimants don't agree with any of that because the factual assumptions are wrong. But if we confine ourselves to public international law and what

must be proved, then there is a large measure of agreement.

Professor Paulsson notes at paragraph 4 of his report that the basic premise of a denial of justice is that a state incurs international responsibility if it administers its laws to aliens in a fundamentally unfair way. In relation to decisions made by national courts, a simple mistake is, of course, unlikely to amount to a denial of justice. Indeed, attributing an international wrong to a local error would damage the integrity of the domestic judicial system and the investor-state dispute-resolution system, but there must also be meaning in protections offered by the TPA. The Tribunal is required to perform a balancing act, and the provisions of Article 10.5 of the TPA, including the requirement of a host state not to deny justice to investors must provide a real measure of protection.

As Professor Paulsson notes at paragraph 24 of his report, while denial of justice does not occur because the internationally competent jurisdiction considers a decision to be erroneous, in extreme

cases, a failure of process may be proved from a judicial decision so egregiously wrong that no honest or competent court could possibly have given it. If there is grave and manifest injustice, then, as Professor Paulsson agrees, that is either because a decision maker was dishonest or because he or she was grossly incompetent. Therefore, while there is no single definition of "denial of justice" in relation to decisions made by national courts, a frequently apprised formulation is set out by Sir Gerald Fitzmaurice, a former Judge of the ICJ, in 1932. He said: "An unjust judgment may and often does afford strong evidence that the Court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence if the injustice be sufficiently flagrant so that the Judgment is of a kind which no honest and competent court could possibly have given."

And a denial of justice may relate to procedure or substantive decisions, as Professor Paulsson acknowledges, in some cases, a failure of process may be proved from a judicial decision so

egregiously wrong that no honest or competent court could possibly have given it.

Mr. Paulsson also notes that cases in which allegations of gross incompetence are made, are frequently also cases in which allegations of bad faith or corruption are raised, and the two possibilities are typically analyzed together.

The Respondent relies on a slightly different formulation set out in Mamidoil and Albania in which the Tribunal considered a judgment of the Albanian Supreme Court, and applied a test of whether the Decision was clearly improper, discreditable or in shocking disregard of Albanian law. The Tribunal determined that the judgment was reasoned, understandable, coherent, and embedded in a legal system that is characterized by a division between public and private law, as well as civil and administrative procedures. The Respondent, therefore, focuses on trying to prove that the relevant Panamanian Supreme Court judgment made sense, or at the very least, was coherent. The Claimants agree that questions of whether the Supreme Court judgment

was reasoned, understandable, coherent and embedded in law are of considerable importance, and will identify which aspects of the Supreme Court judgment contain no reasoning or explanation and which can't be understood, are incoherent or are contrary to law.

We will also identify why the Supreme Court judgment was improper and discreditable, but this language from Mamidoil is vague, and does not cover clearly the two possibilities which we say would have motivated the egregious decision. 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. The Tribunal does not need to determine which of these occurred. It is enough to say that the judgment is the result of one of these. For that reason, we say that the formulation set out by Professor Paulsson in his report submitted on behalf of the Respondent is the best way for the Tribunal to frame the test for denial of justice: a judgment so egregious that no honest or competent court could have given it.

The Respondent has complained in these proceedings that the Claimants' arguments on denial of justice amount to nothing more than an appeal. The Respondent says this is wrong because the only question for the Tribunal is, in a denial-of-justice claim, is whether there has been a breach of international law. The Claimants agree that this is what the Tribunal needs to ascertain but, in the words of Professor Paulsson at paragraph 44, "it is inherent in finding the existence of a denial of justice that it is contrary to national law because such a determination by an international tribunal would imply, by definition, that no fair legal system could have reached that conclusion."

If the Claimants were alleging denial of justice on the basis of Panama's failure to provide access to its courts for unreasonable delay, then there would be no need to get into detail about Panamanian law and what the courts decided. But here, the Claimants argue that the decision of the Supreme Court was egregious. The only way to analyze this is to consider in detail where the Supreme Court went

wrong, and why their decision grossly misapplied Panamanian law and breached Panamanian standards of due process. It's then for the Tribunal to decide whether these serious errors and breaches amount to a judicial decision that was so egregiously wrong that no honest or competent court could have given it.

The Respondent complains that many of the arguments the Claimants now rely on are recycled from their pleadings in the Panamanian proceedings and from Justice Mitchell's dissent. Of course, similar versions of the Claimants' arguments also appeared in the proceedings, and it is not surprising that they appeared in Justice Mitchell's dissent. In the Panamanian proceedings, BSLS and BSJ made submissions aimed at trying to ensure that they received due process. Similarly, Justice Mitchell clearly objected to the Supreme Court majority decision because he could see serious flaws in it.

The Claimants accept that it is a prerequisite of a denial-of-justice claim that the Claimants must exhaust local remedies. In its Rejoinder, the Respondent introduces a new argument.

It argues that BSLS did not exhaust local remedies because it did not file a complaint about the Supreme Court judges with the National Assembly. But such complaint would not have been adequate or effective for two reasons:

First, Panama's system for and track record of investigating Supreme Court judges is very poor. The body empowered to investigate Supreme Court Justices is the Credentials Committee of the National Assembly, and the Supreme Court is the body empowered to investigate members of the National Assembly.

Consequently, as we explained in our Memorial, various reports on corruption issues in Panama have explained that each is highly incentivized not to investigate the other, and that is exactly what happens. The number of complaints made against Supreme Court judges is unknown because they're not made public, but we've come across reports of at least nine complaints made against the Supreme Court judges involved in these proceedings. Complaints are made, and then they're dismissed by the Credentials Committee without any investigation whatsoever.

Second, even if a complaint had led to an investigation, and if it had found misconduct then the remedy would have been for the judges to be removed from office. The remedy would not have been to quash the Supreme Court judgment, and therefore, there would have been no effective remedy for BSLS.

MR. WILLIAMS: Mr. President, Members of the Tribunal, so I will now address you in relation to the Supreme Court judgment itself and those aspects that we say represent a denial of justice.

And we are handing to you now three demonstratives. They've previously gone to the Respondent. The first demonstrative, which is the larger A3 piece of paper, is headed CD-0003, and the intent of this document is to try to assist the Tribunal navigate its way through the various issues in the Supreme Court judgment.

So, what it does is it breaks down the different elements of that judgment. And so you will see that it starts then with the cassation recourse, and then it deals with each of the three elements which gave rise to the Supreme Court's finding of

liability, and then at Row 5 deals with causation, and Row 6 deals with loss.

And what we've done, then, is in each of those rows, then, to extract from the judgment the relevant passages from the Supreme Court judgment that goes to each of those questions.

And then in the third column, we've extracted the equivalent passages that relate to the dissenting judgment.

And then in the subsequent columns, we identify where--what the evidence was in the underlying Panamanian litigation that goes to each of those questions, the issues of Panamanian law, and where these matters are addressed in the expert evidence in this arbitration.

It seemed to us that this might be helpful just to assist the Tribunal and navigate through the discussion.

I should point out at the outset that in Row 1, which is the cassation recourse, in the penultimate column, you'll see there that there's a reference to the treatise by Mr. Fábrega, which are

the subject of the Claimants' application for that treatise to be included on the record.

Of course, that matter is still to be decided and, therefore, of course, should the Tribunal decide not to admit that, then we will need to strike that reference from this table.

So I would like to start then with Row 1 of this demonstrative, so the cassation recourse, which is the starting point in the Supreme Court judgment. And Mr. Lee explains in his reports that this an extraordinary remedy which permits the Supreme Court to act as a court of first instance if one of the stated grounds under Article 1169 of the Judicial Code are satisfied.

And, in this case, the ground for Muresa's cassation recourse was that there an error of fact about the existence of evidence, and you will see that towards the end of Article 1169.

So Muresa was saying that the lower court, the First Superior Court, made an error of fact about the existence of six categories of evidence.

And the Supreme Court issued its Decision

initially on the 4th of December 2013, and you will find that at R-50, in which it admitted the cassation recourse on the basis that each of those six grounds were made out.

And then in the May 2014 Supreme Court judgment, that is also recorded and explained in more detail in the first sections of the judgment. And it is to be noted that it's the same tribunal of the Supreme Court then that issued both of those judgments.

So, the 1169 ground that the Supreme Court found was established, was that the First Superior Court had simply made a mistake. The First Superior Court had erroneously believed that those six categories of evidence did not exist when they did exist.

And in relation to that, I would like to refer you to a second demonstrative, which is the--it's not on A3, it's on A4, and it's the one headed CD-0004. And what that demonstrative does is it sets out in the left-hand column the finding of the Supreme Court in relation to each of the six motives,

each of the six items of evidence that Muresa said the First Superior Court had made a mistake by believing that evidence did not exist.

And then in the right-hand column are extracted the passages from the First Superior Court's Judgment which relate to this.

And you'll see there on the first page, Motive 1, the first motive that the Supreme Court found was established was that the lower court had made a mistake believing that a letter sent by Foley & Lardner, who are U.S. counsel for Transnational BFS Brands, LLC, the Supreme Court found that the lower court had made a mistake by believing that that letter did not exist.

And you'll see in the right-hand column--

PRESIDENT PHILLIPS: You say that that did not exist, but what is being said is it totally ignored it. It's not the same.

MR. WILLIAMS: Mr. President, the standard under Article 1169, which was invoked by Muresa in bringing its recourse petition was that there was--and I'm quoting from 1169--an error of fact about the

existence of the evidence, so that was the ground specifically upon which Muresa relied.

It's not a ground, for example, saying that the, oh, the Court had misconstrued the weight or the importance or the meaning of particular evidence. It is that the Court had made a mistake believing that particular evidence did not exist. That was the specific ground upon which Muresa relied.

No doubt this issue can be explored further with the Panamanian law experts, but it is the case that Muresa, having adopted that ground, then it was for the Supreme Court to decide whether that ground was satisfied.

And the Supreme Court, I agree, uses the language of "totally ignored a document," but the ground under 1169 was that it didn't exist.

But in a sense, either way, even if one is prepared to give the Supreme Court some latitude to say that it approached 1169 on the footing that totally ignoring evidence met the standard, which it does not for the reasons I've explained, but even if the Supreme Court believed that "totally ignoring

evidence" was sufficient for 1169, if one looks, then, at the second column, there is no basis, we say--no basis--upon which the Supreme Court, had it read the First Superior Court's judgment, could have taken the view that the First Superior Court had totally ignored the Foley & Lardner letter, and the reason for that is entirely clear: That the First Superior Court repeatedly mentions the Foley & Lardner letter. Not just in passing, but it actually outlines the Muresa position as to what that letter says and what it meant.

It is, we say, impossible to understand how a competent and honest Supreme Court could have taken the view that the lower court had totally ignored that letter.

We could go through each of the six motive, and it would be helpful to do so.

So, over on the page on Demonstrative 4, we come to Motive 2, and Motive 2 by Muresa was the suggestion that the lower court had ignored certain certificates issued by Muresa in-house accountants, relating to the amount of sales of tires, and the

suggestion was that the lower court had ignored those certificates.

Now, it is the case that the Judgment of the First Superior Court does not expressly mention those certificates, but what it does do is mention Muresa's Experts' Reports on quantum, and those Expert Reports are expressly based upon the Muresa certificates.

So, we say, again, that the suggestion that the Supreme Court made the finding that the Supreme Court made that the lower court had made a mistake of those certificates is not possible to understand, and likewise, it is also not possible to understand how it could be said that the lower court had ignored those certificates when the certificates were the absolute basis of Muresa's own expert evidence.

Now, Motive 3, is that the withdrawal of the appeal which BSLS had made to the trademark opposition decision was something which was ignored by the lower court. And to put this in context, the Tribunal will recall that BSLS's opposition was what failed at first instance, BSLS then put in, filed and appealed, and then shortly thereafter withdrew that appeal.

And Muresa's suggestion here is, that, having done so, the withdrawal of the appeal itself was something that should have been taken into account and was ignored by the First Superior Court.

But the point here is that, at no time did Muresa raise with the lower court, with the First Superior Court, the fact of the withdrawal of the appeal. Muresa made no complaint, never even mentioned that question to the First Superior Court.

And, therefore, it is absurd for it to complain to bring a cassation recourse on the basis that the lower court ignored that matter.

Now, this goes to Article 1194 and the Fábrega point, which is the subject of our application in relation to the record that we had in the beginning of today's hearing, but Article 1194 provides that, in order for a procedural defect to be the subject of the cassation recourse, it has to be raised with the lower court. But as the Fábrega treatise explains, that principle has been broadened through jurisprudence such that in order for any matter to be the subject of the cassation recourse, it has to be raised with the

lower court. And in truth, that's nothing more than a statement of the obvious because if you're complaining that the lower court did not properly conduct itself, plainly the issues that need to be--that are to be the subject of that Complaint need to be raised by the lower court; otherwise, how can you complain?

So that is the effect, we say, of Article 1194 read together with the Fábrega treatise.

And Motive Number 4, going back to Demonstrative 4, Motive Number 4, the complaint that Muresa raised was that the First Superior Court had made a mistake as to the existence of certain witness evidence about the volume of tire sales, the Supreme Court found that, indeed, the First Superior Court had ignored that testimonial evidence.

And we see on the right-hand column, then, under Motive 4, the references to that testimony in the judgment of the First Superior Court. And again, we say it is simply not possible to understand how a competent and honest court--an honest Supreme Court could have made the finding that the lower court had either ignored that evidence or, indeed, made a

mistake as to whether it existed, because it's expressly cited in the First Superior Court's judgment.

Motive 5.

PRESIDENT PHILLIPS: Could I just stop you there?

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: Isn't it right that the First Superior Court didn't ultimately didn't consider the question of damages at all, simply because it said there's no liability and, therefore, damages don't arise?

So, it's not incompatible with the finding that they disregarded evidence that they recited the evidence but then thereafter disregard, is it? Their approach was, this isn't relevant because there's no liability.

MR. WILLIAMS: The--Mr. President, two points: Number 1, again, the standard which Muresa expressly invoked under 1169 is that evidence that the Court made a mistake as to the existence of that evidence. That's a different question from weight or

interpretation, and we say that is simply unarguable because it's expressly referenced. It's just not possible to understand how they could have reached that view.

Now, if we take the ignored point, which we say is not the relevant standard, that is not what the Supreme Court should have been doing, but they do use the word "ignored," that the First Superior Court plainly did not ignore the evidence. They were aware of it, they expressly mention it.

Now, for reasons that the First Superior Court states-and Mr. President as you rightly say, the Court did not need to go on to assess damages because liability was not established, but to say that the Court ignored that evidence is simply wrong because the Court expressly cited it, we say.

And Motive 5, again, is very similar. The suggestion here by Muresa is that the First Superior Court ignored a witness statement in relation to alleged threats concerning seizure and confiscation, and the First Superior Court expressly refer to that and described it, and again, we say it's just not

possible to understand how the Supreme Court could have believed that that evidence did not exist.

And again, very similarly, Motive 6 on the last page of the demonstrative. Again, the suggestion that accounting expert evidence did not exist or perhaps was ignored; and again, there are numerous references in the First Superior Court's judgment to that evidence, and we say, you just can't understand how a court--how the Supreme Court could have taken a view that the First Superior Court thought that evidence didn't exist. You just can't understand it.

And even if you adopt the standard of ignored, well, you can't say it's ignored. It's expressly mentioned numerous times.

So, we say that the starting point in looking at the Supreme Court's judgment, the basis upon which the Supreme Court put itself into a position to consider the substantive appeal was manifestly flawed, obviously flawed, and it is impossible to understand how the Supreme Court reached the Decision that it did in relation to that matter.

Now I want to--

ARBITRATOR GRIGERA NAÓN: Mr. Williams, for me to understand your general approach to this, are you saying that there is a blatant, flagrant violation of Panamanian procedural law and, because of that, there is a claim of denial of justice? Or at the same time, or alternatively that, because of what happened at the level of the Supreme Court, due process brings up something through international level that was directly violated?

MR. WILLIAMS: We are saying both.

ARBITRATOR GRIGERA NAÓN: Okay.

MR. WILLIAMS: Sir, I want to return then, if I may, to the A3 Demonstrative, which is the CD-0003, to then look at the three grounds for liability that the Supreme Court found. And the first ground, then, was the bringing of the trademark opposition proceedings were, themselves, reckless.

And the Supreme Court itself sets out the test for recklessness by citing again the jurist Fábrega, and you will see that's on Page 16, and it is a high test. It is, as appears on the screen, then, it is: "RECKLESSNESS AND PROCEDURAL MALICE. It is

behavior adopted by someone who knows or should know that he has no reason to litigate and yet does it abusing jurisdiction. That implies a crafty behavior, unfair maneuvering, bad faith representations, and no legal or factual support.

"Procedural malice consists of the use of procedural powers with the deliberate purpose of obstructing a proceeding's proper development and decision of the proceeding. Procedural recklessness is present when the litigant knows, or should have known, that there was no legal reason to file or challenge a claim. There is procedural malice in the obstructionist and delaying tactics employed."

So, this is an extreme test, the bringing or defending of the proceedings. Essentially where there is no legal basis to do so in order maliciously to cause harm to the other Party.

In this case, the Supreme Court appears to have found that BSLS's opposition to the trademark application by Muresa met that standard for four reasons. And the first is that the Supreme Court found that Muresa had a legal right to market the

product and had the right to representation and distribution of the brand;

Second, that Muresa's product competes with BSLS's product;

Third, that BSLS had intent to cause damage;

And, fourth, that the opposition itself was without legal basis.

So we need to look at each of those in turn.

So, first, that it was reckless for BSLS to bring a trademark opposition because Muresa had the legal right to sell its products. Now, this is an extraordinary finding because it, we say, entirely misunderstands the purpose of intellectual property and Panamanian intellectual-property law.

Trademark opposition proceedings are concerned with whether marks can be registered, not whether products can be sold. Muresa had been selling tires under the RIVERSTONE mark since 2000, some two years before it applied to register its trademark.

The fact that BSLS opposed the registration did not affect Muresa's ability to continue selling. Muresa's right to sell goods in any particular country

could be affected only if BSLS had obtained an injunction in that country to restrain sale or seize goods, but at no time did BSLS seek such an injunction against any company in the Luque Group in Panama, or anywhere else, and at no time was any such injunction ordered.

So, the finding of the Supreme Court that it was reckless of BSLS to bring a trademark opposition because Muresa had a legal right to sell its products, we say simply cannot be understood. It misunderstands what intellectual property is.

The Supreme Court's second finding was that the trademark opposition was reckless because BSLS competes with Muresa. This is absurd. Much of the purpose of the trademark opposition regime is to protect registered or previously used trademarks from confusingly similar marks for the same or similar products.

Indeed, BSLS's opposition was brought under Paragraph 9 of Article 91 of Law 35 of 1996, which expressly specifies that it applies in respect of goods or services that are the same or of the same

type.

Now, it's hard to imagine how one could interpret that language "goods or services" that are of the same--that are the same or of the same type to mean anything other than "competitive goods and services." The Supreme Court's finding, is, therefore, we say, entirely inconsistent with Panamanian trademark law. It would mean that any trademark opposition that involved goods that are the same or of the same type was reckless or negligent. That's absurd.

The Supreme Court's third finding of recklessness was that BSLS had the intent to cause damages. The Supreme Court does not explain this finding at all. It seems to be based on the fact that Riverstone was a competitor to Bridgestone and Firestone, already in the market, so it was inferred that BSLS would want to harm a competitor, but that is ridiculous. As we've seen, many, if not most oppositions, are between competing products. And the motive for the opposition is obviously to protect the opposing party's interests.

If the consequence is that the Applicant suffers loss, that does not make the opposition application reckless or negligent. Indeed, on the Supreme Court's logic, it would make the great majority of oppositions reckless. This is absurd.

The Eighth Circuit Court specifically held that BSLS and BSJ had acted in evident good faith in bringing the opposition. This was simply a case of trademark owners exercising their rights under Panamanian Law to protect their trademark from confusingly similar marks.

The fact that the opposition failed obviously does not mean that there was any wrongdoing. BSLS's opposition was a perfectly reasonable step to take and was done responsibly. For that reason, the Court decided that BSLS and BSJ would not be liable for costs, even though its opposition had failed.

As Mr. Arjona and Mr. Molino have explained, Panamanian courts typically follow the principle that costs follow the event. And that's pursuant to Articles 196 of Law 135 and Article 1071 of the Judicial Code.

In other words, it is exceptional for the Court to decide not to order that the loser pays in litigation, and it does so only if it decides that the losing Party has acted with evident good faith. That's the effect of Article 196 and Article 1071, and that was the decision of the Trademark Opposition Court here. There was simply no basis, therefore, for the Supreme Court to find that BSLS intended to cause harm to Muresa.

It is also important to note that Articles 1071 and 217 of the Judicial Code are essentially polar opposites. Article 1071 requires that costs will be payable by the losing party unless it has acted with evident good faith, whereas Article 217 holds a party liable for damages caused by their bad faith in conducting proceedings.

The Supreme Court did not even attempt to reconcile the fact that the Eighth Circuit Court had made a finding of evident good faith under Article 1071 with its own finding of bad faith under Article 217. As a matter of logic, if the judgment is to satisfy a test of being coherent and explaining the

basis for the Judgment, it would need to explain how these two provisions could operate together; how the Supreme Court could make a finding which was the polar opposite of the finding of the lower court.

Now, the fourth basis for the Supreme Court's finding of recklessness was that the opposition was without legal basis and then if one looks back at the Fábrega quote on Page 16 of the judgment that we looked at earlier, the Supreme Court is saying that BSLS had no basis whatever to bring its opposition. It did so deviously as an unfair maneuver in bad faith and without factual legal support and without legitimate grounds. And, therefore, the bringing of the opposition was itself reckless negligent or in bad faith.

But there is nothing--nothing--to support that finding other than perhaps the Supreme Court's own fundamental misunderstanding that it is wrong to oppose the registration of a mark for a competing product.

And as we've already looked at, the Eighth Civil Court expressly made a finding of evident good

faith and on that basis, did not order BSLS, as the losing Party, to pay Muresa's costs.

Mr. Kingsbury has explained, in his Third Witness Statement, Paragraphs 6 and 13, that the Bridgestone group generally, group of companies, generally opposes marks for tires with the suffix "-STONE" globally. And in approximately 60 percent of those cases, that opposition is successful, although, of course, the rates of success depend on the jurisdiction in question.

In Panama, BSLS has been successful in opposing applications for registration of "-STONE" suffix trademarks for tires in other cases. Therefore, BSLS has successfully opposed applications for FASTONE for tires in July 2014, RIXSTONE for tires in September 2014, and GRANDSTONE for tires in August 2018.

And, of course, no two cases are identical, and those other cases, there was no use evidence that the marks were being used, whereas in RIVERSTONE, there was.

Nevertheless, the legal grounds for

opposition are the same in all of those cases, and BSLS's success in the FASTONE, RIVERSTONE, and GRANDSTONE cases, taken together with the Eight Circuit Court's finding of evident good faith in its decision on costs, we say makes it simply impossible to understand how the Supreme Court can have found that BSLS's opposition had no legal basis whatsoever; and certainly the Supreme Court made no attempt to explain.

PRESIDENT PHILLIPS: Are you running a separate point on res judicata?

MR. WILLIAMS: Mr. Arjona's Report does deal with res judicata, and we do say that the findings of the lower court, which were not appealed--Muresa had the opportunity to appeal those decisions and chose not to--we say meant that those decisions were final decisions and, that, therefore, it was not open to reopen those decisions. We do say that.

PRESIDENT PHILLIPS: If you are running res judicata, I personally will need some help. I'm familiar with our common law or equitable approach to res judicata, and that distinguishes between issue

estoppel and cause-of-action estoppel.

My understanding is, under Panamanian law, res judicata is statutory, and the statute only appears to address cause-of-action estoppel.

Is this correct?

MR. WILLIAMS: This is, no doubt, a point that would be more productively explored with Mr. Arjona.

Our principal point in relation to this subject area is that the decision made by the Supreme Court simply makes no sense and is not coherent and is not explained. That is our principal point. Res judicata is not a point that I would take as a first-level argument before this Tribunal.

Mr. Arjona has raised it in his report, and it can be explored further with him.

I wanted to go back to our Demonstrative Number 3, and at Row 3, the demonstrative refers to a Foley & Lardner letter that had been sent in November 2004, and the Supreme Court found that that letter was obviously intimidating and reckless, and appears to have been a primary basis for the Supreme

Court's finding of liability against BSLS and BSJ, and the letter is on the screen.

And we say that there are, at a high level, two denial-of-justice problems with the Supreme Court's finding of liability in relation to this letter.

The first, it's irrational and unreasonable for the Supreme Court to consider that this letter could have been intimidating and reckless because of its content, and who sent it and to whom it was sent.

And the second ground for denial of justice, we say, is that there was a fundamental lack of due process in the Supreme Court's reliance on this document because it was not properly admitted into evidence, and BSLS did not have a proper opportunity or, indeed, any opportunity, we say, to respond to it.

So, the letter was sent by lawyers of BFS Brands and Bridgestone/Firestone North American Tire, that they were owners of the Bridgestone or Firestone registered trademarks in the U.S., and the letter is not sent by or on behalf of BSLS or BSJ. It was sent following a successful opposition action by BFS Brands

and Bridgestone/Firestone North American Tire to an application for registration of the RIVERSTONE mark by L.V. International.

It plainly is not addressed to Muresa. It's addressed to L.V. International, which is the Party to the U.S. litigation. It did not--and it specifically did not make any demand as to the use of the RIVERSTONE mark outside the U.S., and it says in the last paragraph: "Without undertaking a country-by-country analysis at this time, and without making any specific demand at this time directed to use of the RIVERSTONE mark in any particular foreign country, you and your client should know that Bridgestone/Firestone objects to and does not condone the use or registration anywhere in the world of the mark RIVERSTONE for tires. Hence, L.V. International is acting at its own peril if it does use the mark."

So, turning to what the Supreme Court found in relation, then, to the Foley & Lardner letter--and if we can get that up on the screen, the Supreme Court judgment--and there is the finding. So, it says: "The Appellants complained in the present cassation

recourse," and then it refers to the Foley & Lardner letter, and the Supreme Court says--and that shows it--"that the Plaintiff's legal representatives stated," and then just to pause there for a moment, this is obviously wrong, "Foley & Lardner were acting for the U.S. companies BFS brands and Bridgestone/Firestone North American Tire, not for BSLS."

Indeed, the Supreme Court's own judgment quotes at Page 4 Muresa's first motion in which it says itself that Foley was acting for BFS brands.

So, the finding by the Supreme Court that Foley was acting for BSLS in sending the letter is internally inconsistent with its own judgment and impossible to understand, we say.

And then the finding continues, and it 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 tire brand."

But, again, 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 then the letter continues. They also added: "Without any legal basis, at least under Panamanian law, that the plaintiffs should abstain from selling the product."

But again, 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 said that Bridgestone/Firestone objects to the use of RIVERSTONE for tires.

So, we say that this letter is a standard letter to be sent in the U.S. It isn't intimidating, and in that regard, we refer to Ms. Jacobs-Meadway's Report: "Bridgestone/Firestone are registered marks in most countries worldwide, and the fundamental purpose of registration is to enable opposition to the registration of confusingly similar marks."

If Muresa somehow subsequently obtained a copy of the letter and decided as a result to stop selling RIVERSTONE tires, that's its own decision, but it is simply impossible to understand how the Supreme

Court can have found that the letter amounted to recklessness by BSLS and BSJ. They had nothing to do with this letter.

And equally, it's impossible to understand how the Supreme Court can have found that such alleged recklessness caused Muresa to stop selling tires.

Indeed, when Muresa brought its damages claim against BSLS, its Complaint did not even mention the Foley letter. Muresa said only that BSLS had brought the opposition action and that that was the cause of its alleged loss.

So, the Foley letter was only introduced into the damages claim at a late stage. And, in that context, I want to very briefly to refer to my last demonstrative, you'll be pleased to know, which is CD-0005. And this demonstrative simply gives the chronology of the damages proceedings that Muresa brought before the Eleventh Circuit Civil Court. And we set out there the chain of--the chronology in that litigation and when evidence was submitted.

And the Foley letter, you'll see the very first time it's mentioned is on Page 2 at Line 18,

when L.V. International filed a petition seeking permission to intervene, so it wanted to be joined to the action and, on that basis, it has attached the Foley letter, but that was an application to intervene, and that was not dealt with until much later. Indeed, it was only in June 2012, that L.V. International was given permission to intervene.

And Article 1265 requires that evidence be submitted at the evidence-taking stage, which is much earlier in these proceedings. It's at--it's up to Row 8 in that demonstrative. That's when the evidence-taking stage ended.

And the first mention of the Foley letter, even if one assumed that the petition to intervene is somehow part of these proceedings and attachment, somehow puts evidence on the record, that it's long after the evidence-taking stage.

And in Panama, under Panamanian law, it is fundamental that evidence be submitted, documentary evidence be submitted, at the evidence-taking stage and not later, and the experts will address that question in due course.

I mean, to a common lawyer, it might seem like an overly technical approach. One might, in common-law proceedings, one often sees the Tribunal take the approach that, well, so long as the other side is able to deal with it, we can allow evidence in late, but under Panamanian law, that is absolutely not the case. And it is a very fundamental aspect of Panamanian procedural law that evidence needs to be submitted in the evidence-taking stage.

And the consequence of the evidence not being submitted during the evidence-taking stage is that BSLS was not able to challenge that evidence, was not able to challenge the relevance or admissibility of that evidence, and it was not able to put in witness testimony in response to it.

For example, it may well have been relevant for BSLS, perhaps, to say, for example, to put in a witness evidence from the relevant lawyer at Foley & Lardner confirming who they were acting for and that they were not acting for BSLS. It had no opportunity to do that because of the stage at which the Foley letter was introduced into these proceedings.

And, indeed, had that evidence been put in, or had BSLS had an opportunity to put in that evidence, perhaps the Supreme Court would not have made its extraordinary mistake in finding that the Foley letter was sent on behalf of BSLS, but it had no opportunity.

And as Professor Paulsson observes at Paragraph 58 of his Report: "The inability to address or make submissions in respect of important basic evidence could, in principle, form an element of a denial of justice under Article 10.5 of the TPA."

But remarkably, the Supreme Court's Judgment found on Page 12, the Chamber notes that: "The aforementioned evidence," therefore including the Foley letter, "on whose grounds the merits are based was duly and timely submitted to the Court, and does not appear to have been challenged as to its authenticity and truthfulness."

Now, BSLS had no opportunity to do that. An extraordinary finding.

So, we say, that the Supreme Court’s finding that the Foley Letter amounted to recklessness by BSLS

is simply impossible to understand and is a denial of justice. It also exhibits, we say, a shocking lack of due process.

ARBITRATOR GRIGERA NAÓN: So, what you have done so far, if I understand you correctly, is analyzing this issue of the Foley letter in connection with the finding of reckless and intimidating conduct on the side of the Bridgestone companies. But this is in addition to the argument that the Supreme Court improperly referred to Article 217 of the procedural code?

This is a different argument that you're making. You are not abandoning the other argument?

I want to understand what you are stating here.

MR. WILLIAMS: So what I'm trying to do, as you'll have gathered, is go through each element of the Supreme Court Judgment to look at--so we can understand it and try to understand what basis there was for it. And, of course, our case is that there was no basis, and no competent or honest court could have reached that Decision.

Now, you are quite right that there is an issue of consistency, and the argument of consistency relates to the fact that the Supreme Court found liability under Article 217, notwithstanding that the Complaint by Muresa was not brought under Article 217.

Now, that point remains, and we say that that point is absolutely right. However, again, that is not our primary case. Our primary position is simply that looking at, in this regard, looking at the Foley letter, the Supreme Court's finding of liability based on the Foley letter is so fundamentally flawed that no competent court could have reached that outcome. We don't abandon 217, the consistency argument, but our primary case is as I've explained.

ARBITRATOR THOMAS: Mr. Williams, may I just pick up on a point.

You have described the importance under Panamanian law of the evidence phase of the proceeding, and you make the point with your Demonstrative CD-0005, that it was not until 11 May 2010 that the first of L.V. International's petitions was filed with the Court. And later on, of

course, the First Instance Court rejects the amended application.

The question I have for you with respect to Panamanian law is this: What is the legal effect of a decision of the Superior Court to permit the intervention on the state of the record that was before the First Instance Court?

MR. WILLIAMS: And as I understand your question, in a sense it is the fact that in June 2012, ultimately, the intervention was permitted. Does that mean, then, that for the purposes of the record at first instance, the attachment to the petition seeking intervention is to be deemed to be on the record in May 2010.

ARBITRATOR THOMAS: Well, I'm not sure whether I would put it exactly this way.

MR. WILLIAMS: Sorry.

ARBITRATOR THOMAS: Mechanically, because as I understand it, the claim has been dismissed already, but after the Claim was dismissed, there's a judgment of the First Instance Court saying that the application was also inadmissible. That application

is then taken on appeal, and the Supreme Court says that it is admissible.

Now, my question is a very narrow one: What is the effect on the file, as it were, since the case continues through the levels of appeal? Clearly, the trial judge had not considered that evidence because the trial judge also meant it rejected its admissibility, but it is now part of the file, evidently, as it goes up through the levels.

I'm trying to understand what this means under Panamanian law. And perhaps, if you wish to leave this over to the experts, you may do so. I just wonder whether, in light of your demonstrative, you had an answer for me at this point.

MR. WILLIAMS: I'm afraid I don't have a ready answer for you, but it may be that after the--that during the break I can consult and give you that answer. But as I sit here at the moment, I'm afraid I do not.

I wanted, then, in Demonstrative Number 3, the larger document, then, to go to Row 4. And Row 4 sets out the third finding of the Supreme Court upon

which it's determined that BSLS and BSJ were liable. And so that third ground, then, was a finding that the withdrawal of the appeal, the appeal of the Trademark Court's decision, that that withdrawal was reckless. And the relevant provision of Panamanian law in relation to appeals and withdrawal of appeals is Article 1132 of the Judicial Code, and Article 1132 of the Judicial Code states that a notice of appeal must be filed within three working days of the notification of a judgment.

"Notification" means the point at which the parties or their lawyers are provided with the Judgment. So, in this case, BSLS/BSJ was notified on 31 July 2006, and, therefore, the deadline to appeal, to file an appeal, was 3 August 2006. That means the decision as to whether or not to appeal had to be taken very quickly, within three days.

Now, when foreign parties are involved in a case, taking a decision within three days becomes especially difficult. So as we know, BSLS and BSJ were in the U.S. and Japan respectively, different time zones, language issues. The truth is that it's

very difficult to see how a considered and informed decision can be made on whether to appeal, in light of legal advice, could be made within three days.

And, therefore, the effect of Article 1132 is that it is commonplace for parties, and especially foreign parties, to have to file an appeal on a precautionary basis. But if parties then act promptly to withdraw the appeal, then it causes no cost or prejudice to the other Party.

And Article 193 of Law Number 35, provides that, where an appeal has been allowed, a term of 10 days shall be set; the first five days for the appellant to substantiate his appeal, and the last five days for the rebuttal by his adversary.

So, in the present case, the appeal was allowed or admitted on 21 August 2006, and the parties were deemed to have been notified of it on 29 August and, therefore, BSLS had until 5 September to file a substantiation of the appeal.

BSLS withdrew its appeal on 5 September 2006, so the last day of the period in which it had to substantiate its appeal. Therefore, Muresa never had

anything to respond to and, therefore, could incur no cost.

On 8 September 2006, the Third Superior Court issued an order admitting the withdrawal of the appeal and ordering that BSLS pay court costs of PAB 50, which is USD 50.

So, if Muresa had incurred costs, it could have appealed the Court's order and ask that BSLS pay those costs, but Muresa made no such application and did not appeal the Court's Decision.

So, we say withdrawal of an appeal, particularly at an early stage, before the appeal is substantiated, is the opposite of reckless behavior. It means that Court time is not wasted. Because of the three-day deadline to file an appeal, it's inevitable that Parties will have to put in precautionary appeals, but there's nothing reckless about withdrawing that in a timely way, and that is exactly what BSLS did.

We say it is incomprehensible that the Supreme Court could find the withdrawal of an appeal in these circumstances to be reckless or evidence of

bad faith. And it is notable that Respondent has put in no argument and no evidence in relation to this matter.

Finally, there's the issue that the withdrawal of the appeal was not raised by Muresa in its Complaint and, therefore, we say that there is a serious error for the Supreme Court to have relied on this in making its Decision.

So, turning to Row 5, then, of my demonstrative, "Causation." You will be pleased to know this is the last page of this demonstrative.

So, the Supreme Court's findings on causation were incoherent and incomprehensible, and we say that they could only have been the result of incompetence or bad faith.

First, the Supreme Court accepted Muresa's witness evidence from its employees, in particular Mr. Samaniego's evidence quoted on Page take 10 of the judgment, and Muresa's Accounting Expert Report quoted on Page 12 of the Judgment, and these baldly assert that the opposition caused Riverstone's sales to cease, but they provided no explanation as to why that

was the case. But it was on this basis that the Supreme Court found on Page 11, the Court noticed from all witness statements that coincidentally due to the process opposing the registration of the RIVERSTONE brand filed by Muresa against BSLS, the plaintiff suffered recurrent damages because they found themselves in a situation of having to improvise with other brands, even lower quality brands, to meet sales demands in the market.

Now, it's notable that there is no explanation, either in the Judgment or in Muresa's evidence, of why a trademark opposition is said to have caused Muresa to stop selling RIVERSTONE mark tires. That alleged causation makes no sense. As I've said already, a trademark opposition concerns whether the Applicant should be entitled to registration of its mark. It does not prevent the Applicant continuing to make sales. That would require an injunction, which BSLS never sought and the Court never ordered.

The loss that Muresa claims to have suffered was from sales stopping throughout Central and South

America and the Caribbean and elsewhere. It is simply impossible to understand why an opposition action in Panama would result in lost sales throughout Latin America and elsewhere.

Third, the Supreme Court's unexplained findings on causation ignored contrary documentary evidence, and evidence from BSLS's expert and from the Court's own expert. The Muresa witnesses stated that sales of RIVERSTONE tires had stopped; and the reference for that is C-154, Page 3, and C-158, Page 4, and C-159, Page 5.

But that was flatly contradicted by documentary evidence, also provided by Muresa, which showed that sales of RIVERSTONE tires continued throughout the opposition action; and that's at C-162 Pages 2 to 4, and C-163, Page 3.

BSLS filed its trademark opposition on 5 April 2005, but Muresa's expert gave evidence that, in 2005, its sales of RIVERSTONE tires actually increased by 18 percent in relation to the prior year. That's at Page 11 of the Supreme Court's own judgment, quoting Muresa's expert.

And Muresa's witness evidence was that it had to start selling inferior-quality tires to make up for the fact that it could no longer sell RIVERSTONE tires. That's on Page 10 of the Judgment, but the documentary evidence showed that these inferior-quality tires were already being sold by Muresa, alongside RIVERSTONE tires prior to the opposition. This is noted by Justice Mitchell in his dissent at Page 22 of the Judgment.

So, we know that the majority of the Supreme Court were aware of this point but they choose to ignore it, and they choose to provide no explanation of this issue.

Fourth, the Supreme Court's findings on causation were actually contrary to the allegations made in Muresa's own pleadings. The Supreme Court found that damages were caused by a decrease in sales whereas Muresa's claim alleged that sales had ceased; and that's at C-16, Page 7, Ground 6 of the Complaint.

That is a serious procedural defect. Professor Paulsson accepts that: "A conscious failure of a court to conduct an examination of the evidence

and a decision to ignore critical documentary evidence could result in a denial of justice," and that's at Paragraph 71 of his Report.

In the present case, we know that the majority of the Supreme Court did make a conscious decision to ignore evidence contrary to their findings because, again, such evidence is expressly cited by Justice Mitchell, and the Majority make no mention of it.

Mr. Lee says that it is normal for Supreme Court cassation judgment to be short and not to contain the level of detail contained in judgments in common-law jurisdiction, but it does not address the specific point raised by the Claimants.

The Supreme Court Judgment does explain what evidence they relied on, and the basis for their findings other than the finding of loss for which there is no explanation whatsoever. The Supreme Court's failure to even mention the contradictory evidence or to explain why it chose one expert's evidence over the other, or why it found Mr. Samaniego's evidence particularly persuasive when

this evidence was, on the face of it, less reliable than other evidence on the record, we say, is incomprehensible.

The same is true for the expert evidence, and Mr. Paulsson agrees again that if the Supreme Court consciously ignored the Expert's Reports, that would form an element of proof of denial of justice; and that's at Paragraph 71.

Professor Paulsson also agrees that: "Conscious reliance on one Party's fact and expert witness and conscious disregard of the other Party's documentary and expert evidence, together with a disregard of the court-appointed expert evidence, then there would be an absence of due process sufficient to be an element of proof for denial of justice."

There were three sets of experts in these proceedings, one each appointed by the Bridgestone Parties and Muresa and TGFL, and one appointed by the Court. Typically the Court would focus on its own expert's report to the extent that there were differences between the two party-appointed experts because the Court's expert is there to be neutral. It

would, therefore, not have been surprising if the Supreme Court had only referred to the Court's expert, but the Supreme Court had totally ignored the court-appointed expert, as well as BSLS's expert, and only relied on Muresa and TGFL's expert.

Justice Mitchell refers to the other expert evidence in his dissent, so there cannot have been an error by the Supreme Court Majority in forgetting to consult the evidence of the other Experts. Therefore, this falls into the category of treatment described by Mr. Paulsson: "There is no explanation for the failure to refer to that piece of evidence except for bias, fraud, dishonesty, lack of impartiality or gross incompetence and not merely bona fide error," and that is at Paragraph 66 of Professor Paulsson's Report.

In answer to this, the Respondent relies on the statement at Page 14 by Supreme Court in its judgment that it had fully verified the body of evidence. The Supreme Court actually said this Chamber fully verified the body of evidence on which the notion of factual error is based about the existence of evidence. These are items that the

Chamber addressed in detail when verifying the respective reasons.

So, the Supreme Court is clearly stating that it had not verified all of the evidence, but what it was verifying was that it specifically had looked at the evidence that Muresa had asked it to look at in its six reasons: The so-called "ignored evidence," its witness statements, its expert reports, the Foley letter, the fact of the withdrawal of the appeal.

The Panamanian Supreme Court itself set out the requirements for substantiation of judgments in a decision of 15 December 2014, and that required that: "The substantiation required by the constitution in any substantive judicial decision requires that it is founded upon points of fact and law, which includes an indication of the value that the judge assigns to each of the probative elements included in the Court record. Substantiation, therefore, is not deemed to be satisfied with a simple review of the documents of the file or a merely descriptive and shallow allusion to the arguments invoked by the Parties."

The truth is that the Supreme Court simply

ignored evidence which did not support the conclusion it was determined to reach. This was a fundamental breach of due process, we say.

And then lastly, Row 6, "Loss," and the Supreme Courts' finding on loss is that--

PRESIDENT PHILLIPS: Would that be a good moment to break for quarter of an hour?

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: We're adjourning for 15 minutes.

(Brief recess.)

PRESIDENT PHILLIPS: Are you ready, Mr. Debevoise, or do you got problems?

MR. DEBEVOISE: Respondents are ready.

PRESIDENT PHILLIPS: All right.

We will give our ruling in relation to the Claimants' application to adduce further material of Panamanian Law. We think it is right that the two-page extract from the Fábrega treatise should be admitted in response to the Rejoinder, albeit that the procedures that we've prescribed in our First Procedural Order have not, unfortunately, been

followed, so we will permit that material to be adduced.

So far as the U.S. and English authorities are concerned, we consider that the fact that they are said to be uncontroversial is a very good reason why they should not be admitted at this last stage, and that application is refused.

MS. GEHRING FLORES: Mr. President, if I may, just for a point, perhaps, a point of humor, the Fabrica treatise was also labeled as "uncontroversial." That said, we would disagree that the Fabrica treatise, for what it is being proposed, is uncontroversial. The arguments that Mr. Williams has been expounding upon in his Opening Statement that are based on that treatise are new--are new--and we believe they're based on an incorrect application of that treatise, but I'm sure that the Tribunal will have a chance to explore this with the Panamanian Civil Procedure Experts later.

PRESIDENT PHILLIPS: I'm sure we will.

MS. GEHRING-FLORES: Thank you.

MR. WILLIAMS: Mr. President, perhaps I could

start with going back to Mr. Thomas's question which we've had an opportunity to consult about over the short break, and the position then in relation to evidence attached to a petition to intervene by a third party is evidence which is, for the purposes of that petition to intervene, it is not then, if the petition is granted, the consequence of that is not that the evidence which is attached to the petition to intervene then becomes part of the evidence in the underlying litigation. The two, if you like, are separate processes.

In the event that a third party's documents or a third party has documents which it wishes to be admitted in evidence, then the relevant provision of the Judicial Code is Article 871, and that then specifies a process by the judge by which that material is to go through an evidentiary phase in a similar way under 1265 that the Parties to the litigation are subject then to an evidentiary phase for any evidence that they wish to rely on or put on the record.

ARBITRATOR THOMAS: Thank you.

PRESIDENT PHILLIPS: Just on that, it's your case that the Claimants had no opportunity to respond to this evidence. If it had been their case that the letter was a forgery, I find it surprising that that's not a point that could have been made, but that's perhaps something to be explored with the experts.

MR. WILLIAMS: I suppose as a practical matter, it is not the case that anyone suggests it is a forgery, but there would have been a practical objection at the evidentiary phase that this is irrelevant and should not be put on the record because it is irrelevant, has nothing to do with BSLS, so that would have been a matter which the judge would have decided at the evidentiary phase.

And then, in addition, there is the further point as I mentioned, that there would have been an opportunity for BSLS to put in witness evidence, and it did not have that opportunity as a result of the stage in the proceedings at which the Foley letter was raised. I don't say "put in evidence" because, of course, that is a contentious point, but even at the point that it was raised, if one even assumed that it

was evidence for that purpose at that time, it meant that BSLS did not have an opportunity to put in witness evidence.

So, Mr. President, Members of the Tribunal, I want to then briefly touch on Row 6 in Demonstrative 3, which is the row which considers the Supreme Court's finding in relation to loss, and the Supreme Court's finding on loss appears at Page 18 of the Judgment, with the Supreme Court ordering BSJ and BSLS to pay Muresa and TGFL the sum of $5 million as compensation for contractual liability, and there is no attempt to explain where that number came from.

Mr. Arjona has indicated that the Supreme Court is required to justify its finding on loss, and that is in Arjona 2, Paragraph 67 to 92.

Mr. Lee says that there is implicit explanation. He says that in Lee 1-161 and Lee 2-87 to 88, which he says arises from the references in the Supreme Court judgment to the witness and expert evidence. However, the only reference in the judgment to alleged quantum of loss is that Muresa is said to have suffered loss of PAB 3.03, which is $3 million at

Page 11 of the Judgment. The difference between that and $5 million that Muresa and TGFL were required to pay is not explained. There is no mention of any further amount in the judgment. Therefore, we say there is not even an implicit explanation of $5 million. And in any event, the damages analysis must be explicit, not implicit, and this is a point that Justice Mitchell raised in his dissent on Page 25 of the Judgment.

So, moving on, then, from the analysis of the Supreme Court judgment through Demonstrative 3, I wanted, very briefly, to say something about corruption.

Now, the findings of the Supreme Court on their own and taken together, we say, amount to a judicial decision that is so egregiously wrong that no honest or competent court could possibly have given it, and the Tribunal needs to go no further. And, of course, the reality is that it's vanishingly unlikely that a Party that is the victim of denial of justice can prove corruption, but in the present case, there is circumstantial evidence.

Now, Constantine Partasides, the well-known arbitration practitioner/academic, has recently published an article in the ICSID Review on precisely the question of proving corruption in investor-State arbitration, and that is at CLA-153, Paragraph 77, and he says this: "Where an inference is a reasonable conclusion to draw from the known or assumed facts, tribunals should be willing to draw the inference to determine allegations of illegality as they would any other allegation. Indeed, more so given the often deliberately concealed nature of an illegality. Tribunals in other cases have accepted that corruption is rarely proven by direct cogent evidence, but rather it usually depends on an accumulation of circumstantial evidence." And in relation to that, see the UFG and Egypt Decision, which is at CLA-137, Paragraph 7.52.

And it's, of course, true, as the Respondent notes, the Tribunal must be satisfied that each of the elements of the Claim are proven, but such proof in the case of corruption may not be direct and may include inferences in circumstantial evidence, and we

say in the present case there are circumstantial points that support a conclusion that the Supreme Court's, what we say is "incomprehensible" judgment, was the result of corruption.

Now, I'm going to pause here. I don't believe that anything I'm going to say on this requires that we go off-line, but, of course, I would invite the Respondent to let me know immediately if they feel that that is occurring and, of course, we can then make the relevant arrangements.

MR. DEBEVOISE: Well, certainly any reference to the three complaints which were the object of your Supplemental Reply should be off-line.

MR. WILLIAMS: So, the starting point in terms of the environment of corruption--again, so start broad and then move narrow, so the starting point is what we say is the established prevalence of corruption, unfortunately, in Panama, and there are numerous reports and NGO reports that such corruption, unfortunately, extends to the judiciary where there is a serious issue; and, in that regard, I will refer only to the Claimants' Memorial Paragraphs 116 to 130

in its Reply; Paragraphs 7 to 9, and 40 to 48 in the Supplemental Reply, and that sets out the basis for that suggestion. And the allegations of corruption that have been made extend to the Supreme Court. These are not made public, so the Claimants' only aware of those that they have discovered through press searches; and of those complaints, only two, it seems, have ever resulted in any investigation by the National Assembly.

Mr. Arjona, a former Chief Justice of the Panamanian Supreme Court explains that, in the vast majority of cases, complaints against Supreme Court judges are dismissed. That's at Arjona 3, Paragraph 18. And very few are investigated. He says: "The political composition of the Credentials Committee, the system of reciprocal judgment among justices and deputies and the lack of ethical or disciplinary consequences for those decisions are some of the reasons that may, to varying degrees, explain why these charges have not been admitted."

And there have been specific corruption allegations made against the drafting justice in the

Muresa case, Mr. Ortega. These involve his son and his assistant, and the reference there is C-230.

Now, in this case, there is specific evidence which goes to corruption beyond the mere environment, and specific evidence that we have is what Ambassador Gonzalez-Revilla said in his meeting with representatives of Bridgestone at the Panamanian Embassy in Washington, D.C., on 13 March 2015. At the very beginning of this meeting, whilst the circumstances of this case were being described, Mr. Gonzalez-Revilla interrupted the explanation and said: "You know what this is; right? It's corruption." This admission by Panama's representative to the U.S. was astonishing to the Bridgestone representatives at the meeting. He recalled his words and described them in their Witness Statements, and that is the statements of Mr. Akey and Mr. Lightfoot.

Now, it's very significant that Ambassador Gonzalez-Revilla was Panama's representative in the U.S., and that he said that this judgment was the result of corruption. Now, of course, this is

embarrassing for Panama, and now the suggestion that this admission was made is denied. The Respondent has abandoned its initial hopeless argument that the Ambassador was not speaking in his official capacity, and now the issue rests simply on whether he did or did not say what it is alleged he said, therefore, there is a dispute as to who is to be believed. But the Respondent has chosen not to call or to question the Claimants' witnesses on this issue, so their recollections will not be tested, and their witness evidence stands as it is. We say the Tribunal should accept what Mr. Akey and Mr. Lightfoot say in their Witness Statements because the Respondent has avoided giving them an opportunity to give oral testimony.

PRESIDENT PHILLIPS: Could I just check, is it correct that you've abandoned your point?

MR. DEBEVOISE: I was about to raise an objection on that basis. We have not abandoned that point.

MR. WILLIAMS: Noted, thank you.

And on top of what I have outlined, we say that the Tribunal should draw adverse inferences from

the Respondent's failure properly to conduct searches and to produce relevant evidence. The Claimants requested that the Respondent search for documents and communications between the three Supreme Court Justices and any third parties. The Respondent first argued that such request was irrelevant and too broad, and that the Claimants had not provided evidence of the existence of any such documents. The Tribunal, however, ordered the production of such documents; and, following that, the Respondent claimed that no such documents existed.

Third, having been ordered to explain how it could conclude that no documents existed, the Respondent explained that it had searched merely by writing to one of the three Justices who simply recited the usual practice that all documents are held within a particular case file, and that third parties are not consulted in connection with cases. No actual searches of hard copy or electronic documents were undertaken, and the other two Justices were not even asked to carry out searches.

Now, to recall, there have been a number of

specific corruption allegations against the drafting Justice, Mr. Ortega, that involved his son and his assistant. On any view, it is appropriate, therefore, that searches be made to ascertain if there are any communications between the Justices and third parties. That was not done. Justice Ortega was on the Supreme Court at the time that the document requests were made, and at the time of Procedural Order Number 7. He retired from the Supreme Court on 13 March 2019. Justice Ortega could and should, therefore, have been asked to search for documents responsive to the Claimant's request, but he was not. It may be that there could be relevant communications between Mr. Ortega and his son and his assistant or any other third party, but we will never know.

As Mr. Partasides--

(End of open session. Attorneys' Eyes Only information follows.)

ATTORNEYS' EYES ONLY SESSION

MR. DEBEVOISE: Mr. President, Claimants' counsel seems to be entering into the area of the so-called "third complaint" related to allegations against Justice Ortega's son, which is one of the three documents which is restricted. I think, therefore, at a minimum, we should be off-line during this time.

But I think I have a further objection, too, which is that he's misstating to the Tribunal the content of that Complaint, and I think that he's trying to draw you out on matters that you have previously addressed rather satisfactorily after what surely was deliberate consideration.

MR. WILLIAMS: Mr. President, I should say that I have no more submissions to make in relation to the matters that I have just mentioned. I'm about to end what I'm going to say on the question of corruption.

And I would say--we can probably disagree, but I would say that what I just mentioned are matters of public record, they're in the press, so therefore,

they're not confidential. But it's academic because I'm moving on, I'm no longer going to be saying anything further about what I've just covered.

PRESIDENT PHILLIPS: Very well.

ARBITRATOR GRIGERA NAÓN: We heard from the submission of the United States that the standard is clear and convincing evidence. I assume that that's not the standards you're suggesting we should follow. I assume that you're talking about circumstantial evidence, inferences, preponderance of the evidence. How do you fit whatever you said?

MR. WILLIAMS: We say that, in the context of corruption in denial of justice, it is vanishingly unlikely that there will be direct evidence of corruption. It is, in principle, possible, but extraordinarily unlikely. And we rely on the UFG and Egypt Decision, that the accumulation of circumstantial evidence for these purposes is sufficient because that is all, realistically, that can be achieved.

I mean, in this case, we have the environment of corruption, we have what we say is a specific

admission by Panama's representative, and we have a failure, we say, to undertake proper searches and to give production of documents which the Tribunal ordered should have been done. And we say, taken together, those matters amount to circumstantial evidence that, in the context of this Supreme Court Judgment, this profoundly flawed Supreme Court Judgment, we say, should be sufficient to support a finding of corruption.

However, the Tribunal does not need to take that final step. As we said, it is sufficient for the Tribunal to make the finding that no honest or competent court could have produced the Supreme Court Judgment and could have made each of the individual findings that we rely on.

SECRETARY TORRES: Mr. President, may I reopen the feed?

PRESIDENT PHILLIPS: Yes.

(End of Attorneys' Eyes Only session.)

OPEN SESSION

MR. WILLIAMS: It's probably helpful in this context, then, to reference Mr. Partasides again, who I've quoted from before in his recent Article in the ICSID Review. He said this: "Once a certain prima facie threshold of evidence is reached by the Party alleging illegality, which may not, in and of itself, be enough to discharge the standard of proof, it should not be adequate, given the nature of the allegation, for the defendant to sit back and not contribute to the evidentiary exchange on the issue." And we say that's precisely what's happened.

What has happened is that a threshold of evidence has been achieved, but contrary to the Tribunal's orders, the Respondent has simply sat back and not complied with the Tribunal's requirements, as a result of which, evidence that should have been available is simply not available. We do not know what the outcome of those searches and document--of those searches would have been. We just don't know.

And in light of the fact that Respondent refused to actually carry out any searches of any hard

copy or electronic documents or to ask two out of three of the justices that issued the Supreme Court Judgment to conduct any searches, we say the Tribunal should infer that there were communications, and that such communications would support a finding of corruption.

The last topic that I wanted to address the Tribunal on is in relation to BSLS's entitlement to recover the $5.431 million.

PRESIDENT PHILLIPS: Just before you move away from the Judgment of the Supreme Court, could you help us with this. We've had statistics of the number of cases that the Supreme Court has to deal with each year, and on my calculation, this particular court of three Justices would have over a thousand. What inferences do we draw as to the amount of time that they would actually have available to spend considering the voluminous evidence that was put before them in this case?

MR. WILLIAMS: Mr. President, we say that it may be--it may be--that the Panamanian Supreme Court is overworked, but that is not an answer to our

suggestion that the treaty protections have been breached. If Panama does not resource its Supreme Court adequately, that is not an excuse.

The Supreme Court issued a judgment which no competent or honest court could have done.

Now, it may be that the reason why no competent or honest court could have produced that judgment is because, in the circumstances, the Courts were just overwhelmed with work and Panama had not sufficiently resourced its Supreme Court. Perhaps--perhaps, I don't know--perhaps that is why such a flawed judgment was issued, but that does not mean that that does not amount to a defense to the breaches of the standards upon which our claim rests.

I am going to, very briefly, and you will pleased it will be the end of me, get into why BSLS is entitled to recover the full $5.431 million.

So, as a result of the denial of justice, BSLS was held jointly and severally liable to pay Muresa and TGFL the sum of $5.431 million. BSLS paid the sum in full on 19 August 2016. This sum represents the loss incurred by BSLS on account of the

denial of justice, and BSLS seeks to recover that sum in full.

The Parties agree that, in cases of denial of justice, the prevailing standard for recovery under international law is the oft-cited Factory at Chorzów. Wrongly pronounced. I mean, we're all very familiar with this, so as far as possible, reparation must wipe out all of the consequences of the illegal act and re-establish the situation which would, in all possibility have existed if that act had not been committed.

The Supreme Court held both BSLS and BSJ jointly and severally liable to pay the Judgment debt. And each, of course, was liable to pay the full amount, and the Parties were at liberty to decide which of them should pay as their corporate needs dictated, and that, we say, was recognized by the Tribunal in the expedited objections phase, and the reference there is Paragraph 330.

Now, the Respondent, however, still insists that because there was joint and several liability, neither Party incurred loss on the day that the

Supreme Court ordered payment. Instead, because it was not clear which Party would pay, the Respondent says that loss was not suffered until it was actually paid, and no authority has been offered in support of that surprising suggestion. However, Mobil Investments Canada and Canada is authority for the proposition that loss is, indeed, suffered on the day that payment was ordered. The Tribunal in that case held that damages are incurred and compensation is due when there is a firm obligation to make a payment, and there is a call for payment for expenditure or when a payment or expenditure related to the implementation of the guidelines has been made. In that case, the question was whether compensation was due to the Claimant based on money owed to the Respondent, and so there was an issue as to which of the possibilities listed above applied, for example, whether there was a firm obligation to make payment or not. In this case, there is no question as to when and whether there was a firm obligation to make payment because such obligation arose from the order contained within the Supreme Court Judgment.

The Tribunal in this arbitration made the same finding, and then that's the Decision on the Expedited Objections, Paragraph 328.

Ultimately, it was BSLS that paid the 5.4 million. There was no agreement or policy in place between BSJ and BSLS as to who should pay any damages if a third party sued them in relation to any trademark opposition. It's hardly surprising that there was no agreement or policy since this had never happened, anywhere in the world, ever before.

There was a 2010 Agreement under which they agreed to share the costs of pursuing trademark oppositions, but this did not extend to cover payment of damages claimed by third parties. And it made sense that BSLS should pay because of geographic responsibilities. So trademark enforcement and protection issues related to the Americas are generally handled, out of the U.S., by BSLS and other U.S. entity, and BSLS had responsibility for the protection of the FIRESTONE trademark around the world, including in Panama.

Further, it was BSLS, rather than BSJ, that

was facing imminent enforcement action, and BSLS took into account tax issues; and this was mentioned by Mr. Kingsbury in his oral testimony in the September 2017 hearing at Page 483, Lines 18 and 19.

Further, BSLS took into account that it had standing to bring the present arbitration claim to recover the sum paid, whereas BSJ did not. And, again, Mr. Kingsbury covers that at Page 484, Line 1 to 6.

So, BSLS entered into an arrangement with BSJ as recorded in the 20 July 2016 BSLS Board Resolution; and that's at R-95. Under that arrangement, BSLS paid the full amount of the 5.4 million damages, and, in return, was entitled to retain for itself all of the fruits of the present arbitration. Therefore, BSLS has not obtained any contribution from BSJ in respect to the 5.4 million.

The Claimants, of course, accept that they should act reasonably. But BSLS's payment of the 5.4, and its agreement with BSJ in that regard, are, in the circumstances, we say, entirely reasonable. BSLS obtained a loan from BSAM to pay the Judgment debt.

It's not unusual, of course, for a company to obtain financing to pay a debt, and it made sense for BSAM to provide this loan because BSAM is the main profit center for the Americas within the Bridgestone group of companies, and it was readily able to provide a U.S. currency loan.

Now, the Respondent suggests that this is not a real loan, but the financial statements show that BSLS makes quarterly interest payments on it; and that's at C-273, shown from the bank statements. BSLS's financial statements record the fact that the payment--that the repayment of the principal amount of the loan will be delayed until conclusion of these arbitration proceedings. But that does not mean the loan is not repayable, and there is no agreement that the loan is not repayable if BSLS loses the present arbitration.

ARBITRATOR GRIGERA NAÓN: Mr. Williams, you say that the books indicate that the loan won't be repaid until the end of this arbitration, but I read the Loan Agreement. The Loan Agreement provides for, I believe, a maturity in 2017, and a one-shot

extension until 2018, and that's it.

There are new arrangements that justify your accounting, or what's going on?

MR. WILLIAMS: The debt has been rolled over each year subsequently, and Mr. Kingsbury is available as a witness and will be giving evidence and no doubt will be asked questions on precisely this issue.

That is all I wanted to say on the damages point, but my colleague, Ms. Kepchar, will discuss the IP issues and the damages claimed beyond the 5.4.

MS. KEPCHAR: Mr. President, Members of the Tribunal, good morning. I have the dubious honor of being the last speaker before lunch. My name is Karol Kepchar.

I'm following onto Mr. Williams's Opening Statement on the Claimant's 5.43 million claim for damages with a discussion of a fundamentally different type of damages incurred by the Claimants as a result of the Supreme Court's Decision.

The 5.43 million is but one category of loss incurred by these Claimants, and that amount should be restored for the reasons Mr. Williams articulated.

But the matter at hand, as the Tribunal already well knows, involves a special type of intellectual property: Trademarks. And this case involves not just any trademarks. BRIDGESTONE and FIRESTONE are beyond question globally famous marks and have been declared as such in many countries around the world.

Because trademark rights are involved here and examining what damage was incurred by the Claimants by the Supreme Court Decision, a second, different type of damage must also be considered, and that is damage to the trademark rights themselves; damage resulting from a Supreme Court decision that was not only wrong in the result, it was a shocking departure from internationally accepted trademark laws and norms, as well as Panamanian law.

Gentlemen, this case has been pending for several years, and to this day, Respondent has not identified a single case anywhere that assessed any trademark owner, much less the owner of a globally famous trademark, money damages for bringing and losing a trademark opposition--mind you, on the merits

and on substantial evidence, not summarily--and while it seems trivial, withdrawing an appeal of a decision before either party had made any submissions.

Yes, there was also a demand letter, as referred to by Mr. Williams, sent, to which both the Supreme Court, and now Respondent, giving an enormous amount of weight. But it is entirely unwarranted. We can call the letter a Reservation of Rights Letter, a Cease and Desist Letter, a Demand Letter, or something else entirely, but the only thing that matters here is what the letter actually says, who said it, to whom, and where. And each respect having no connection with Panama.

The Tribunal does not need trademark experts to understand the plain language of that letter.

Notably, though, all four trademark experts in this case agree that these types of letters are routine, standard, trademark enforcement tools. That's not in dispute.

And Respondent's efforts to justify Muresa's state of mind, its high anxiety and extreme and baffling decision-making, by offering the statements

of trademark law experts, that, just honestly, makes no sense. It's not clear how a trademark law expert saying Muresa's reactions were "not irrational" or "not unreasonable" or that it felt bullied helps at all in illuminating the Supreme Court's assessment of the Bridgestone Parties' behavior. That's what the Supreme Court said was "reckless."

I want to be very clear: Claimants offer their trademark law experts not for the purpose of re-litigating the merits, which is obviously not why Claimants are here before this Tribunal. Claimants offer Ms. Jacobs-Meadway and Mr. Molino to help the Tribunal in assessing whether any competent and honest court looking at the same case would have arrived at such a decision, but equally importantly in understanding the full consequences of that decision on the trademark rights at issue.

The evidence offered by the Claimants helps explain the unique purpose and function of trademarks, quite different from other types of "intellectual property" rights.

First, put simply, trademarks are an

indicator of source. They enable consumers to make efficient and informed choices among the products and services of different Parties. But importantly, trademarks also embody the reputation of the business in the public sphere; not just to consumers, but to distributors, manufacturers, investors, and the public at large. A trademark functions in a way as a persona of business. That reputation of that persona can be enhanced or it can be damaged. This reputational element of trademarks often called "goodwill."

The Claimants enjoy licensed rights in the BRIDGESTONE and FIRESTONE marks in Panama and, as such, they enjoin the benefits of the goodwill associated with these iconic, historic marks. But they also bear the negative repercussions of any damage to those valuable rights.

Respondent disputes that Licensees share the benefit and the risk of goodwill, but that's not correct; and Claimant's expert, Ms. Jacobs-Meadway, will explain exactly why that's the case to the Tribunal.

Given the special attributes of trademarks,

trademarks can be damaged in any number of ways. They can be legally invalidated or limited by a judicial action, or by failure of the trademark owner to adequate police against copycats or other infringers. Goodwill, that reputational dimension of trademarks, can also be damaged in various ways. There could be quality issues with the goods, but importantly, there can also be external events that damage goodwill.

For example, the company Nike was in the press and plagued by reports that it used child labor. That was not a quality issue with its products. Businesses can be tarnished by association with criminals or certain political agendas.

Most relevant in this case, a judicial decision can damage intellectual property. For example, a U.S. Supreme Court ruling several years ago, invalidate certain business method patents, called into question the validity of all business method patents. Who would pay for a license or purchase, a business method patent, at that same rate as it would have before that Decision issued?

One can easily see how a cloud of doubt and

risk created by a court decision can cause the value of intellectual property assets to decrease.

Even a pending legal proceeding may lead manufacturers and customers to walk away from the Party involved, as claimed by Muresa itself in the damages case in this matter.

Claimants' trademark expert, Ms. Jacobs-Meadway, explains the legal and practical consequences of the Supreme Court Decision for the Parties, noting that numerous points where the Supreme Court's Decision departs from internationally harmonized and accepted trade law of principles. These consequences include, for the Claimants, at least, a chilling effect on the exercise of trademark rights.

Mr. Kingsbury's testimony will also be relevant to that point.

The increased likelihood that products bearing confusingly similar marks will enter the market is another risk. That will likely occur if trademark owners are faced with the impossible choice between facing potential multimillion-dollar damages

if they lose a trademark opposition, or foregoing that risk and allowing a similar mark to register and enter the market, resulting in loss of exclusivity and the erosion of the breadth of its rights.

Also, decisions of one tribunal may influence the determination of issues in other jurisdictions and, of course, in other cases within that jurisdiction, even if there is no formal system of binding precedent.

Mr. Arjona's statements are also relevant to that point.

It's critical to bear all of these trademark concepts in mind because they are necessary as a foundation for the damages analysis addressing the impact to the trademark rights that the Claimants offer through Mr. Daniel, Claimants' damages expert.

Claimants will establish--

PRESIDENT PHILLIPS: Just before we get on to Mr. Daniel--

MS. KEPCHAR: Yes.

PRESIDENT PHILLIPS: --so I can follow your submissions, it seems to me that these submissions

would apply to all trademarks in Panama. The argument is that this decision of the Supreme Court demonstrates that if you tried to enforce or defend the trademark in Panama, you may get zapped for damages, so that all trademarks have been devalued.

Is that the case?

MS. KEPCHAR: I do--yes, Mr. President. I do believe that that's a potential impact of this decision. Absolutely.

With Mr. Daniel, Claimants will establish that they, as rights-holders to the BRIDGESTONE and FIRESTONE marks, have, in fact, incurred damage as a result of the Supreme Court decision.

Gentlemen, as I'm not an accounting expert or damages expert by any stretch, Mr. Daniel is the best messenger of his own analysis and conclusions. But, in my simpler, layperson’s term, what Mr. Daniel does is quantify how much the risks to the trademark rights created by the Supreme Court Decision impacts the value of the trademarks.

As Mr. Daniel will explain in detail, he considered commonly accepted valuation methodologies

to compare the value of the marks before the Supreme Court Decision, to the value of the marks after that Decision.

He concluded that the value decreased. The academic underpinnings for Mr. Daniel's approach is the Heath & Mace Study, which is referenced in Mr. Daniel's First Report, which found that a change to legal protections for trademarks in the U.S. Trademark dilution statute had a demonstrable economic impact on trademark owners and competitors.

Respondent's expert Mr. Shopp's analysis is over-simplistic. Mr. Shopp looks only at sales and profitability of products under the marks, sees no change, and stops there.

Mr. Daniel's model starts with the revenue streams, but then does the necessary extra analysis to capture the change in buyer and seller expectations before and after the Supreme Court Decision regarding sales, profitability, and, importantly, risk, and the impact those would have on the value of trademark rights.

Mr. Daniel developed a damages analysis using

standard methodologies that was most appropriate to the consequences created by this most extraordinary of Supreme Court cases. But Mr. Daniel's damages methodology is, frankly, quite intuitive, in the world of trademarks, particularly. A helpful analogy might be that of an owner who purchased a structurally sound building in, say, Riverside, California, but in the recent earthquake, the earth shifted, making the building unstable.

Whether the owner is seeking to sell at this moment or not, it's obvious that the value of the building has gone down. The building doesn't have to fall down for the loss to the value to occur. That's the economic concept of "unrealized loss." The risk itself decreases the value.

As to the geographic scope of Mr. Daniel's analysis, he does two separate damages calculations: One for Panama and one for the BSCR Region, looking at the royalty basis for each region.

The reason for assessing damages in Panama is straightforward, but there are several reasons why the regions applied by BSCR is an appropriate focus.

First, the Colón Free Trade Zone through which BSCR sells and ships products to the greater region, is located in the Republic of Panama, undeniably. Sales of BRIDGESTONE and FIRESTONE tires through the Zone of Panama utilize the very trademark rights in Panama that the Tribunal has deemed to be Claimants' investments in Panama.

Panama, as a WTO member, is obligated under the TRIPS Agreement to apply intellectual property rights, border measures, and criminal measures set forth in TRIPS to protect those rights in Panama.

It's also worth noting that Claimants' position that the BSCR Region is the appropriate territory for determining the royalty base for the damages analysis is completely consistent with the Supreme Court's crediting Muresa's evidence of lost sales as Muresa's lost sales in Panama, even though these sales were for tires manufactured and sold from China through the Colón Free Trade Zone for broader distribution to Central, South America, and the Caribbean.

To summarize, Mr. Daniel concluded that the

appropriate range of damages for the decrease in value of the Claimants' trademark rights caused by the Supreme Court Decision is for--is between about 500,000 and a million for Panama and between 6.7 million approximately and 12.8 approximately for the BSCR Region, and those numbers are, of course, specifically defined in his Report.

We look forward to further discussion of these issues with Mr. Daniel when he appears later this week.

Thank you to the Tribunal. Claimants' Opening Submissions are concluded.

PRESIDENT PHILLIPS: Thank you very much.

Over to the Respondent.

MR. DEBEVOISE: Would you like us to resume after lunch?

(Tribunal conferring.)

PRESIDENT PHILLIPS: We prefer to carry straight on, and if we finish early this evening, that will be a bonus.

MR. DEBEVOISE: Then I think we just need a few minutes to set up, and then we will be ready.

PRESIDENT PHILLIPS: We will certainly have a break for five minutes to enable you to get in order.

(Brief recess.)

MR. DEBEVOISE: Mr. President, I thank you for the Tribunal's patience with the arrangements here, and I think we're now ready to proceed.

I think Ms. Silberman will proceed for about an hour and 15, hour and 20 minutes followed by Ms. Gaela Gehring Flores, and then I will have a quick wrap-up of about 10 minutes. Overall, I think it should go two hours or a little bit more, so you can decide at what point you need a human rights break or a lunch break or anything else.

PRESIDENT PHILLIPS: Very well. In principle, we will be going on until about 1:00, but if you find that you've reached a convenient break shortly before then, we will adjourn at your suggestion.

MS. SILBERMAN: Excellent. Will do. Mr. President.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MS. SILBERMAN: And good afternoon to you and

the other Members of the Tribunal.

Now, approximately five years ago, on an ordinary Wednesday in May, Panama's Supreme Court issued an ordinary cassation decision. The Decision followed an ordinary, if lengthy, civil proceeding, and there is nothing particularly remarkable about the Decision itself. A lower court was overruled; one side won, the other side lost; and the majority in dissent were split — all ordinary occurrences.

But the losing party apparently believed in its case quite strongly — so much so that it continued arguing and arguing it again and again. It appealed to the Supreme Court; it appealed to the Japanese Government; it appealed to the U.S. Government; and now it has appealed to you.

But as the United States has explained and stated again this morning, international tribunals are not courts of appeal. The appeal here shouldn't have been filed. We shouldn't have to be here today.

Now, with that caveat stated, we are very grateful to be here. And this is so because, over the course of the past few years, the Bridgestone group

has been tireless in publicly decrying Panama and denouncing its public officials. They have deemed respected jurists to be "incompetent and dishonest," and they have used the word "corruption" more than a hundred times — and that was just before today.

These allegations are baseless — in the literal sense of the word. For example, Claimants have not even purported to identify a single factual allegation as to what the supposed corruption supposedly entailed. Was it collusion? Was it bribery? Who was involved? They don't explain.

And neither did the Ambassador. So, the Claimants adverted to this toward the end of their closing this morning. Nowhere in that statement — which is fervently disputed by the Ambassador, who you will be meeting next month — is there an explanation about what supposedly happened here. There is no basis on which you could possibly make factual findings.

Now, the Tribunal is bound, of course, to rely on actual evidence, and to reserve judgment until the end of this case. But the internet can be less

discerning. And that's one of the reasons why we are grateful to be here today: because we're going to set the record straight, not just for the Tribunal, but also for anyone watching who happened to hear these words.

We're going to begin by walking you through the record and through the actual documents — not just the three that the Claimants showed you today. This is necessary in order for you to evaluate what happened in this case and the Supreme Court's Judgment in Panama.

At the end of our discussion, you may find that you disagree with the Supreme Court, that you might have concluded otherwise, but what you're not going to see is a denial of justice under customary international law. So, let's begin with some background.

Now, in 1979, the Bridgestone Tire Company was just one of a number of players in the global tire market. A few years later, in 1981, it set its sights on expansion, and more specifically upon becoming one of the world's top three manufacturers of rubber

products and tires. The fight to the top was a battle, but the company achieved a coup.

In 1988, Bridgestone acquired a former competitor, Firestone. At the time, Firestone was already a strong brand in its own right. And BRIDGESTONE and FIRESTONE trademarks, both "-STONE" suffix marks, had coexisted throughout the world.

Following the acquisition, the company changed its name to Bridgestone/Firestone, which I will return to a bit later. Now, approximately a decade later, in 1999, a company named Muresa Intertrade began to market tires under the brand name RIVERSTONE. And these activities don't appear to have caught the attention of the Bridgestone group, perhaps because, at the time, the group was dealing with a quite large product-safety scandal.

In the year 2000, as you may recall, there was a defect in certain Bridgestone group tires that was linked to numerous crashes, injuries, and even fatalities, and this prompted a global backlash and a steep decline in business — not to mention a 14.4 million tire recall. So, accordingly, for a

period of time, the RIVERSTONE side went on its way without any objection, and it began requesting registration of the RIVERSTONE trademark around the world.

In May of 2002, for example, Muresa applies for registration of the RIVERSTONE trademark in Panama. And a few months later, in August, its sister entity, L.V. International, applied for registration of RIVERSTONE trademark in the United States. And while these applications were pending, as Mr. Williams mentioned earlier, there were sales of RIVERSTONE tires — large sales, in fact. In 2003, for example, Muresa sold $3.4 million in RIVERSTONE-brand tires.

Now, throughout that same year, L.V. International continues seeking registration of the RIVERSTONE mark in various countries. It submitted applications in Bolivia, Costa Rica, the Dominican Republic, Nicaragua, and Peru. And in their pleadings, the Claimants neglected to mention this in their timeline or argued [*sic*] that the applications had been opposed by Bridgestone entities. And that stood out to us in light of certain other arguments

that were made—for example, the following:

First of all, that as you will recall, Bridgestone Licensing is the owner of the FIRESTONE trademark in all countries outside of the United States, and that the BRIDGESTONE trademark is held by Bridgestone Japan, or Bridgestone Corporation.

Second, that "a key aspect of the Bridgestone group's business is to protect and maintain the BRIDGESTONE and FIRESTONE trademarks."

Third, the idea that this exercise involves "Bridgestone carefully and diligently monitor[ing] the tire markets and trademark registries in each jurisdiction in which it has a presence," and then going on to assert objections as relevant to the registration of any other mark.

And fourth, that the Bridgestone group has a presence in some of these jurisdictions. Costa Rica, for example, is home to BSCR — the entire basis for Claimants' argument about the BSCR Region. And there is also evidence that Costa Rica and Peru were home to BRIDGESTONE/FIRESTONE tire factories.

Now, at some point the Bridgestone group did

wake up, and in December 2003, it opposed the application that L.V. International had submitted to the United States. The "opposition," or challenge, alleged that the RIVERSTONE trademark was confusingly similar to BRIDGESTONE and FIRESTONE. L.V. International responded shortly into the new year, and it denied the allegation of confusing similarity. And in the meantime, while the case was pending, authorities in Costa Rica, Guatemala, and Nicaragua all registered the RIVERSTONE trademark, which in practical terms meant that the RIVERSTONE brand could be sold without opposition (without challenge) in all of these countries. And that's what happened: sales continued. As expert reports would later show, sales were on an upward trend.

Now, in the meantime, the U.S. Trademark Opposition Proceeding continued. At least, it did until 2004, when — suddenly, without any explanation that can be found in the record — L.V. International withdrew its application. The U.S. authorities then rejected the application as having been abandoned, and the law firm of Foley & Lardner sent what we've been

calling the Demand Letter.

Now, I'm sure that you've already reviewed this letter in full. So, I would just like to pause briefly on a couple of points that stand out.

First, this letter, as you know, made its way into the Panamanian proceeding, and one of Claimants' arguments is that it wasn't properly authenticated in that proceeding. As an initial matter, though, there is no question that this letter itself is authentic. This version that I have on the screen: this is Claimants' own exhibit. And Claimants have stated repeatedly that the Bridgestone group transmitted this letter.

Earlier today, there was an argument that Bridgestone Licensing had nothing to do with this letter at all; it was just BFS Brands. But there have been other occasions when Claimants themselves have connected both Bridgestone Licensing and Bridgestone Corporation to this letter, and the fact that it refers to trademarks around the world means necessarily that one of these entities must have been involved (because BFS itself didn't have rights to use

FIRESTONE or BRIDGESTONE trademarks everywhere in the world).

Now, second, the date of this letter is the 3rd of November of 2004. And this was after certain countries, as I mentioned, had registered the RIVERSTONE trademark. And that meant necessarily that the Bridgestone group couldn't just object to the use and registration of the mark everywhere in the world. There were jurisdictions in which the mark had been registered and could be used.

Yet, notably, around this same time, the Bridgestone group developed a new policy — one that their own Mr. Kingsbury called an "extremely aggressive" one. The policy involved automatically changing--automatically challenging the registration for any "-STONE" suffix mark. This was bold, to say the least, for a company that had been born of two former competitors named Bridgestone and Firestone.

Now, third, in their pleadings, the Claimants argue that this letter was just a normal one: a standard reservation of rights letter that no person could ever fear. But the letter was sent by a global

law firm with offices in 19 countries--or 19 places to what has to have been a family firm or solo practitioner. If you were the solo practitioner, mightn't you be intimidated by this?

And to be clear, the purpose of this letter was to intimidate. It was to deter the use of the RIVERSTONE mark. Mr. Kingsbury admitted that last time we were all together, during the Hearing on Expedited Objections.

And the conclusion also follows directly from the text of the letter as well. It states: "Please take notice that Bridgestone/Firestone," which was the common name of the company, "please take notice that Bridgestone/Firestone objects not only to any registration of the RIVERSTONE mark by your client, but also to any use of the mark."

The letter continues:

"Bridgestone/Firestone's position . . . is not limited to the United States. [Now,] without taking a country-by-country analysis . . . , you and your client should know that Bridgestone/Firestone objects to and does not condone the use or registration

anywhere in the world of the RIVERSTONE mark for tires. Hence, L.V. International, Inc. is acting at its own peril if it chooses to use the mark RIVERSTONE in other countries."

Now, in 2005, the Bridgestone group followed through on this threat that it had made — and it did so in February. So, in January of that year, the RIVERSTONE mark was registered in Bolivia. And then — in February — Panama's DIGERPI, which is the Industrial Property Board, published an application for registration of the RIVERSTONE mark in the State's Official Bulletin. In practical terms, this signaled that DIGERPI had concluded that the application complied with the requirements for registration and would go on to be registered if no valid objection were made. The publication apparently caught the attention of a law firm that had been instructed by Bridgestone Licensing to monitor its trademarks, and this brings us now to the Panamanian Opposition Proceeding.

Now, in their pleadings, Claimants argue essentially that it is ludicrous that challenging a

trademark could be cause for a damages claim. Earlier this morning, Mr. Williams used the term "ridiculous." But, in March 2005, at the outset of the Opposition Proceeding, Bridgestone Corporation and Bridgestone Licensing granted powers of attorney to a Panamanian firm which contemplated the possibility of claims against the Bridgestone entities. Let me show you those documents. For example, this is the Power of Attorney for Bridgestone Corporation, and it's the Power of Attorney in which Bridgestone Corporation authorized the law firm of Benedetti & Benedetti to represent them in connection with the Opposition Proceeding in Panama. In addition to authorizing the filing of a claim, there also was authority to file counterclaims and complaints as a plaintiff or as a defendant, which is a possibility that would only make sense in the event of a claim against Bridgestone.

The attorneys were empowered, in short, to "do whatever is necessary before the national, judicial, and/or administrative authorities, either as a plaintiff or as a defendant, to protect the interest of the grantor." This same language, or similar

language, also appeared in the power of attorney that Bridgestone Licensing signed.

Now, turning back to the timeline: in April of 2005, these two Bridgestone entities — which I will refer to as "Bridgestone Litigants" — filed an opposition suit against Muresa in Panamanian court. Their allegation was that the RIVERSTONE trademark was confusingly similar to BRIDGESTONE and FIRESTONE. The Bridgestone Litigants asserted that, "without a doubt, when the customers see the RIVERSTONE [trademark], . . . there [is] a grave risk of confusion and association" with the BRIDGESTONE and FIRESTONE marks.

In June, a few weeks later, Muresa contested the suit — arguing on the very first page that the opposition claim had been "reckless." In addition, Muresa argued, among other things, that the RIVERSTONE & DESIGN trademark was original and distinct, and that it was something that "consumers can easily distinguish in comparison to the 'BRIDGESTONE and FIRESTONE' trademarks."

Now, as the case progressed, there also were third-party intervenors. In August of 2005, L.V.

International petitioned to intervene as a special type of intervenor that is known as a "coadyuvante." As Article 603 of the Panamanian Judicial Code explains, a coadyuvante is a third-party that intervenes for the purpose of assisting one of the parties. If its application to intervene is granted, the coadyuvante is permitted to introduce both evidence and claims. This is important, as we will discuss.

Now, Tire Group, another sister entity, also petitioned to intervene as a coadyuvante. And this submission asserted, among other things, that RIVERSTONE, BRIDGESTONE, and FIRESTONE tires "ha[d] coexisted in the national and international markets, for example in [a list of 18 different countries . . . ."

Why is this important? Let's turn to the Witness Statement of Ms. Audrey Williams. As you may recall, Ms. Williams is a member of the firm of Benedetti & Benedetti, and that's the firm that was retained by the Bridgestone Litigants to represent them in this Opposition Proceeding. As Ms. Williams

explains, "in the case of an opposition [proceeding], . . . [if there is] proof that the confronted marks can coexist . . . in the market [it means that] the [opposition] action would be dismissed because there would be no likelihood of confusion or association."

Later, in August, the court granted the coadyuvante petitions, and that meant that the two coadyuvantes, Tire Group and L.V. International, joined as intervenors. The Bridgestone Litigants appealed to Superior Court, and the Opposition Proceeding was then suspended so that the appellate court could deal with this issue.

On October 14, 2005, the Bridgestone Litigants submitted arguments in support of appeal. Muresa, Tire Group, and L.V. International then contested the appeal, but eventually, the appeal was rejected, so the coadyuvantes were permitted to stay.

PRESIDENT PHILLIPS: Could I just ask you to help me with the coadyuvantes.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: They intervene to support a party, and they can bring further claims but

can they or can they not advance claims in their own right as oppose to supporting the original party?

MS. SILBERMAN: This is something that I would like to confer with Mr. Lee about, and it's something that to the extent that we don't have a chance to discuss it today, he can answer it tomorrow.

PRESIDENT PHILLIPS: Thank you.

MS. SILBERMAN: Now, when the Opposition Proceeding resumed, it was in the evidentiary phase, and both parties presented evidence in support of their positions. But for present purposes, I just want to focus on what the Bridgestone Litigants submitted — what they did submit and didn't submit — because it became relevant later on, once this entire file became part of the record that was submitted in the Tort Proceeding.

So, the submission included evidence that was materials from the U.S. Opposition Proceeding — a foreign opposition proceeding. The Bridgestone Litigants submitted that evidence. What was not submitted was any evidence of consumer confusion, which, as Ms. Williams had stated, was very important.

Now, in May of 2006, the parties presented their closing arguments. And a few months later, the court handed down its decision, dismissing the opposition claim that the Bridgestone Litigants had filed.

Here are the highlights from that Decision, which is in the record at Exhibit R-40:

The court acknowledged that there are, of course, "similarities of an orthographic and phonetic nature" among the marks. Nevertheless, these similarities do not cause sufficient confusion.

As the court explained, as Ms. Williams has stated: market conditions are "one of the determinant factors to eliminate any likelihood of confusion" among the marks. And in practice, these trademarks had had occasion to co-exist. In fact, the court continued, "[t]he commercialization of the []RIVERSTONE tires has[] taken place in Panama [and 23 other countries]." And "[h]undreds of thousands of []RIVERSTONE tires have been sold." through "transactions that[] reached significant figures (millions of dollars) . . . ."

And yet, throughout all this time, "there [wa]s no evidence that the[marks'] coexistence had caused error, confusion, mistake, or [that it] misle[d] or dece[ived] the public . . . ." And so, accordingly, the court concluded, there was no reason to deny access to the trademark registry to RIVERSTONE.

And then the court concluded by deciding the issue of costs, and stated: "[The Bridgestone Litigants] will be exonerated from the payment of costs, given that this [court] considers that [those litigants] acted with apparent good faith. . . . Thus, they will only be compelled to cover the expenses of the proceeding."

Now, at first, the Bridgestone Litigants sought to appeal this judgment, and the appellate court went on to establish a deadline for their more fulsome arguments. But, as Claimants have explained, in the days leading up to the deadline for submitting those arguments, the Bridgestone Litigants decided not to pursue the appeal. They withdrew the appeal on the 5th of September 2006, and the court dismissed the

case with a symbolic award of procedural costs.

And, in practical terms, this meant that, as Claimants themselves have put it: "Tires with the RIVERSTONE mark [are permitted to] be sold in Panama."

Now, in their Reply, Claimants were somewhat cavalier about this. Their position was: "Th[e] opposition failed — so be it." Get over it; move on. But that was much easier for the BRIDGESTONE side to say than the RIVERSTONE side.

As witnesses from Muresa and Tire Group would later go on to explain, RIVERSTONE trademarks were challenged in various countries around the world — and, because of that, Muresa and Tire Group had to "spend large sums of money every year. . . ." For example, traveling to those countries and hiring attorneys to resolve the problems.

In addition, witnesses testified they were "notified in the Dominican Republic of the seizure of the [RIVERSTONE] inventory that [their] distributors [had] had in that country."

And on top of this, customers reportedly refused to buy RIVERSTONE tires for fear of reprisal

against them and seizure of the tires.

Because of that, Muresa and Tire Group mitigated by selling lower-quality substitutes. But they had to do that at cost, or less than cost, and customers would often return the lower-quality tires. Because of that, profits went down.

And in addition, there were certain tack-on effects. For example, Muresa and Tire Group witnesses testified that they were unable to achieve shipping quotas, resulting in breach of certain shipping contracts.

Eventually, Muresa and Tire Group decided that they'd had enough, and in September 2007, they initiated a civil lawsuit in Panama against the Bridgestone Litigants.

Now, I'm going to show you the Complaint, which is a document that Claimants had focused on significantly in their pleadings but wasn't one of the three documents that they showed you earlier today.

In their pleadings, Claimants focused on this document almost to the exclusion of any other. They jumped straight from this document to the Supreme

Court Decision, without analyzing what happened in the middle— what arguments were presented. And how could you possibly determine whether or not the Bridgestone Litigants had an opportunity to be heard without examining their pleadings? You can't. So, we're going to look at that now, but we'll start with the Complaint.

So, at bottom, the Complaint was a claim for the amount of $5 million, plus the costs and expenses that were generated by the proceeding. And as a basis for this request, Muresa and Tire Group alleged that they had incurred damage and loss as a result of the Opposition Complaint.

Now, this morning, Claimants asserted that the withdrawal of the opposition appeal was, "not mentioned by Muresa in the Complaint." That was on Page 86 of the provisional transcript. But the reality is that this was mentioned in the document. It's mentioned in the very first paragraph.

Now, that paragraph happens to be on page 5 of the exhibit, which is Exhibit C-16, because the exhibit includes a power of attorney, but this does

appear in the very first paragraph.

What else did the Complaint say? Importantly, the Complaint requested a copy of the opposition record and that it be transferred to the First Instance Court that was deciding the civil claim. That opposition record, as I mentioned earlier, also included certain materials from a U.S. Opposition Proceeding abroad — materials that the Bridgestone Litigants themselves had submitted.

And this, of course, is a point on which the Bridgestone Litigants supposedly didn't have an opportunity to be heard: The issue of opposition proceedings abroad.

Now, at the end of the Complaint, there was a section headed "Legal Grounds," and here the plaintiffs provided a non-exhaustive list. So, you see a list of articles: “Articles 256, 665, 1012, 1255, and other related articles of the Judicial Code.” This isn’t exhaustive. It continues: “Articles 1644 and 1644-A, and 1706 and other related articles of the Civil Code.”

Now, one of the questions in the pleadings

arose out of a discussion between Article 1644 of the Civil Code and a different article — a provision of the Judicial Code. So, I'd like to just remind you quickly what Article 1644 says. It states: "Any who causes damage to another by action or omission through fault or negligence is obliged to compensate the damage caused."

Then, Article 1644-A continues: "Included in the damage caused is both material damage and emotional distress."

Now, following the Complaint, on the 18th of September of 2007, the First Instance Court established a deadline for the Bridgestone Litigants' Answer. This was 40 business days. And that deadline was ultimately extended for approximately a year to allow for international service of process upon the Bridgestone Litigants.

Eventually, more than a year later, on the 13th of October 2008, Bridgestone Licensing submitted its Answer, and here's what Bridgestone Licensing had to say:

First, it asserted: "The Respondent did not

commit any negligent or reckless, or bad-faith act or omission to the detriment of the Plaintiffs."

Now, the word "reckless" doesn't appear in Article 1644 or Article 1644-A. Where does it come from?

The submission goes on: "In order for a plaintiff to be liable for damages and consequence of a proceedings" — of a court proceeding — "by express and clear mandate of Article 217 [of the] Judicial Code, it is imperative for such plaintiffs to have acted recklessly or in bad faith."

Bridgestone Licensing introduced the issue of Article 217. And here is what that article says, it states: "The parties shall be liable for damages caused to another party or to a third party by their reckless or bad faith procedural conduct."

Now, in their pleadings, Claimants have argued that Bridgestone Licensing and Bridgestone Corporation didn't have an opportunity to be heard on Article 217. But as you can see from those slides, that simply isn't true.

And in addition to discussing Article 217 of

the Judicial Code, Bridgestone Licensing also mentioned a foreign opposition proceeding — another point on which Claimants say that Bridgestone Licensing and Bridgestone Japan didn't have an opportunity to be heard. Bridgestone Licensing refers expressly to the Opposition Proceeding in the U.S., even though, of course, Bridgestone Licensing was not a party to that proceeding.

And to be clear, all of these points were part of Bridgestone Licensing's defense. There was a section that stated: "With regard to Facts to support our defense, we state the following . . . ." They state: "Our client, [Bridgestone Licensing], did not act recklessly . . . . Our client, [Bridgestone Licensing], acted with outstanding good faith . . . ."

They also mentioned the opposition procedure in the United States against L.V. International.

And the Answer concluded by stating that there would be evidence and arguments to come. Specifically, that there would be "arguments and evidence that [the lawyers] consider[ed] appropriate for the best defense and protection of Bridgestone

Licensing Services."

Now, in 2009, approximately 10 months later, Bridgestone Corporation submitted its own Answer. And this Answer was very much similar to the one that had been submitted by Bridgestone Licensing. For example, it argued that the applicable standards was found in Article 217 of the Judicial Code, and that this was recklessness or frivolous procedural conduct. And Bridgestone Corporation also advanced a merits defense, arguing that it had "acted with outstanding good faith."

And to be clear, this was a defense to a claim of recklessness. The Answer stated: "[A]t no time did our principal act recklessly or in bad faith or file frivolous litigation, and therefore the requirements for liability set forth in Article 217 of the Judicial Code . . . are not met."

On the same day of this submission — the same day of Bridgestone Corporation's answer — both of the Bridgestone Litigants also submitted a joint motion to dismiss for lack of jurisdiction. And, in that document, they again argued that Article 217 of the

Judicial Code was the applicable standard. Their theory was that because Article 217 of the Judicial Code applied, the claim should have been submitted to the court that had decided the Opposition Proceeding, and that this new court wasn't authorized to be hearing the claim.

The next month, September 2009, Muresa and Tire Group contested the motion to dismiss, arguing that their claim could proceed. In addition, they describe some of factual points that they intended to establish, and the discussion included references to the foreign opposition proceedings.

Now, the case then moved on to the evidentiary phase, and on September 28th of 2009, Muresa and Tire Group submitted their list of affirmative evidence — which you should know is a term that in Panama refers to quite a number of things. It refers to documents, sworn evidence, statements by the parties, statements by witnesses, expert opinions, reports, scientific means, and any other rational means which serve to mold the opinion of the judge. All of that serves as evidence.

And Muresa and Tire Group submitted examples of this. So, their list included documents; witness testimony (I believe from 17 different witnesses) —— including witnesses from L.V. International, which at the time was not a party; and it included a request for the appointment of accounting experts to respond to a series of questions on damages.

In addition, Muresa and Tire Group reiterated their request that a copy of the Opposition Proceeding file be transmitted to the First Instance Court.

A few days later, on October 1st, 2009, Muresa and Tire Group supplemented their list of affirmative evidence, and the Bridgestone Litigants had an opportunity to respond.

So, first, on that same day, the Bridgestone Litigants submitted their affirmative evidence, and their list included a copy of the record from the U.S. Opposition Proceeding—no witness, though. Following that, there was a list of counter-evidence, countering what Muresa and Tire Group had put forward.

Further, on October 9th, 2009, the Bridgestone Litigants objected to the admission of

certain items on Muresa and Tire Group's list, and those issues were later decided by the court.

Now, before the court got to that point, before there was any decision on evidence, the Bridgestone Litigants allocated the risk of an adverse decision. Let me take you to this.

Now, I don't have the actual document up on the screen because Claimants gave it to us only yesterday. But I do have a 2016 resolution that describes the 2010 Agreement, and it states--

PRESIDENT PHILLIPS: I'm sorry, I don't understand what is meant by "allocated risk of adverse decision."

MS. SILBERMAN: Let me show you.

So, in this document, or — this is a document that's summarizing the 2010 Agreement—which as I mentioned the Claimants only disclosed yesterday: The Bridgestone Litigants agreed, in this particular agreement, "to split 50:50 the cost of . . . opposition . . . actions against third parties and the cost of defending against any counteractions taken by third parties."

Now, earlier today, Claimants argued that this agreement didn't cover the cost of damages claims by third-parties, but that's not how the parties themselves interpreted this document. When push came to shove, they interpreted this to apply to the damages award in the Muresa case. Ms. Gehring Flores will return to this point a bit later on.

So, still in 2010, we move on to the court's decision about the admission of evidence on the parties' lists. And the vast majority of the evidence was admitted, including all of the documentary evidence from the Plaintiffs, the witness testimony, and the idea of expert reports. Dates were established for the examination of witnesses, and the court also commissioned expert reports — not just from Muresa and Tire Group but also from the Bridgestone Litigants and from a court-appointed expert.

ARBITRATOR GRIGERA NAÓN: I see that you're following a chronological order, which is good for everybody, but are you already done with this famous Article 217 of the Judicial Code?

MS. SILBERMAN: Oh no, the parties come back

to this many, many times in the proceedings.

ARBITRATOR GRIGERA NAÓN: So you are going still to address that, because I have a question in that connection.

MS. SILBERMAN: If you want to ask now, I'm happy to try to address it as well.

ARBITRATOR GRIGERA NAÓN: Okay.

I am looking at the document, which is Exhibit C-0167, which is the Decision of the Panamanian Supreme Court as to what extent this cassation appeal was going to be accepted. And there it discriminates between two different concepts. One concept refers to the evidence, and the other concept refers to what they call—I'm looking at the English translation—"The second concept corresponds to the direct violation, the latter being invoked accordingly."

Now, this second violation is the only one in which a reference is made to Article 217, but this, counsel, was rejected as a basis for the cassation. And I think that the argument that has been made by your opposing counsel is that since this was outside

of the scope of what the Cassation Court had to decide, the fact that the Cassation Court anyway made a reference to Article 217 was what they call "inconsistent," and this is part of their basis of their denial of justice argument.

So, nothing that happened before is relevant, that's according to the opposition. What seems relevant is what the Cassation Court said they couldn't look at, and finally looked at, and on that basis made a decision.

You understand what I'm saying?

MS. SILBERMAN: I do, yes.

ARBITRATOR GRIGERA NAÓN: Okay.

MS. SILBERMAN: So, I would like to--

ARBITRATOR GRIGERA NAÓN: This is why I said chronologically it doesn't fit with your analysis so far, but if you want me to raise it, I raise it.

MS. SILBERMAN: So, I'd like to respond in part now and come back to the question again later once I've had a chance to re-review this particular document in context.

But part of the answer is if the question is:

"does one document state that the court is not going to be addressing this issue, and then the court does address that issue?" That may be a question of mistake.

If the question is, did the parties have an opportunity to be heard — which is what actually is the question under customary international law, because courts cannot be held in violation of international law for a simple typo, a mistake —

If that second piece is what the question is, there's no doubt that the Bridgestone Litigants had an opportunity to be heard on all of these issues. And, in the pleadings that were submitted after that point, the Bridgestone Litigants themselves discussed the issue of recklessness.

So we will turn to that, and as you will see, this issue came up again and again and again in the appellate proceeding, which we will get into. Eventually, the court issued a ruling on the issue of recklessness. The Bridgestone Litigants asked the court to do that in their request for relief, and the Claimants make no complaint whatsoever about that

finding. It's just when the court ruled against them they have some sort of issue.

ARBITRATOR GRIGERA NAÓN: I understand you're going to look at a document and come back?

MS. SILBERMAN: Yes.

ARBITRATOR GRIGERA NAÓN: Okay. Thank you.

MS. SILBERMAN: So, for now, let's continue with the timeline in the evidentiary phase.

As I mentioned, the court had established dates for the examination of witnesses, and I'd like to walk you through a bit of that testimony because it's quite revealing.

So, first, Muresa's Tire Sale Manager testified and was cross-examined by the Bridgestone Litigants, and here is what he had to say. He says: "When we found out about the objection to the registration of the [RIVERSTONE] brand, we had to create contingency plans . . . [and] had to obtain other brands to satisfy the needs of our customers."

This was harmful because: "Introducing these brands that were not at the market at that time recognized," it "forced us to introduce them at a

lower price," and that was "detriment[al] [to] the company's profit margin."

Then there is cross-examination by the Bridgestone Litigants: "Will the witness state the reason for adopting a contingency plan?"

Well, the witness says, "we were worried about an instruction that would allow the Bridgestone Corporation to carry out seizures or prevent the sale of []tires[,] and the situation was very delicate [because] we had product[s] in the warehouse, product in transit, and product in the factory with the RIVERSTONE brand."

Now, later that day, there's more testimony, this time from Muresa's Warehouse Manager. This witness testifies and is cross-examined by the Bridgestone Litigants. And here, there's a discussion of when the witness first heard of the challenge that was submitted by the Bridgestone Litigants, and the witness explains: Well, in April of 2005, "Management held a meeting with the sales persons and [the witness], informing [them] that they [needed] to cease selling RIVERSTONE [tires] . . . and not to import

[any] more" —at least "until some issues with the BRIDGESTONE and FIRESTONE brand were resolved."

And then, on cross-examination, the Bridgestone Litigants come up with what they are sure is a winning argument: Do you have a document? "Could the witness state if you remember a document that refers to the Bridgestone Corporation and Bridgestone Licensing with the order to halt sales?"

This pattern repeats itself again and again.

So later, we have Muresa's import manager being examined, and the witness first testifies on whether or not she knows that, "in addition to challenges that occurred in Panama[:] Were there [other] challenges [from] other countries?"

No objection from the Bridgestone Litigants.

The witness answers: "Correct, in the United States, also in China, countries in which we sold our products such as the Dominican Republic, Haiti, Colombia, Venezuela . . . ."

And then on cross, there is the question again: Do you have a document? "Can the witness say if she remembers or she knows whether she saw a

written document from Bridgestone Licensing and Bridgestone Corporation requesting the stoppage of manufacturing and sale of the Riverstone product?"

This happens again, again, and again.

So, from April 23rd to the 5th of May, additional witnesses testified and are cross-examined by the Bridgestone Litigants. The witnesses discuss opposition proceedings both in Panama and abroad, and they testify in detail about the resulting impact.

And on cross, every witness is asked whether he or she has seen any correspondence from the Bridgestone Litigants requesting the suspension or cessation of RIVERSTONE sales. The Bridgestone Litigants were challenging the witnesses to find a document.

So here are some of the occasions on which the Bridgestone Litigants don't object to questions about opposition proceedings abroad, and here are the exchanges asking for documents: "Will the witness state . . . were you presented or shown a note or document ordering a halt to the importation or production of RIVERSTONE products from Bridgestone

Corporation or Bridgestone Licensing?" "Will the witness state if . . . at any time [you've] received from the Bridgestone Corporation or Bridgestone Licensing companies any letter or corporation [*sic*] requesting that, there be a suspension or cessation of sale of RIVERSTONE products?" Have you seen a document?

This continues, again, and again, and again.

And at one point, Muresa and Tire Group actually object. They say it's fine to ask this question, but you should ask it of someone else. You're asking a person who wouldn't have any knowledge. And the Bridgestone Litigants push forward with the question regardless. They wanted to hear the answer.

Now, all of this changes after L.V. International submits its Coadyuvante Petition. On May 10th, 2010. L.V. submits a petition--

PRESIDENT PHILLIPS: Might that be a good moment to adjourn for lunch?

MS. SILBERMAN: Yes, shall I just finish the sentence so we have--

PRESIDENT PHILLIPS: Yes.

MS. SILBERMAN: So L.V. International submits a coadyuvante petition, and appended to that Petition is a notarized copy of the Demand Letter. The Petition itself describes this as a "threat" against Muresa, Tire Group, and L.V. International.

We will come back to this after the break.

PRESIDENT PHILLIPS: We'll adjourn until 2:00.

(Whereupon, at 1:01 p.m., the Hearing was adjourned until 2:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT PHILLIPS: Right. Shall we resume?

MS. SILBERMAN: Yes.

Good afternoon, Mr. President, Members of the Tribunal.

Now, before the break, we were in the midst of the First Instance Proceeding at the evidentiary phase, during the period of time when the parties were presenting questions to the various experts. And as I mentioned, there was this pattern going on where the witnesses for the Muresa and Tire Group — which all of

them were because the Bridgestone Litigants didn't put forward any witnesses of their own — now, all those witnesses were testifying: "We were frightened; we were frightened that tires would be seized; we were told by management to stop production, to just stop selling tires for a while." And every single time, the Bridgestone Litigants came back and said: "But do you have a document from Bridgestone Corporation or Bridgestone Licensing stating that this should happen?" "Do you have a document?" "Do you have a document?" "Do you have a document?" And the witnesses, some of them, weren't people who would have seen that particular document — like a person who was the manager of the warehouse.

And so, this goes on for some time until we get to May 10th of 2010: L.V. International submits the document. It submits a coadyuvante petition, and it appends to that petition a notarized copy of the Demand Letter, describing the letter as a threat against Muresa, Tire Group, and L.V. International.

Now, a few days later — and this had been

pre-scheduled — the President of L.V. International was coming to testify. And he's examined, asked questions by Muresa and Tire Group, and then cross-examined by Bridgestone Licensing and Bridgestone Corporation. And here is what happens on direct: Muresa and Tire Group asked him: "Will the witness state if you have seen a document, any threats or document which would prevent the sale of RIVERSTONE tires?"

The Bridgestone Litigants object. After spending all this time saying, “do you have a document, do you have a document, do you have a document,” Muresa presents the question, and the Bridgestone Litigants object. Now, that said, later in the day, the witness goes on to testify about the Demand Letter, and the Bridgestone Litigants pose questions on cross-examination.

Following this testimony on the 24th of May 2010, the experts submitted their reports. As I mentioned earlier, there were experts for Tire Group and Muresa; there was an expert for the Bridgestone Litigants; and there also was a

court-appointed expert as well. And both the court-appointed expert and the Muresa/Tire Group experts appended the Demand Letter to their reports.

In late May of 2010, the parties examined the experts, and the court-appointed expert explains that she had asked Muresa's CPA and the Sales Manager for any document which stated that they couldn't sell RIVERSTONE tires, and in return, she received the Demand Letter. That's why it was appended to her report. In addition, the Muresa and Tire Group experts also cited the Demand Letter as a contributing factor to the injury. The Bridgestone Litigants asked questions about the letter on cross.

Then we move on to the submissions phase, which was in June of 2010. So, L.V. International at that point submits a corrected coadyuvante petition. But this petition, just like the earlier version, also discusses and encloses the Demand Letter.

Following that, Muresa and Tire Group presented closing arguments in writing. And, let me just show you a couple of those.

The submission quotes the Demand Letter in

full and it discuss it throughout pages 3 and 4 and 34 and 48--on 40, 41, 42, 61, 63. And Muresa and Tire Group allege that they had been injured through "reckless and malicious" acts by the Bridgestone Litigants. Their argument is, in essence, that "the [Bridgestone Litigants] began an international persecution of [Muresa and Tire Group] at the global level and even tried to intimidate them, successfully, by announcing to [their] clients or buyers throughout the world that they would be subject to legal actions filed by them."

Now, one week later, which means that the Bridgestone Litigants had a week to respond, the Bridgestone Litigants presented their closing arguments, and here is what they had to say:

First, their closing argument advanced arguments in respect of the legal standard. Again, the Bridgestone Litigants insisted that "the claims . . . are governed by Article 217 of the Judicial Code . . . ." There also were arguments in the submission on procedural matters. So, here you see, for example, the res judicata theory — the

theory that, because the Opposition Proceeding Court had in its statement on costs concluded that the Bridgestone Litigants had acted in good faith, that the tort proceeding wasn't allowed to revisit that issue.

There also were alleged violations of the principle of consistency. You've seen that discussed in Claimants' pleadings in this proceeding as well.

And importantly, the Bridgestone Litigants also advanced arguments on and objections to the Demand Letter. They argued that it was submitted extemporaneously. They argued that it was irrelevant because it didn't refer, on its face, to any of the parties in the proceeding. They argued that it was a copy and incorrectly translated, that it was submitted in contravention of certain articles of the Judicial Code, that again Claimants repeat in their pleadings in this proceeding. And notably, all of these arguments were in respect of the version of the Demand Letter that was appended to the expert report of Muresa and Tire Group. There was no objection at all to the copy of the Demand Letter that was attached to

the court-appointed expert's report.

Now, in addition to this, the Bridgestone Litigants also advanced merits defenses. They said: "It is false that the note constitutes an intimidating action against [the Plaintiffs], due to the fact that it is addressed to an American attorney . . . and is related to a trial in the United States lost by L.V. International . . .." They also assert that it has been "proven that the [Bridgestone Litigants] acted in good faith and in the lawful exercise of a right . . . ."

In addition to merits arguments, and procedural arguments, and objections to evidence, and analysis of evidence, there also was a discussion of damages. They argued "the non-existence of the causal nexus." They said there was no damage that has been verified that was suffered either by Muresa or by Tire Group.

Now, after this point, the First Instance Court rejected the Bridgestone Litigants' Motion to Dismiss — which as you'll recall they submitted at the outset of the proceeding. And a few weeks after that,

the First Instance Court rendered its decision on the merits. Let's turn to this now.

A couple of things are notable, the first of which is that the First Instance Court didn't rule on the objections to the admission of the Demand Letter as an attachment to the report of Muresa and Tire Group's experts. This is notable because, as former Justice Lee explains: "[I]f a judge does not rule on an objection within a legal period, the evidence is considered admitted by operation of law, it is incorporated into the record, and becomes part of the evidence of the proceeding."

Second, the First Instance Court rejected the res judicata argument. It stated that the parties in the Panamanian Opposition Proceeding "were not totally the same parties involved in th[is] proceeding" — the Tort Proceeding — and "n[or] is there identity of property, or object, or claim."

It continued: "Under no assumption can a res judicata objection operate in this proceeding because it does not conform to any of the assumptions enshrined in the standard."

Now, earlier today, Mr. Williams argued that the good-faith statement was "final and binding." You'll find that at Page 70 of the provisional transcript. But importantly, in their pleadings, the Claimants conceded that "[Bridgestone Licensing's] and [Bridgestone Corporation]'s application for a res judicata declaration was refused . . . ."

The third point about the First Instance Court's ruling that is important is that it rejected the claim: rejected the claim by Muresa and Tire Group. In doing so, it accepted that in principle "[f]ear of seizure caused the Plaintiffs to stop production and sale of the RIVERSTONE brand." But then the court continued, "that wasn't a decision based on any judicial order." It continued: "Muresa Intertrade alleges as a basis for their claim, that they were prevented from selling and distributing the RIVERSTONE brand as a result of the [Opposition Proceeding]. That's why the claim is denied."

Let's turn then to the appellate proceeding.

On January 5th, 2011, Muresa and Tire Group appealed the First Instance Decision. And you should

know that the recourse of appeal enables the Court of Appeals to conduct the full review of the entire case, examining everything that's done in the proceedings.

Now, Professor Thomas, you had asked a question earlier about the provisions of the Judicial Code, to the extent that they existed, whether they would enable a party to introduce new evidence — For example, following the Coadyuvante Petition. And in an appeal, this is permitted. The parties are permitted to introduce new evidence, the parties are permitted to challenge aspects of the prior ruling, and the court at any point in the proceedings is permitted ex officio to introduce new evidence. On top of that, the parties are permitted to ask the court or the judge to do that. So, for a first instance proceeding and an appeal, Article 793 of the Judicial Code is what covers this, and in a cassation proceeding, it's Article 1195. The parties' rights to ask that the justices or judges do this is confirmed in Article 473 of the Judicial Code.

Now, here is what Muresa and Tire Group argued in their appeal: First of all, it was all

about the Demand Letter. The Demand Letter was the central focus. The Demand Letter was mentioned throughout the submission, including in the section setting out the request for relief. In addition, Muresa and Tire Group argued that the Demand Letter was a threat that the Bridgestone Litigants fulfilled by opposing registration in various jurisdictions.

In terms of procedural matters, the submission observed that the Coadyuvante Petition was never decided by the First Instance Court, and the damages claim was increased to $5.7 million.

Now, as before, the Bridgestone Litigants responded. They responded on the 14th of January of 2011, and this was another opportunity for the Bridgestone Litigants to be heard.

In their response, they asserted that they had already established the absence of recklessness before the First Instance Court. And although the Claimants now allege that Bridgestone Corporation and Bridgestone Licensing didn't have an opportunity to be heard, here it states expressly: "Our clients, in their defense, established that there was

no . . . recklessness or fraudulent act." They presented a defense on this issue, one that they were satisfied with.

Now, as before, the Bridgestone Litigants repeated their argument that the governing law is Article 217 of the Judicial Code. They stated, "Article 217 of the Judicial Code is what governs the circumstances in question." "The legal regulation that governs in this case is Article 217 of the Judicial Code." "[T]hese proceedings should be analyzed and applied from the point of view of Article 217 of the Judicial Code."

And in addition, the Bridgestone Litigants advanced arguments on evidence — including the Demand Letter — and they presented a merits defense. They stated: "It's necessary, according to Article 217, for a party to have acted recklessly or in bad faith." "The claimant party has not proven nor will [it] be able to prove that our clients acted in this manner . . . ." "[O]n the contrary, the [Bridgestone Litigants] acted in good faith . . . ."

And in addition to this, the Bridgestone

Litigants affirmatively asked the Appellate Court to decide the question of recklessness. In their request for relief, they asked for a conclusion that their actions in the underlying proceedings, the Opposition Proceedings, "were not reckless or in bad faith."

On the 6th of April 2011, the Appellate Court ordered the First Instance Court to decide the Coadyuvante Petition. So, that issue went back to the lower court; and, on May 5th, the First Instance Court rejected the Coadyuvante Petition. Its conclusion was that the Petition was essentially out of time. So, L.V. International appealed, requesting to intervene as a coadyuvante in the appellate proceeding, and the Bridgestone Litigants then had an opportunity to object. They objected to the intervention of L.V. International as a coadyuvante.

And, importantly, they objected to both "the form and the substance of every piece of evidence submitted with the third-party Coadyuvante Application." The argument was that they were "irrelevant to the proceeding," and that those documents were "foreign documents that were not

properly authenticated." Therefore, they were of little probative value.

Now, earlier today, Mr. Williams said that the problem with the admission of the Demand Letter — or the submission of the Demand Letter —was that the Bridgestone Litigants didn't have a chance to respond. If they had a chance, he said, "they would have objected to relevance." That's on pages 96 to 97 of the transcript. But they did. They objected on relevance grounds. They discussed those issues that Claimants say they didn't have an opportunity to be heard on.

Later that month, on June 19th, the Appellate Court granted the Coadyuvante Petition, explaining that the Petition contained relevant evidence. And this didn't quite come through in the English version, so I just wanted to put up here for you the Spanish version, which as you will see it says (in Spanish) "y a ella se acompañaron pruebas pertinentes" (through interpretation) "the relevant evidence was attached," (in English) "accompanied by pertinent evidence."

Following this, the First Instance Court

issued a formal notice of the reinsertion into the physical file of the Coadyuvante Petition. So, there can be no question that the Coadyuvante Petition, the documents that were attached to it, and what was discussed in that Petition became part of the formal file in the Appellate Proceeding. This was the file that went up to the Panamanian Supreme Court. Following this, in May of 2013, the Appellate Court issued a judgment dismissing the appeal. Let's turn now to that decision.

So, the decision began by stating that Muresa and Tire Group's "disagreement with the First Instance Court inevitably leaves us to exhaustively examine the body of evidence that is the basis of the claim, in accordance, of course, with the requirements to establish non-contractual liability." What does that mean? Specifically, it means that the court "needs to verify whether the Respondents acted recklessly and in bad faith."

Now, the court observed that "there are no precise rules to define recklessness and malice." But "recklessness — represented by an abuse of the

litigation right — should be characterized by excessive conduct, where recklessness goes beyond a mere exercise of procedural rights authorized by the law in defense of an interest."

And here is what the Appellate Decision had to say in its analysis: "From an exam[ination] of the record, this court deems that the Plaintiffs did not comply with the burden to prove the factual requirements of the legal rules invoked in this case. . . . The Plaintiffs did not prove that the Respondents had incurred excesses beyond the exercise of a right that the law itself allows in this type of business."

Now, again, earlier today, the Claimants alleged that the finding that the Supreme Court made that the lower court had made a mistake on the issue of the existence or not of evidence is impossible to understand. But it's not, because what's on the screen — plus an additional sentence that I'll read to you — represents the entirety of the Appellate Court's analysis. So, let me read the entire paragraph to you.

It states: "From an exam of the record, this court deems that the Plaintiffs did not comply with the burden to prove the factual requirements of the legal rules invoked in this case. The Plaintiffs evidently did not prove that there was recklessness, willful misconduct, or gross negligence in the Respondents' conduct when the Respondents opposed the trademark registration filed by the Plaintiffs before the courts. The Plaintiffs did not prove that the Respondents had incurred excesses beyond the exercise of the right that the law itself allows in this type of business."

This was the only discussion. And what the Supreme Court was saying was that, in this discussion, evidence is missing. It's not impossible to understand.

Now, this brings us, finally, to the cassation proceeding.

PRESIDENT PHILLIPS: Just before we go on, I don't think we've got any evidence as to the case load on the First Superior Court. All cases going up to cassation would have to go through this appellate

process.

MS. SILBERMAN: Yes.

PRESIDENT PHILLIPS: So, would it be right to infer they have a pretty heavy case load as well?

MS. SILBERMAN: I can ask Justice Lee if he can find the numbers, but yes, in general, a cassation proceeding is a challenge against a second instance ruling, so they would have to follow through in that way.

So, Muresa and Tire Group initiated their Cassation Proceeding by means of a Cassation Request dated the 1st of July of 2013. And let's just touch briefly on some of the basic facts about cassation.

Cassation, as mentioned, is a mechanism for reviewing and vacating second instance decisions, and this mechanism is only available in instances of certain procedural and substantive errors. In certain situations, if a decision is vacated on particular procedural grounds, the case is remanded to the lower court. But if a decision is vacated on substantive grounds, the Supreme Court decides the case and is permitted to order ex officio that evidence be

produced.

Now, cassation proceedings begin with an admissibility phase. And if a cassation request survives this phase, then the parties may request that an oral hearing be held. The default style of pleading is by means of written submissions. In this particular case, there wasn't any request for a hearing.

Now, the Cassation Request was based on two alleged grounds. The first alleged basis was that the Appellate Decision contained a factual error pertaining to the existence or absence of evidence. The theory was that outcome-determinative evidence had been ignored.

Now, I don't have this on the slide, but I should mention that, in this first request as well, on page 7 of the Cassation Request, it expressly states that this claim was based on Article 217 of the Judicial Code in addition to several others. This also was the case for the second Cassation Request. And the theory there was that the Appellate Court directly contravened Articles 1644 of the Civil Code

and Article 217 of the Judicial Code by failing to apply them.

The relief requested was revocation of the Appellate and First Instance Decisions, and the amount of $5 million in damages plus expenses or costs.

Now, in terms of the evidence that supposedly was ignored, there were six items, as the Claimants mentioned earlier: The Demand Letter; tire sales certifications by the companies' CPA; the Bridgestone Litigants' withdrawal of their appeal in the Panamanian Opposition Action; witness testimony on the damage suffered by Muresa and Tire Group; witness testimony on the effect of the Bridgestone Litigants' threats and foreign actions; and Muresa and Tire Group's expert report.

Following receipt of that document, the Bridgestone Litigants objected to the admissibility of that cassation request. Here again they had an opportunity to present arguments. They argued, first of all, that the Appellate Court had examined all six items of evidence; that the evidence was not outcome-determinative; that the alleged threats or

warning don't actually constitute any type of damage because Muresa and Tire Group could have chosen to ignore those threats; and then they argued that the second ground for cassation was duplicative of the first.

In December 2013, the Supreme Court deemed the first Cassation Request admissible but it rejected the second for being duplicative. And the Decision is signed by Justices Oyden Ortega Durán, Hernán de León Batista, and Harley Mitchell.

Now, I would like to return to the question that was asked earlier about what was actually stated in this decision on admissibility. So, if you turn to the document, which is Exhibit R-50.

Sorry, Exhibit C-167.

Let's turn to page 2.

And in the second paragraph it states that "the Cassation Recourse is related to the merits and two concepts are invoked." In the next paragraph it goes on to discuss the first concept. And then following that, it states that the provisions of law that had been invoked were Articles 780 and 217 of the

Judicial Code, in addition to Article 1644 of the Civil Code, as well as Article 1 of the law Number 57 of September 1st, 1978.

Following that, it states that grounds for cassation have been met, and again this comes through in the original Spanish version; the English translation may have some issues. But in any event, in the following paragraph, they then go on to discuss the second concept, and further down Article 217 of the Judicial Code and Article 1644 are mentioned as well. So, it should have been clear that both of those — to the parties at least — that both of those provisions would be at issue in the ensuing Cassation Proceeding. And, in fact, it was clear because the parties presented arguments on those issues.

So, on January 3rd, 2014, Muresa and Tire Group submitted their arguments in support of cassation, and here is what they argued:

First, they said: "The Appellate Court fail[ed] to consider evidence that appears in the file and that clearly proves that the Defendants did not act in good faith . . . ." And they said: "There is

a series of . . . different elements of evidence that lead to the conclusion that the defendants' actions . . . involved recklessness, thus causing damage to our clients. . . . [W]e are not faced with an isolated incident or piece of evidence," as Claimants had argued this morning, "but a series of evidence that was ignored."

And they argued that "the defendants," meaning the Bridgestone Litigants, "because of their multinational power, are in a position to easily oblige small companies . . . to cease production on account of pressure." These companies (the Bridgestone Litigants), they argued, "make every effort to remove their competitors from the market . . . and use their lawyers to ensure that competitors have no doubt regarding the seriousness of their threats." In essence this was a response to the "but we were only filing an opposition suit" argument. That was all that it was. "No," Muresa and Tire Group say, it was more than that, given the size of the Bridgestone Litigants, and the fact that they were using lawyers to enforce their threats.

The Bridgestone Litigants then respond and here is what they have to say. First, they note that: "The appellant insists that there has been [a] bad faith and recklessness [allegation]" — "a claim that can be tried." So, the res judicata argument disappears.

Then they go on to say that, in order for the claim "to be recognized, there must be evidence that determines and demonstrates the recklessness of the judicial action that is alleged to be the cause of the damage." And then they walk through every single item of evidence, presenting arguments. They touch on the Demand Letter, arguing that it "has no evidentiary value," and also making technical and procedural arguments. They make arguments on the CPA certifications, arguing that they go to quantum as opposed to the existence of injury. They discount the withdrawal of the appeal, arguing that it "doesn't represent the abuse of the right to litigate." And then continue on with the remaining three. "The

statements [of testimony] of the employees of the company on the probable factors that had an impact on the stoppage of the [sale] of a product doesn't [actually] constitute evidence of damage by the [Bridgestone Litigants]." "The alleged threat or se[izures] in other countries . . . are totally irrelevant and pointless . . . ." "The accounting expert . . . of the Plaintiff . . . doesn't have the ability to [overturn]the appealed decision because it focuses on [quantifying] the possible damage," but doesn't establish causation.

They had an opportunity to be heard on all of these points — and exercised it.

And so eventually, based on all of these arguments and everything that had come before them, the Supreme Court issues its ruling on May 28th of 2014, and it vacates and overturns the Appellate Court Decision.

Now, Claimants asserted this morning that "our principal point is that the decision made by the Supreme Court simply makes no sense and is not

coherent." That was at page 71. Well, when you walk through the reasoning, it does make sense. Here is what the Supreme Court said.

It stated, there was "an infringement of substantive rules of law due to factual error regarding the existence of evidence." That was the first basis for cassation invoked. The Court continues: This basis for cassation "occurs when evidence in the proceeding was ignored by the Appellate Court when issuing a decision, and when such evidence would have had an influence on the dispositive part of the decision."

"[A] thorough review of the challenged decision shows that the evidence referred to in the list of six items was ignored."

"Now it is up to this Chamber [of the Court] to determine if an appropriate analysis of that evidence supports the Plaintiffs' claims, thus having an influence on the dispositive part of the [Appellate] Decision."

"This Chamber fully verified the body of evidence on which the notion of factual error is

based . . . .”

“[A]n analysis of the evidence . . . ha[s] an effect on the dispositive part of the [challenged] judgment. That is why the judgment must be overturned.”

“This Chamber shares the doctrinal analysis set forth in the [Appellate] Court'[s] Decision,” meaning “[p]rocedural recklessness is a behavior adopted by someone who knows, or should know, that he has no reason to litigate and yet does it, abusing jurisdiction.”

Nevertheless, “we do not share the [Appellate] Court's assessment[] that the evidence submitted does not show any negligence by the [Bridgestone Litigants], as provided for in Article 1644.”

“[T]here [was] strong evidence that [Muresa and Tire Group] had a legal right to market a product, [and] that such product was also substantially important to generate income . . . .”

And yet the Bridgestone Litigants' “representatives stated, in an intimidating manner, that opposition proceedings were going to be filed in

various countries. . . . They also added, without any legal basis, at least under Panamanian Law, that the Plaintiffs should abstain from selling the product. This is obviously as in plainly intimidating and reckless conduct."

"The [Bridgestone Litigants] filed an action lacking in legal grounds . . . by opposing the registration of the RIVERSTONE tire brand." In essence, they "went to extremes to oppose the registration of a product brand that was conveniently commercially competitive. And then, after spending a significant amount of time in litigation, they withdrew the appeal that they had filed against [the] adverse Decision."

Now, "[i]t is not this Chamber's intention to say that initiating a legal action to claim a right may be interpreted as a synonym for damages that may be caused" to the other party. So, it's not the mere act of initiating an opposition proceeding that's a problem. It's just in this case when "there's strong evidence that the Plaintiffs/Appellants [Muresa and Tire Group] had a legal right to market a product,

[and] that[] product was also substantially important to generate income, and conveniently a commercially competitive item, such a situation may be key for anyone who, with no strong legal grounds and the will to cause damages to such commercial competitiveness, wishes to jeopardize the party's dominant market presence."

"This Chamber considers that the conduct by the [Bridgestone Litigants] is precisely a reflection of such a situation," and "[their] behavior cannot be held as good faith behavior; indeed, it is negligent behavior."

The Court continues: "The [opposition] action caused irreversible damages to the key part of the Plaintiffs' business activities."

"[E]xpert accounting reports show what the RIVERSTONE brand meant for the Plaintiffs . . . in terms of sales . . . . [I]t was a well-positioned brand, well-known for durability and quality." And "losing this product has a substantial impact in terms of the companies' revenue."

The "expert report also shows a decrease in

sales of [Tire Group]. For the year 2005, sales of the RIVERSTONE brand were 56% of total sales, in 2006 they went down to 33%, in 2007 to 35%, and in 2008 to 2%. The report states that decreases were caused by the Opposition Request against the trademark registration."

Now, in their pleadings and again this morning, the Claimants asserted that they simply couldn't follow the Supreme Court's reasoning on damages. But, again that's not true. Following the issuance of the Supreme Court Judgment at issue, the Bridgestone Litigants attempted in various ways to challenge that decision in the Panamanian courts. And, one of the motions they submitted was a Motion for Clarification and Revision. And, in that document they laid out in meticulous detail what exactly the Court had done. They understood the reasoning. It was plain that it could be followed.

Now, the Court also mentioned that this same situation on damages: "the situation is also verified by witness statements made by Plaintiffs' employees [which] showed a sales crisis reflected in the

Plaintiffs' earnings which, despite implementation of contingency plans, could not prevent the loss of sales or market position of the RIVERSTONE brand."

And so, in light of all of this, the Court "decides as follows: [The Bridgestone] Litigants are ordered to jointly pay Muresa and Tire Group the sum of . . . US$ 5 million," and to "jointly pay all of the procedural costs to the Plaintiffs . . . as well as expenses."

The Claimants' reaction to this is that this decision is "fundamentally unfair and outrageously wrong and cannot be justified on any rational basis." They go so far as to argue that the Supreme Court Judgment is "so clearly and manifestly wrong that it could only have been procured through corruption." "The result was shocking," they say. They used that word this morning; they used it in their pleadings; it appears in the witness statements: "Shocking."

But is it so shocking? Is it shocking that the Supreme Court overturned an Appellate Decision? Can't be; that happens all the time. Is it shocking that the Supreme Court decided a merits claim? No,

that possibility is expressly contemplated in the Judicial Code, and both Parties' Panamanian Law experts agree that such is the case. Now, there is a citation missing on this slide. It should be to Exhibit R-138.

Is it shocking that the Bridgestone Litigants might suffer an adverse decision? No. Every party can lose, and the Bridgestone Litigants even planned for that eventuality.

In addition, to the extent that the Bridgestone Litigants were concerned about losing, it may be that they should have hired specialized Supreme Court counsel before the Supreme Court Judgment was rendered. As the Claimants explained in their Memorial, it wasn't until after the Supreme Court Judgment they supposedly found specific--counsel with specific expertise in Supreme Court matters.

Is it shocking that the Supreme Court might rule on the basis of recklessness? No. The lower court decided on that basis, and the Bridgestone Litigants accepted it.

Is it shocking that a court might consider

the Bridgestone Litigants' behavior to be aggressive? Not shocking, either. Claimants' witness, Mr. Kingsbury, has stated before the U.S. Government: "We are extremely aggressive with "-STONE" suffix marks."

Is it shocking that a court might conclude that trademark policing had gone too far? No. Again, in Claimants' own words, "trademark opposition actions . . . are specifically designed to balance the right of the trademark holder to protect its brand[] with the right of other entities to conduct business and compete fairly." And that means necessarily that there is a line. And any line can be crossed.

What about the Demand Letter? Is it shocking that the Demand Letter was part of the analysis? It can't be. The Bridgestone Litigants egged that on. They asked question after question after question, challenging Muresa and Tire Group to find a document. "Have you seen this document?" "Do you have a document?" "Can you prove that with a document?" "Can I see a document?" The document was submitted. It was a document that existed. It was an authentic

document. How is this shocking?

Is it shocking that a court might conclude that the realization of the threat in the Demand Letter had caused a decrease in sales? That can't be shocking, either. Mr. Kingsbury conceded that that was the purpose — that the purpose of the letter was to try to "deter the person who is trying to register and to use the mark from actually using it."

And further, the First Instance Court, if you'll recall, concluded that fear of seizure had caused the plaintiff to stop production and sale of the RIVERSTONE brand. And, the Claimants haven't advanced any argument in respect of the First Instance Court Decision.

So, why is this shocking? Well, in their Memorial, the Claimants allege that "Bridgestone's representatives were shocked because they never before encountered a situation in which a court determined that simply filing an opposition proceeding was unlawful and reckless, and ordered damages to be paid." But as I just showed you, the premise is false; that's not what the Supreme Court did. That's

not the basis for its finding.

And in any event, new fact patterns emerging simply cannot be shocking.

So, the Claimants purport to be from the United States, and here is the leading treatise on trademarks and unfair competition in the U.S. It states: "The law of unfair competition is a constantly changing body of law, and the lack of precedent directly on point need not preclude a claim." And then in the footnote: "Nothing . . . requires that there be a reported case in advance of an unfair practice holding the practice to be unfair."

In addition, the treatise goes on to state that examples of unfair competition include "[f]iling a groundless lawsuit or administrative challenge as an aggressive competitive weapon."

So, this leaves us essentially with the Claimants' argument that the finding of the Supreme Court is "illogical and impossible to understand" because all that the Bridgestone Litigants were doing was "invok[ing] the mechanism for trademark opposition

that's mandated under Panamanian Law." Again, this was repeated this morning: "This was simply a case of the FIRESTONE mark owners exercising their rights under Panamanian Law."

Let's try it this way, if the Claimants can't understand, if the Bridgestone Litigants couldn't understand: Walking into a store isn't harmful to anyone. But what if you're the bull walking into the china shop? Do you get to say, "I was just walking?" Can a court not take those circumstances into account? That's what the Panamanian Court was doing here.

Now, the Claimants didn't really spend very much time on this piece this morning — their actual denial of justice claim — but I do just want to close the loop as we turn to the main flaws in the Claimants' case.

In essence there are two: First, neither Claimant has identified any cognizable merits theory. And second, neither Claimant has identified any injury.

On the first point, here are what the Claimants' arguments were in their pleadings.

First, they argued that "Bridgestone Licensing and Bridgestone Japan had no opportunity to deal with Article 217 of the Judicial Code."

They also complained that "the Supreme Court decided that the Bridgestone Litigants were liable because they were reckless and intimidating in filing opposition actions against the RIVERSTONE mark in several countries." And, they claim that "this violates the international due process principle that the parties have a right to a fair hearing and to be able to confront findings made against them." And, yes, "findings" was the word there, which seems a bit off because the parties don't always have an ability to confront the findings of a court because of the principle of finality. There is, in most instances, a right to appeal; there is an opportunity to review in Panama on cassation; but there aren't endless opportunities to challenge a court decision.

Their third argument is that "[Bridgestone Licensing] and [Bridgestone Japan] had no opportunity to respond to and deal with the Demand Letter." And here, one of the arguments this morning was that

"Bridgestone Licensing did not have a proper opportunity or indeed any opportunity to respond to the letter." That's on page 72.

A similar argument was: "Bridgestone Licensing wasn't able to challenge the relevance or admissibility of that evidence, the Demand Letter, and was not able to put in a witness statement in response to it." That was at page 78.

But you know that's not true. The Bridgestone Litigants presented arguments on all of these issues. They had an opportunity, and they exercised it. And before I show you that, let me just quickly ask where is Bridgestone Americas? All of these arguments are about Bridgestone Licensing, and Bridgestone Corporation (or Bridgestone Japan). Bridgestone Americas isn't mentioned because Bridgestone Americas wasn't there. It wasn't a party to the proceeding. It could have attempted to intervene as a coadyuvante to assist the Bridgestone Litigants, but it didn't.

And as the United States confirmed this morning, "a Claimant must establish that the

enterprise sought to be, but was prohibited--either was or sought to be but was prohibited--from becoming a party to an adjudicatory proceeding in order for the treatment to give rise to a denial of justice." Bridgestone Americas was not there. It did not try to be there. It has no standing to bring a denial of justice claim under customary international law.

And let's be clear, that's what this is. The only standard articulated in the Treaty is a customary international law standard, minimum standard of treatment — which includes fair and equitable treatment, but does not create any additional obligations beyond the customary international law minimum standard. And the Claimants conceded this morning that if the customary international law standard applies, Bridgestone Americas doesn't have standing.

Now, you have seen all of these pieces before, but just for your convenience, we have collected them all into single slides. This shows that the Bridgestone Litigants made use of their right to be heard. They presented arguments on Article 217

of the Judicial Code. And even if they hadn't, they had opportunities to respond to those arguments by Muresa. They presented arguments on foreign opposition proceedings.

And they had ample opportunity to be heard on the Demand Letter. They asked questions during cross-examination. The issue came up during witness testimony. It came up during the testimony of the court-appointed expert. It came up, and the Bridgestone Litigants argued the point in their opposition to the coadyuvante appeal. It was argued in closing arguments. The Bridgestone Litigants discussed it in the opposition to the appeal by Muresa and Tire Group, the opposition to the admission of the Cassation Recourse, the response to the Cassation Recourse, and even following the Supreme Court Judgment, in a Request for Review.

Now, Claimants have conceded that "the allegation that a host [S]tate through its judiciary has denied justice to an investor is a serious one," but the Claimants have utterly failed to make the requisite showing. All they are doing is appealing.

This isn't a valid basis for a claim.

Now, to the extent that there were anything at all that is shocking about this case, it is the complete lack of any basis, both on the merits and in terms of injury and quantum. So, I will turn the floor now over to my partner, Ms. Gaela Gehring Flores to discuss the issues of injury.

MS. GEHRING FLORES: Before I proceed, Mr. President, Members of the Tribunal, I just wanted to check to make sure no one needs a human rights break or anything of the sort.

PRESIDENT PHILLIPS: Commence on.

MS. GEHRING FLORES: Okay. Good afternoon, Mr. President, Members of the Tribunal, counsel. My name is Gaela Gehring Flores, and I will continue the submissions on behalf of the Republic of Panama by addressing Claimants' submissions on injury and damages after which I will cede the floor to my partner Mr. Whitney Debevoise who will give concluding remarks.

Like Ms. Silberman, I will begin by reference to the text of the U.S.-Panama Trade Promotion

Agreement, or the "TPA" in this case. Article 10.16 of the TPA requires and, as emphasized by the U.S. representative this morning, that each Claimant, on its own behalf, established that it has incurred loss or damage by reason of, or arising out of, that breach.

This provision is designed to preclude claims for hypothetical, future harm, which are likewise barred under general principles of international law.

In this case, Claimants have failed to satisfy this threshold jurisdictional requirement under the TPA, as neither Bridgestone Licensing nor Bridgestone Americas has demonstrated that it "has incurred loss or damage by reason of" the Supreme Court Judgment.

Every Claimant must establish injury before proceeding to the question of quantum. To state the obvious: If there is no injury, there is nothing to quantify. One cannot quantify an empty set. For that reason, this Tribunal need not proceed to the question of quantum. However, for the sake of completeness, I will briefly address the Claimants' quantum arguments

along the way.

As you have seen, Claimants' case has evolved somewhat dramatically over time. In fact, I believe we have seen Claimants' most recent installment this morning during Opening Statements. Indeed, there are aspects of their arguments that still aren't quite clear, nearly three years after Claimants submitted their Request for Arbitration and as we stand here in the final Merits Hearing.

What is clear is that Claimants are seeking compensation for two types of alleged injury:

First, Bridgestone Licensing seeks to recover the entire $5.431 million awarded by the Supreme Court in the Tort Proceeding.

Second, Bridgestone Licensing and Bridgestone Americas jointly claim between $550,000 and $14.5 million for some other alleged damage to their respective investments that they allegedly may somehow suffer in the future. I will address each head of alleged injury in turn.

Let's begin with Bridgestone Licensing's claim for damages awarded by the Supreme Court in

2014. I will refer to this as Bridgestone Licensing's claim for the "Muresa Damages Award."

This claim fails for a number of reasons. First and foremost, Bridgestone Licensing has failed to demonstrate that it actually suffered any economic loss associated with the payment of the Muresa Damages Award. This failure is so critical and as confirmed by the U.S. Representative this morning, that it prohibits Bridgestone Licensing from recovering under this Treaty. Thus, our inquiry can and should stop here.

But, even if it were possible to conclude that Bridgestone Licensing suffered any economic loss in paying the Muresa Damages Award, it has failed to prove that it alone suffered that loss, leaving an open question as to exactly how much of any conceivable loss Bridgestone Licensing actually suffered. In this manner, Bridgestone Licensing has failed to quantify any supposed loss associated with the Muresa Damages Award. Bridgestone Licensing claims $5.4 million, which is the full amount of the Supreme Court's damages award that it shared jointly

and severally with Bridgestone Japan. That creates a number of sticky issues, each of which I will address in turn.

Bridgestone Licensing's claim for the Muresa Damages Award will be familiar to the Tribunal because it was discussed at length during the Expedited Objections phase.

Bridgestone Licensing thus has had ample opportunity to substantiate this claim. Yet Claimants have presented a shifting story about the payment of the Muresa Damages Award, and a careful review of the record reveals very little by way of actual evidence to support this supposedly straightforward claim.

Unlike Claimants, who actually bear the burden of proof in this proceeding, I will approach this claim in a systematic way by asking and attempting to answer a series of important questions. So let's begin with the most basic question: Who paid the Muresa Damages Award? This question should have elicited a straightforward answer from the beginning. Unfortunately, it did not.

In their 2016 Request for Arbitration,

Claimants had stated that Bridgestone Corporation, the Japanese parent company, had paid the damages Award through its subsidiary BSLS, or Bridgestone Licensing.

In response to Panama's Expedited Objections, Claimants insisted that Bridgestone Licensing had paid this Award. They submitted a bank statement showing a transfer of funds from Bridgestone Licensing's account.

So, Claimants' answer is that Bridgestone Licensing transferred payment to Muresa.

But Bridgestone Licensing was jointly and severally liable with its Japanese parent company, so either entity could have paid.

The next logical question is: Why exactly did Bridgestone Licensing pay the Muresa Award? The Tribunal will recall from the evidence submitted during the Expedited Objections phase that Bridgestone Licensing is a licensing company with no employees or office space. This suggests that the Japanese parent corporation, and not this mere licensing company, would be best positioned to pay the Muresa Damages Award.

This was confirmed by Panama's damages expert, Mr. Shopp. Based on Claimants' financial records, Mr. Shopp determined that, in the years preceding the payment of the damages award, Bridgestone Licensing maintained a cash balance of at least a million dollars less than the amount of the Supreme Court Judgment.

As you can see on your screen, I have on only displayed the part of the chart from Mr. Shopp's First Report that shows the cash balance before the payment that was made on August 16, 2016. I will show you the remainder of the chart shortly.

So, again, the question is: Why would Bridgestone Licensing be the one to make the payment? The Tribunal asked this very question during the Hearing on Expedited Objections, and you can see it on your screens.

Claimants have been in a position to answer this question clearly and directly with supporting evidence. Instead, they've thrown out a number of competing suggestions over time.

They have suggested, for example, that

Bridgestone Licensing's Board of Directors considered this to be "in the best interests of the Company"; that Bridgestone Licensing had a vaguely described "natural commercial interest" to pay; and that Bridgestone Licensing paid because its work involves trademarks.

It was in a passing comment that Claimants provided the most straightforward answer to this simple question to date. Specifically, they conceded that Bridgestone Licensing paid because it was "covered by a guarantee."

That "guarantee" appears to be the U.S.-Panama TPA, which Claimants also have described as an "insurance policy." Members of the Tribunal, I think I need not express how troubling these characterizations of a bilateral treaty are, but that is how Claimants see the Treaty: An insurance policy.

All of this is to say that the Bridgestone group deliberately resolved to transfer the payment from Bridgestone Licensing in order to orchestrate jurisdiction under the TPA.

That brings me to the next question. As I

previously indicated, Claimants' records demonstrate that Bridgestone Licensing had historically maintained much less than $5 million in its bank account, so how did Bridgestone Licensing make this $5.431 million payment?

Yet again, this simple question has not been met with a direct answer from the Claimants.

During their Opening Submissions at the Hearing on Expedited Objections, counsel for Claimants was asked directly if the funds came from the Japanese parent company, Bridgestone Corporation. Counsel claimed, in no uncertain terms, that the funds did not come from Bridgestone Corporation.

The Tribunal: "Does that exhibit show that it paid out of its own funds rather than provided by the parent?"

"Yes." Claimants' counsel: "Yes. The funds were not provided by the parent, but that doesn't show in the exhibit. It's just a bank statement of BSLS."

In doing so and in response to the Tribunal's questions about the source of funds, Claimants implied that the funds were those of Bridgestone Licensing

alone.

We now know that this response was incomplete, if not abjectly misleading. During the cross-examination of Mr. Kingsbury, a different version of the story emerged. Mr. Kingsbury admitted that Bridgestone Americas had loaned $6 million to Bridgestone Licensing to enable it to pay the damages award.

In other words, the funds to pay the Muresa Damages Award did not come from Bridgestone Licensing.

Mr. Kingsbury's unexpected revelation came during the Expedited Objections phase, so Claimants had plenty of time to formulate an answer to the final and most fundamental question for the purpose of their claim of injury: Did Bridgestone Licensing itself incur a financial loss as a result of the payment of the Muresa Damages Award?

But when the time came in their Memorial to clarify this issue, Claimants failed to even broach the subject of the source of the payment transferred by Bridgestone Licensing. This did not stop them, however, from simply making a bald assertion of loss.

In its Counter-Memorial, Panama called this attention to this gaping hole in Claimants' claim. So did Panama's damages expert, Mr. Shopp. As I mentioned previously, Mr. Shopp reviewed the financial records provided by Claimants and developed the chart on your screen.

When viewed in its entirety, the chart clearly shows that Bridgestone Licensing paid using a cash inflow from Bridgestone Americas. There can be no better illustration that Bridgestone Licensing did not incur a financial loss.

Faced with this evidence, and having over a year-and-a-half to ponder the question first raised during the Expedited Objections Hearing, Claimants at last responded regarding the source of the payment in their Reply.

Their "discussion," if it can be called that, consists of the assertion that the transfer of funds from Bridgestone Americas to Bridgestone Licensing was a "genuine loan," because quarterly interest payments are made.

The only document Claimants have submitted in

support of the notion that interest payments on the loan were made by Bridgestone Licensing is an exhibit labeled--labeled--"BSLS bank statements." This is Exhibit C-273 to which Mr. Williams referred earlier this morning. Claimants said that this exhibit shows "Payments of interest made by BSLS to BSAM."

This document shows no such thing.

For starters, a glance at the first page of the document reveals that it is actually a bank statement for Bridgestone Americas.

And, contrary to Claimants' assertion, this statement actually shows electronic payments from Bridgestone Americas to Bridgestone Licensing.

Members of the Tribunal, if those are loan repayments, they are going in the wrong direction. The question that Claimants were asked nearly two years ago is quite simple. Claimants inexplicably delayed an incongruous answer to this simple question is a critical failure, and we are left wondering whether this could possibly be an inadvertent error, or whether this is an attempt to conceal the truth.

As if this were not enough, the documents

Claimants produced in response to Panama's document requests also contradict their theory of the so-called "genuine loan."

For example, internal Bridgestone documents make clear that the so-called "loan" simply rolls over every year. I believe counsel for Claimants confirmed that this morning.

Another internal document suggests that the so-called "loan" is, in fact, contingent on the outcome of this arbitration; in other words, Bridgestone Licensing will never be required to repay this "loan" unless Bridgestone Licensing is awarded damages in this arbitration. You can see this at Exhibit VP-46, Tab 4.

To sum this up: Bridgestone Licensing asserts it suffered a financial loss when it executed a payment of the Muresa Damages Award through its bank account. Bridgestone Licensing characterizes this as a self-evident loss because $5.4 million was transferred out of its bank account. But the reality is that that same $5.4 million was transferred into Bridgestone Licensing's account shortly before the

payment was made.

Claimants have done their best to downplay the importance of this bait and switch, but let's be precise. They have mischaracterized an inter-company transfer as a "genuine loan," and have purported to submit evidence of repayments that never happened.

Members of the Tribunal, these casual fabrications cannot sustain a claim of compensation.

Claimants thus not only have failed to meet their burden of proving that Bridgestone Licensing itself actually incurred a financial loss, they have also strung this Tribunal and Panama along for nearly two years on this question.

Much to the contrary of their claims, the documents that Claimants produced reveal that the financial loss of the Muresa Damages Award was suffered by another Bridgestone entity. And this Treaty does not allow a Claimant to submit a claim for injuries suffered entirely by another entity. Each Claimant must establish injury "on its own behalf." Having failed to do so, Bridgestone Licensing's claim for the Muresa Damages Award must be dismissed.

PRESIDENT PHILLIPS: Could I please intervene at this point?

MS. GEHRING FLORES: Of course.

PRESIDENT PHILLIPS: To suggest that your proposition is not axiomatic as a matter of law: If Party A wrongly causes Party B to incur a legal liability and Party B is put in funds, maybe by a gift from Party B's aunt to enable Party B to discharge that liability, I would suggest it's never answer to a claim against Party A, you didn't suffer the loss; your aunt did.

MS. GEHRING FLORES: I believe when it comes to a question of financial loss, injury, damages and quantum, Bridgestone Licensing must prove that it actually suffered some sort of financial loss.

So, for instance, if I--if Party A does injury to me and Party A owes me $10, and the Court proclaims that, you can say that I have--or that Party A has incurred a liability on that date. But if Party A's aunt gives Party A--*gives* Party A--$10, to pay the Judgment, Party A won't suffer any financial loss by paying me $10.

If before Party A pays me $10, Party A has $1 in its bank account and the aunt gives Party A $10 to pay the Judgment, and Party A pays the Judgment, Party A still has $1 in its bank account. It has suffered no financial loss--it has incurred no loss--due to being a pass-through mechanism.

PRESIDENT PHILLIPS: All I can say is that I believe that if English law were applied, the answer would be that the fact that the aunt provided the money is res inter alios acta and not relevant.

MS. GEHRING FLORES: Well, I guess, first of all, English law doesn't govern. The TPA governs this proceeding, and Article 10.16 requires that each Claimant prove loss on its own behalf; that it actually incurred some sort of financial loss. I'm not talking about the date upon which a liability was incurred, but we are talking about whether or not Bridgestone Licensing, as an entity, actually incurred some sort of financial loss which it hasn't. It just hasn't. It was given money by another entity to pay the Judgment, money that it doesn't have to pay back.

PRESIDENT PHILLIPS: I don't think we can

take this any further at this stage.

MS. GEHRING FLORES: Well, I certainly encourage you to ask more questions later, should you have them.

PRESIDENT PHILLIPS: Well, all I would say is it's a startling proposition that if A incurs liability and is assisted to discharge that liability by a relative or an associated company, it loses the right to claim compensation in relation to that liability from the Party that caused it.

It is startling, not axiomatic, and I doubt if it's good law.

MS. GEHRING FLORES: I think as a matter of--certainly as a matter of quantum, if you want to put aside the issue of loss and whether or not this particular claimant has proven any financial loss from acting as a pass-through entity, if putting that aside for the moment, if you want to just talk about issues of quantum, how would you quantify the loss that Bridgestone Licensing incurred?

And I guess another question would be, what would--what would A's injury be if a third party pays

on behalf of or for them? What is their injury? How would you quantify their injury?

But I guess we can leave that for now.

Because Bridgestone has failed to establish injury, there is no need to proceed to the question of quantum, which is what we were just talking about, but we will move on.

Claimants' silence actually on the issue of quantum is particularly surprising in light of the Tribunal's remarks on the subject in its Decision on Expedited Objections.

Specifically, when discussing the Claim for the Muresa Damages Award, the Tribunal observed that it does not necessarily "follow that the whole payment" or "the whole of the payment will be recoverable as loss sustained by BSLS."

There are at least two reasons why it does not follow. Both of these reasons stem from the fact that Bridgestone Licensing was held jointly and severally liable with Bridgestone Corporation for the Muresa Damages Award.

The first reason was initially raised by

counsel for Claimants. During the Hearing on Expedited Objections, the Tribunal asked: "Do you accept that there may be an issue when--if and when quantum comes to be dealt with as to whether the subsidiary has a right in law to recover part of the payment it made from its parent, in which case it might be arguable that it can't expect to recover that portion of its payment?"

Counsel responded by saying: "I think that is something that could come up. I think that that will depend upon the terms of what's been agreed to between BSLS and BSJ, which is not in evidence right now."

Claimants' counsel thus conceded that internal arrangements between the Bridgestone codefendants may be relevant.

Yet, in their Memorial, Claimants failed to return to the subject of this internal arrangement. It was not until the submission of their Reply that Claimants finally circled back to the issue that they had raised. Specifically, they proposed that when analyzing this issue, the Tribunal "look to any

agreement made between the Parties as to how they would apportion loss." Claimants then advised that "There are no documents that remonstrate any formal agreement between BSLS and BSJ as to how they would apportion loss."

That statement, Members of the Tribunal, is false. There is no other word for it.

How do we know that this statement is false? Because during the document production, months before Claimants submitted their Reply, Claimants had produced a 19 May 2016 e-mail, in which Bridgestone officials discussed just such an internal loss-splitting agreement: "It has been decided that it will be BSLS's responsibility alone to pay a total of approximately $8 million in Panama-related damage compensation and international arbitration expenses, which had initially been planned for and even split between BSJ and BSLS."

Claimants also produced a 2016 Bridgestone Licensing Board Resolution that revealed that there was a 2010 Agreement, pursuant to which Bridgestone Licensing and the parent, in other words, Bridgestone

Corporation, had agreed to split 50:50 the cost of all actions taken jointly for the purposes of protecting both BRIDGESTONE and FIRESTONE trademarks, including the cost of defending against any counteractions taken by third parties."

In that 2016 Resolution, Bridgestone Licensing agreed to deviate from that initial agreement for the purposes of this case. The idea was that despite--and that's not my word; that's the word in the Resolution--the 2010 loss apportionment agreement to split financial burdens 50:50, Bridgestone Licensing would "bear the entire financial burden of the Muresa Damages Award."

And that 2010 Agreement, the one that Claimants purported did not exist in their Reply? It just surfaced yesterday. We received this document yesterday, less than 24 hours before the Hearing. And the only thing that we've heard about this document today is that this 2010 Agreement, this 2010 document, it just has to do with costs. It doesn't have anything to do with paying an award, but let's go back to the 2016 Resolution. That's not the way

Bridgestone sees the 2010 Agreement. So, no matter what counsel might think, or no matter what misleading characterization counsel might place on the 2010 Agreement, that's not the way Bridgestone sees this. Bridgestone sees this as loss apportionment agreement that has existed since 2010 to split all costs 50:50.

Other than revealing Claimants' duplicity, what assistance do these documents provide? The answer is simple: If this Tribunal concludes that Bridgestone Licensing has proven some loss despite evidence of a loan that will never be repaid with Bridgestone Licensing funds, Claimant Bridgestone Licensing cannot recover the full amount of the Muresa Damages Award because it failed to mitigate its alleged losses.

The Commentary to the Articles on State Responsibility recognizes the principle that a party must seek to mitigate its injury and that "a failure to mitigate by the injured party may preclude recovery to that extent."

In this case, Bridgestone Licensing could have easily mitigated its losses. It was operating in

a world in which any and all costs associated with joint actions with Bridgestone Corporation would be evenly split. Yet, in 2016, two years after the issuance of the Supreme Court Judgment, that default arrangement was abruptly changed. Bridgestone Licensing was suddenly to assume the burden of paying a damages award that it could not afford on its own.

There can be no conclusion other than Bridgestone Licensing utterly failed to mitigate its alleged loss. As such, it could at most recover half of the Muresa Damages Award, which is what it agreed to pay under the 2010 Agreement.

There's a second reason that it doesn't follow that the whole of the payment--

PRESIDENT PHILLIPS: Sorry, if you're moving on from that--

MS. GEHRING FLORES: Yes.

PRESIDENT PHILLIPS: --again, it seems to me these submissions raise quite a difficult area of law. It might be said to be surprising that, assuming Panama has a liability, the size of that liability would be dictated by internal agreements between

different members of the Bridgestone group.

MS. GEHRING FLORES: I think--

PRESIDENT PHILLIPS: Equally, an issue of law that I raised at the last hearing, if you have two companies that are jointly and severally liable, as a matter of law, it may not follow that the Company that makes the entire payment can recover if, as a matter of law, the other company was under an obligation to pay 50 percent to the Company that paid.

Now, this will not necessarily depend on any agreement between them at all. It may depend on principles of law.

MS. GEHRING FLORES: I think--I guess, first, I wouldn't say that question of damages is being dictated by internal agreements. It's dictated by principles of mitigation that are governed by international customary law. Parties are required to mitigate their losses.

In the normal course of business in this situation, the 2010 Agreement was the applicable agreement that they had, and probably what--and would govern in any normal business arrangement. If we're

held jointly and severally liable for any particular judgment, we'll split that 50:50.

Now, the idea that Bridgestone Licensing would agree to take on the entirety of that--of that liability is an acute example of failing to mitigate its losses, and certainly shows something less of an arm's-length business arrangement and transaction here.

Bridgestone Licensing is required under international law to mitigate its losses. And, instead of mitigating, it did quite the opposite; it took on more liability than it needed to.

Also, I think one of the other questions driving this is, are we talking about Bridgestone Japan's loss or are we talking about Bridgestone Licensing's loss? We need to be talking about Bridgestone Licensing's loss.

And that's an acute question in this proceeding, particularly because Bridgestone Japan can't collect. Bridgestone Japan cannot be a party in this proceeding, as much as it wants to be, and clearly it wants to be. It wants this Tribunal to

award BSLS money that it lost. That is Bridgestone Japan's skin in the game.

And as much as it would like to be here, it can't be. It's not allowed by the Treaty. That's why these questions of who lost what and whose money is this are extremely important in this case. This isn't just a case of my aunt loaning me money. This is a case of an entity orchestrating a financial transaction so that it can be compensated for an action that, under the Treaty, it cannot be compensated for. It cannot be part of this case.

PRESIDENT PHILLIPS: I follow the arguments you raise on mitigation, although again, I have a question mark as to whether they apply to an intergroup situation.

But the more fundamental point is, if two different legal entities are held jointly and severally liable and one of them is covered by a form of guarantee or insurance, can that one, as it were, volunteer to pay the lot and then recover a hundred percent from the guarantor or the insurer?

Now, that's a question of law, and I just

don't know what international law has to say about this.

MS. GEHRING FLORES: Well, I think we'll--I was moving to that question, the question of contribution, but before I do, as a matter of law--and this is confirmed in a variety of investment arbitration decisions--investment agreements or investments chapters of Trade Promotion Agreements cannot--may not--be treated as guarantees or insurance policies. They just can't. And that, again, is why all of this analysis of whose loss is this, is so important. That's why the Treaty provides you must prove who lost. You can't have representative loss here because this is an issue of jurisdiction.

Bridgestone Japan isn't a party here, and this Tribunal has no jurisdiction to award Bridgestone Japan any compensation for its loss.

So, when two defendants are held jointly and severally liable and one pays a damages award, the paying defendant may have a legal right to seek contribution from its codefendant.

The Tribunal explicitly asked Claimants about

this during the Hearing on Expedited Objections.

Counsel for Claimants responded by promising to look into the subject.

Two pleadings on the merits and one opening presentation later, we still don't have an answer from Claimants, the Party that bears the burden of proving the existence and amount of injury that they claim.

So, this issue was raised by the President of Tribunal to Claimants. They said they'd get back to us on it. And as the President has posited, this may be an issue of fact, of law that you have charged the Claimants with answering, and they have not.

Bridgestone Licensing has not satisfied the Treaty requirement of establishing that it actually incurred the alleged injury of $5.4 million. Moreover, and in any event, Bridgestone Licensing has failed to substantiate the quantum of this purely alleged injury, instead concealing the evidence in its possession about contribution and its failure to mitigate.

Under these circumstances, Bridgestone Licensing simply cannot recover the $5.4 million it so

casually requests.

I now turn to Claimants' second claim of injury.

PRESIDENT PHILLIPS: Just before you do, I'm not sure that I necessarily charged the Claimants or the Claimants solely into looking into this question. It is something I would have expected the Respondents to look into.

MS. GEHRING FLORES: Well, given that all of the information with respect to contribution is in Claimants' hands, that there's--

PRESIDENT PHILLIPS: In so far as it's a question of law, I would have expected both Parties to give it due consideration.

MS. GEHRING FLORES: Given the law governing these proceedings as international law, and the Tribunal essentially asked the Claimants to respond and provide evidence of if there is any duty to contribute or any duty of contribution, and Claimants have failed to come back with anything in that regard, I would definitely say that Claimants have failed their burden here.

So, for lack of a better description, this second claim of injury is for other injury that allegedly was or perhaps a more accurate description, allegedly "will be," someday, caused by the Supreme Court Judgment.

Claimants jointly claim that this "other injury" amounts to between 550,000 or perhaps $14.5 million. The sweeping range of this other injury amount should give the Tribunal an indication of its merit.

And I pause here to mention two threshold problems with the second injury claim:

First, for the reasons articulated by the representative of the United States this morning and by my colleague, Ms. Silberman, Bridgestone Americas does not have standing to assert a denial of justice claim because it was not a party to the local proceeding at issue. For that reason, consideration of injury and quantum in this second "other" category should be limited to Bridgestone Licensing, and Bridgestone Licensing alone. However, for the sake of completeness, and because Claimants have so

intertwined their arguments, I will demonstrate why neither Bridgestone Licensing nor Bridgestone Americas could be awarded any damages for this alleged "other" injury.

Second, this claim includes a request for compensation for damages allegedly suffered outside of Panama.

The Tribunal previously made clear that alleged injury outside of Panama falls outside of its jurisdiction, and warned against the maintenance of such a claim. The relevant holdings are on your screen.

The United States also made this point in its statement this morning. In interpreting the Treaty to which it is a party, the United States said, I quote, "The Investor may only recover for damages it incurred in its capacity as an investor having made an investment in the territory of the other Party."

The U.S. observed that it made similar submissions in the context of the Cargill versus Mexico Case. In fact, in that case, all three Treaty Parties to NAFTA, U.S., Canada, Mexico, agreed that

the damages available in an arbitration under NAFTA were limited to those suffered by the Claimant as an investor. And an investor is inextricably linked to its investment which, by definition, is limited to the territory of the Respondent State here. And here it's Panama.

Yet Claimants have maintained their request for damages outside of Panama. You've heard them mention the BSCR Region. They mentioned it this morning.

BSCR Region. It is a region that includes Guatemala, the Dominican Republic, Costa Rica, Puerto Rico, among others.

In fact, the damages sought for the BSCR Region make up more than 90 percent of Claimants' damages claim. To seek compensation for this supposed harm in this arbitration is both inconsistent with the Tribunal's previous ruling and impermissible under the TPA.

Those are just the threshold problems with this "other" claim. As to the merits of the Claim itself, frankly, the shifting nature of Claimants'

arguments with respect to this "other" injury makes it difficult to know where to begin. The one common thread running through their pleadings is that this "other" injury consists of some kind of impairment to their rights.

Missing from their arguments, however, is any clear analysis of what those rights are and how to identify any such impairment, so that's where I will begin.

One of the Claimants, Bridgestone Licensing, owns a registered trademark for the mark FIRESTONE in Panama.

As explained by Panama's international trademark expert, Ms. Nadine Jacobson, a trademark is an indicator of source. This is something that Ms. Kepchar mentioned this morning as well. Consumers make purchasing decisions based on what they know about the quality and reliability of the particular maker's products. The resulting reputation of the trademark--namely, its strength and attractiveness to consumers--is known as the goodwill of the trademark.

A trademark has a single owner. The goodwill

in the trademark belongs to that owner.

Ms. Kepchar stated that Panama disputes that the idea that the Licensor and Licensee share in the benefits of the goodwill of the trademark. That's a bit misleading. Panama does not dispute that the Licensor and Licensee can both actually benefit from the goodwill of a trademark. There is, however, as a matter of law, only one owner of that goodwill, and that's the owner of the trademark. The Licensee does not own the goodwill.

I encourage you to ask Ms. Jacobson about this issue. She will give you many thoughts on it. But there's just one owner of the goodwill.

Admittedly, trademark law concepts are foreign to many of the arbitration attorneys in this room, but Claimants seem to hope that they will remain foreign to us.

For example, in their Reply, Claimants stated that: "As a general matter, valuation of intangible property such as trademark is difficult, as there are no set methods for determining this value."

On this score, Claimants are simply wrong.

There are set methods for determining the value of trademarks, and that valuation is no more difficult than it is in other contexts.

Valuing Bridgestone Licensing's investment is simply a matter of determining the income received by a trademark owner. If Bridgestone Licensing manufactured and sold the trademarked products itself, one could simply determine the income from sales of those products. Bridgestone Licensing does not do so, however; instead, it has contracted the use of the trademarks out to a licensee.

Bridgestone Licensing, therefore, receives royalties on the sales made by the Licensee. For Bridgestone Licensing, one can determine the value of the trademark by considering the royalty income, which is the product of the royalty rate applied to the sales revenues.

The Tribunal affirmed this in its Decision on Expedited Objections.

And this is consistent with the text of a book on "Trademark Valuation" cited repeatedly by Claimants' damages expert.

This is also consistent with the Expert Reports submitted by Mr. Fried and Mr. Shopp. In fact, Claimants' own damages expert, Mr. Daniel, concedes that one can assess the value of a trademark by determining the income stream associated with the trademark.

So much for the mystery of valuation.

So, the question in this case is whether there has been a change, and specifically a decrease, in the value of the FIRESTONE trademark to Bridgestone Licensing.

Here, the Firestone license provides that the License--in this case, Bridgestone Americas--will pay royalties based on the sales of FIRESTONE products.

Bridgestone Licensing's royalty income is therefore a product of two factors: The royalty rate applied to the revenues from the sales made by the Licensee.

Fortunately, we have actual data for the years before and the five years since the issuance of the Supreme Court Judgment that provide a definitive answer: There has been no decrease in value. None

whatsoever.

First, there has been no change in the royalty rate before the Supreme Court Judgment and after the Supreme Court Judgment. The royalty rate has always been and remains 1 percent. This is undisputed.

In fact, pursuant to transfer-pricing rules, if Bridgestone Licensing considered that the FIRESTONE trademark had decreased in value, it would be required to adjust the applicable royalty rate downward. It has not done so.

And what about the other factor in this equation? The sales revenue base to which the royalty rate is applied? Claimants have been unable to prove a decrease in sales by the Licensee, Bridgestone Americas.

In fact, the data show that sales of FIRESTONE tires in Panama have increased since 2014, when the Judgment was issued.

Given this information about what has actually happened over the past five years, you have to wonder: Where is this alleged "other" damage? The

answer is, of course, that it does not exist.

That brings us to Bridgestone Americas and its investments. Bridgestone Americas has a license with Bridgestone Japan to use the BRIDGESTONE trademark in Panama and a license with Bridgestone Licensing to use the FIRESTONE trademark in Panama.

A trademark license is a written agreement granting a licensee the right to use a trademark. It is, in other words, a contractual right. The Licensee of the trademark--in this case Bridgestone Americas--sells the trademarked products. It pays royalties licensors, which are, respectively, Bridgestone Japan and Bridgestone Licensing.

Given these facts, the Tribunal previously determined that: "The value of the License to the Licensee will reflect the fruits of the exploitation of the trademark, out of which royalties are paid."

At its most basic, this means that the income to a licensee will depend on revenues from sales, minus the royalty expense (which is the sales revenue times the royalty rate) paid to the Licensor. Decreased sales could lead to a decrease in the value

of the License to the Licensee, and so could an increase in the royalty rate.

And what does the actual evidence show in this case?

As I have mentioned, sales of FIRESTONE tires in Panama have increased, but so too have sales of BRIDGESTONE tires. In the case of BRIDGESTONE tires, in fact, the increase has been exponential.

As previously mentioned, it is undisputed that there has been no change in the royalty rate for these Licenses so where's the injury? There is none.

The real world data demonstrates that there has been no damage to Bridgestone Americas since the issuance of the Supreme Court Judgment.

As if this weren't enough, Claimants' own financial records confirm the absence of any injury. As discussed in Mr. Shopp's second Damages Report, Claimants are under an obligation to conduct annual impairment testing to ensure that their financial statements accurately reflect the value of their investments.

From 2014 to 2017, Bridgestone Americas'

Financial Statements have consistently stated that "no impairments were identified" for any intangible assets, including trade names and other intangible assets.

Likewise, BSLS's Financial Statements show no impairment to the trademarks from 2014 to 2017, and Bridgestone Licensing did not record any impairments to goodwill.

In other words, the economic data definitively disprove the notion of loss.

So, too, do the facts on the ground in Panama. Claimants have argued that they are suffering or perhaps will suffer some day from a chilling effect on enforcement rights in Panama. It appears that a significant predicate to this claim is that the Supreme Court Decision is the first and only of its kind in the world. That's bold. That's not true.

Courts around the world, including in the United States, commonly penalize intellectual property rights holders for abusive behavior, including abusive opposition proceedings.

You have expert testimony on this, and I

encourage you to review Ms. Jacobson's Expert Report on this subject, her First Report at Paragraphs 25 through 30.

At its most extreme, Claimants' argument in this regard, and what we heard this morning, is that the Supreme Court Judgment may cause a collapse of the entire trademark system, globally. Yet again, the facts directly contradict Claimants' tale of woe.

Mr. Kingsbury has admitted that Claimants have successfully brought a number of trademark opposition proceedings since the date of the Judgment.

As for the need to resort to trademark infringement proceedings, which Claimants claim as part of this chilling effect, Claimants seem to suffer from a misunderstanding of trademark law. A Trademark Opposition Proceeding is an attempt to prevent registration of a trademark and registration only. If one wanted to prevent the use of a trademark, one would have to initiate a trademark infringement proceeding. That was the case in Panama before the Supreme Court Judgment, and it's the case now.

In other words, the Supreme Court Judgment

did not change the status quo, whereby a party seeking to enjoin the use of a trademark would have to initiate a trademark infringement proceeding. In any event, Claimants have produced no evidence to demonstrate that they have had to resort to trademark infringement proceedings in Panama.

So much for the notion of a chilling effect, then, much less an implosion of the entire global trademark protection system.

Members of the Tribunal, that should end the analysis. Five years' worth of sales data, Claimants' own financial records, and the facts on the ground plainly show that Claimants have not incurred any loss. One simply cannot get around that incontrovertible fact.

To their credit, Claimants have tried. Claimants have tied themselves in knots to conjure increasingly inventive theories of injury that might result in a positive damages number, despite the fact that their royalty rate has stayed the same and sales revenues have only increased. In doing so, they have contradicted themselves again and again.

Given that the time is short, I will give you just a few examples.

In 2015, in their Notice of Arbitration, Claimants alleged that they Supreme Court Judgment had completely destroyed the economic value of their investments, and they sought compensation for this permanent deprivation.

During the Expedited Objections phase, Claimants defined Bridgestone Licensing's injury in a different way, one based on royalties. And Claimants further clarified that their loss was based on lost sales, as you can see on your screen.

But time progressed, and the data rolling in from Panama showed that sales weren't dropping. In fact, sales were increasing.

This meant that by the time Claimants submitted their Reply in 2018, they were forced to acknowledge that: "BSLS and BSAM do not claim sales have dropped."

But they did not want to abandon their case, at which point the latest theory of "unrealized loss" appeared, which Claimants' damages expert explains is

"independent of elapsed time."

Claimants' struggle to find an appropriate mooring does not change the inconvenient fact that their damages are ultimately dependent on sales. They believe that their hypothetical loss will be realized someday, after which: "BSAM may see a drop in sales and loss of market share as a result" of the Supreme Court Judgment.

BSAM may see, they may see a loss. We don't know when it will occur, so Claimants have asked that you trust them. This fantasy, this hypothetical, is not allowed under the TPA. You heard this morning from the United States; the U.S. representative stated, and I quote: "An investor may recover such damages under the TPA only to the extent that damages are established on the basis of satisfactory evidence that is not inherently speculative."

Mr. President, Members of the Tribunal, in the absence of any evidence of injury, these Claimants simply cannot recover under this Treaty.

With that said, and because I'm conscious of time, I will make only brief remarks about Claimants'

submissions on quantum. These submissions are, in a word, "bizarre."

Claimants' damages expert, Mr. Daniel, begins by assuming that an injury has necessarily occurred, and that financial loss has necessarily been incurred. That's not what an independent objective damages expert should do.

An objective, rigorous, scientific damages analysis should start with a hypothesis that is then tested with real evidence and data. Not so for Claimants' damages analysis, which instead starts with a foregone conclusion where the ends justify the means.

Ideally a damages expert also assesses the actual investments at issue. Here, those investments are one trademark and two trademark licenses. Also ideally, in assessing the subject investments, he or she would use the real world data that is available. Quantification of damages is by no means an exact science, but it does need to be grounded in some semblance of reality, particularly when engaging in a discounted-cash-flow analysis. Again, not so for

Claimant's expert.

Claimant's expert started by assessing the alleged damages suffered by Bridgestone Licensing and Bridgestone Japan, an entity that cannot be a party to this arbitration, much as it might want to be.

And Claimant's expert studiously avoided using the actual sales figures in Panama after 2014. Perhaps that's because those numbers revealed that there was no damage.

Finally, I again note that more than 90 percent of the damages that Claimants assert are alleged damages incurred outside of Panama. Needless to say, such damages cannot be Awarded in this arbitration.

These and many other flaws are detailed in Panama's briefs and Mr. Shopp's two expert reports.

For all these reasons, Claimants have failed to substantiate either of their claims of injury. These claims should be dismissed.

And with that, I will turn the floor over to my partner, Mr. Debevoise, for a brief conclusion.

Thank you, Mr. President and Members of the

Tribunal.

MR. DEBEVOISE: Thank you, Mr. President. I'm going to keep this extremely brief in the interest of time.

Panama is confronted with an international investment claim that should never have been submitted. They may make a treaty claim against Panama as reckless as the trademark bullying undertaken by them, and more importantly, the trademark bullying undertaken by their Japanese parent company, Bridgestone Corporation, an ineligible Claimant in this case.

Their claim is built on a canard, a myth that Supreme Court of Panama held Bridgestone Licensing and Bridgestone Japan liable in tort merely, underlining that word, merely for pursuing a routine Trademark Opposition Proceeding without anything more.

Where's the clicker?

Go ahead.

So, I think you've heard a lot today about the Supreme Court Judgment itself, and you're going to hear more this week, so I'm not going to say anything

detailed about it, except to say that when you really analyze it, it's something that the Claimants have studiously avoided doing throughout this proceeding, but there are 5,000 pages in the record, as you were informed, and we have analyzed them, and you're going to hear an awful lot more than you've already heard today about it.

But the Supreme Court of Panama based its Decision on a broad course of conduct, not just on a narrow Opposition Proceeding, and that is the basic canard here.

Let's just pause for a second and think about it. Claimants had no legal basis at the time that Bridgestone's counsel sent the Demand Letter to tell Muresa, Tire Group, and L.V. International to stop selling RIVERSTONE tires in Panama. At that time, RIVERSTONE, BRIDGESTONE, and FIRESTONE tires were all actively and legal sold in Panama. The Claimants had no injunction or even a pending infringement proceeding underway in Panama.

Without doing any homework on Panamanian Law, they made a threat on which they could not make good.

They ended up filing an Opposition Proceeding, but submitted no evidence of confusion in the marketplace, which is a required element of any Opposition Proceeding, as Claimants' counsel, Audrey Williams, told us in her Witness Statement.

In other words, she said that if there are two marks already co-existing in the market, then the Party bringing the Opposition Proceeding is going to lose, and that's what's happened.

Now, Claimants have brought numerous meritless international claims in this case. They started out with an expropriation claim which they dropped recently in their Reply, some three years into the case;

They started with an MFN claim, which they dropped in their Reply three years into the case;

They started with a national-treatment claim, which they also dropped three years into the case, after noticing that there was a basic element, namely a comparator, that was missing;

And now they doggedly pursue a hopeless denial of justice claim, which we will demonstrate to

you really is hopeless. Because a denial of justice claim is not an appeal, which is what these Parties are trying to do.

So the key thing to take away from what you heard from my colleague, Ms. Silberman, this morning, and what you'll hear this week, is that, in fact, they are trying to take ordinary appellate issues, questions of evidence which are not properly the subject of denial of justice claims in international law, and dress them up as due process claims.

But as I think you saw, or began to see today, and hear more, in fact, every single one of these alleged due process claims, the Claimants presented between five and nine times in the proceedings in Panama between 2007 and 2014--or I'm sorry, 2010 and 2014.

And in questions about the denial--I'm sorry, the Demand Letter, they claim that it was irrelevant because it was between parties that were not present. Let's not kid ourselves. Bridgestone and the Luque Group were in a global competition. The Claimants tend to forget this.

They slice and dice Bridgestone Corporation into all its corporate entities when it's convenient, but the competitive reality was different: All Bridgestone units were in this fight, and I want you to keep that in mind as you hear more about the Demand Letter.

Finally, in the Expedited Objection phase of this case, Panama ran an abuse of process argument based on Bridgestone Corporation's--that is, the Japanese parent of the two Claimants here--use of its corporate Treasury to arrange to pay 100 percent of the damages in the Panamanian Tort Proceeding. The Tribunal found that to be an issue, if at all, for damages.

Well, with all due respect, Panama submits and will say some more about this as the week unfolds, that the Philip Morris Case is not quite as easily distinguishable as the Tribunal had suggested in its Decision.

In any case, in light of new documents that have come to light, some as recently as yesterday, as you just heard, Panama urges the Tribunal to revisit

its prior construction of the Philip Morris case, and furthermore, to decline to exercise any jurisdiction it has over any claims on the basis of Claimants' abuse of process in the conduct of these proceedings.

Claimants asserted in their Reply, without qualification, that no agreement existed between Bridgestone Japan and Bridgestone Licensing concerning any allocation of the economic burden of the proceeding; yet yesterday, on the eve of the Hearing, we were presented with irrefutable evidence of the existence of at least two such agreements: One from 2010 and one from 2016.

Claimants reluctantly provided the 2010 Agreement yesterday, and they have meekly told us that they're consulting their client to try to find the 2016 agreement. With all due respect, that's not the way that international arbitration ought to be conducted, and we urge you to consider that when you consider abuse of process and denying them any recovery.

So, I think we will end there at this point, and move on to the cross-examination of the first

witness, and we thank you for your time and attention.

PRESIDENT PHILLIPS: The Tribunal's grateful to counsel for their Opening Submissions. We will adjourn for 15 minutes and resume at 5 minutes past 4:00.

(Brief recess.)

THOMAS R. KINGSBURY, CLAIMANTS' WITNESS, CALLED

PRESIDENT PHILLIPS: Good afternoon, Mr. Kingsbury. You will have in front of you a Witness Declaration. Read it to yourself, and if you're happy with it, then read it aloud.

THE WITNESS: I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.

PRESIDENT PHILLIPS: Thank you.

DIRECT EXAMINATION

BY MS. HYMAN:

Q. Good afternoon, Mr. Kingsbury.

A. Hello.

Q. There's a bundle right in front of you. Could you look at Tabs 1, 2, and 3 in that bundle, and they should have your three Witness Statements.

A. Yes, they do.

Q. And could you turn to the last page of each of those, and confirm that it's your signature on the last page of each.

A. Yes, it is.

Q. Are there any corrections or clarifications you wish to make in respect of any of your Witness Statements?

A. No.

Q. Okay. Please, could you just remind the Tribunal of the positions you hold within the Bridgestone group?

A. Yes. Sure, I am Chief Intellectual Property Counsel for Bridgestone Americas Inc. and Assistant Secretary for Bridgestone Licensing Services, Inc.

Q. Was Bridgestone Americas, the Claimant in this action, ever approached by Muresa or any of its affiliates to pay the Judgment Debt of 5.43 million?

A. Yes, it was.

Q. What were the circumstances of that?

A. One of the Luque family members, Aegis, I believe it was, sent a direct message through LinkedIn

to our CEO of Bridgestone Americas, inquiring about payment of the damage award in Panama.

Q. When was that?

A. That was in June 2016, right after the Final Judgment.

Q. And how do you know about that?

A. Gary Garfield, who is our CEO, forwarded it to my boss, Chris Nicastro, who is the General Counsel, who forwarded to me.

Q. Which Party ended up paying the Judgment Debt?

A. The Bridgestone Licensing Services, Inc. ended up paying the Final Judgment.

Q. Why did BSLS pay it?

A. There were a number of reasons that we kind of considered when we made this decision, one being that Bridgestone Licensing Services is a U.S. company, and this issue happened in the Americas. You know, it was handled by Panamanian counsel in Panama through Ladas & Parry, who is or firm in New York, through my office in Akron, so it seemed very America-centric, and Bridgestone Licensing is a U.S. company.

Also, Firestone is the primary brand for us in Latin America, and Bridgestone Licensing Services is the owner of the Firestone brand in Latin America.

Also, there was some strategic reasons. In the event we had decided to file this arbitration, we realized that there would be some benefits to having Bridgestone Licensing Services pay the full amount.

Q. Did BSAM play any role in that payment?

A. Yes it did. Bridgestone Americas provided a loan to Bridgestone Licensing Services to pay the debt.

Q. Why did BSAM do that?

A. Again, you go to the territorial issues, that Bridgestone Americas is the profit center for the Americas, including Panama, and so it made sense from a geographic standpoint as well as there were some currency exchange benefits from the global corporation standpoint that made sense to have Bridgestone Americas pay this.

Q. Could you have a look at Tabs 4, 5, and 6 in your binder. And they should be e-mails.

Are you familiar with those e-mails?

A. I was not copied on these e-mails, but I have reviewed them in preparation for this Hearing.

Q. And what's your understanding of those e-mails are about?

A. Again, from what I gather from reading the e-mails, it is an analysis by Bridgestone's financial group there would be some advantages from a currency exchange point of view to have Bridgestone Americas provide this loan.

Q. And could you turn to Tab 7 and tell us what that document is?

A. That is the Loan Agreement between Bridgestone Licensing Services and Bridgestone Americas Inc.

Q. What was the repayment date of that loan?

A. The repayment is on 3.1, and it's July 19th, 2017.

Q. Was the loan repaid on that date?

A. No, it was not.

Q. Why not?

A. We have extended this loan pending the resolution to this arbitration, so we have continued

in 2017, '18, and '19, continued to extend this until we get resolution to this arbitration hearing.

Q. Was that always contemplated by the Parties to the loan?

A. Yes, it was.

Q. Please, could you turn to Tab 8.

A. Yes.

Q. What is that document?

A. That is the Bridgestone Licensing Services Mid-Term Plan, and from 2016, and a Mid-Term Plan is our rolling Five-Year Plan for each of our business units, so every year they update this to add another year and take into consideration what happened the previous year.

Q. Please, could you turn to Page 5.

A. Yes.

Q. And there's a Dividend Plan. And what does that show?

A. So this is the Dividend Plan from BSLS to pay dividends. In particular, if you look at about halfway down, it said "Required BSAM Loan Balance," and you can see that that balance is carried forward

until 2021, where it goes from to 6 million to zero.

And if you look at the cash balance from year to year, it goes up about 1.3 to $2 million each year. And if you carry that through from 2020 to 2021, you end up with roughly, you know, 10 to $11 million, which is you subtract out the $6 million loan payment, you get down to the $4.2 million that we expect to have as a cash balance in 2021.

Q. Do you know whether the loan will ever actually need to be repaid?

A. Yes. It will be--it will be repaid regardless of the outcome of this arbitration.

Q. Does BSLS make interest payments on the loan?

A. Yes, it does.

Q. Please, could you turn to Tab 9.

A. Yes.

Q. And what's that document?

A. This is a bank statement for Bridgestone Licensing Services, Inc. from June of 2017.

Q. Does this bank statement show payment of interest on the loan--

A. Yes.

Q. --to BSAM?

A. On the second page, at the very bottom, it's the last entry on June 30th, the $82,335 amount is the--is the interest payment for the first half of the year for the loan that BSLS is carrying on its books, and you can see that is from Bridgestone Licensing Services to Bridgestone Americas Inc.

Q. Thank you.

Please, can you turn to Tab 10.

A. Yes.

Q. What is that document?

A. This appears to be a resolution by the Bridgestone Licensing Services Board of Directors.

Q. What is your understanding of the meaning of this document?

A. Again, I was not part of this. But, just from the plain language of it, it basically says that Bridgestone Licensing Services and Bridgestone Corporation agree that Bridgestone Licensing Services will pay the entire amount of the Supreme Court Judgment in Panama, and in exchange--and including the attorneys' fees associated with this arbitration, and

then in exchange, Bridgestone Licensing Services would be able to retain any awards that are a result of the arbitration action.

Q. The recitals to the Resolution refer to an agreement dated January 1, 2010.

A. They do.

Q. Are you aware of that Agreement?

A. Again, I had not seen that until I started preparing for this Hearing.

Q. Could you please turn to Tab 11.

A. Yes.

Q. Is that the 2010 Agreement?

A. That is the 2010 Agreement.

Q. And what's your understanding of the meaning of that Agreement?

A. This Agreement basically says that Bridgestone Corporation, "BSJ," and Bridgestone Licensing Services, "BSLS," agree to split costs of any trademark actions taken as a result of enforcement, cancellation, raid, suit investigation.

Q. So, you weren't aware of the Agreement, but weren't you aware of that policy?

A. In general, I knew that's how we operated, yes.

Q. Going back to Tab 10, there is a reference to a 2016 Agreement also in the recitals.

A. There is, at the very bottom.

Q. What's the 2016 Agreement?

A. That is this Resolution, basically. It's a defined term under the last "WHEREAS" clause Subsection (2)(i), that they state the terms and then they call it the "2016 Agreement."

Q. Are there any other agreements between BSLS and BSJ regarding apportionment of loss?

A. Not that I'm aware of.

Q. Please, could you turn to Tab 12, which should be Mr. Shopp's First Expert Report.

A. Yes.

Q. And go to Paragraph 165.

A. Yes.

Q. In that paragraph, Mr. Shopp refers to an inter-company loan between BSJ and BSAM made in 2015, and Mr. Shopp speculates that that loan may have been used by BSAM to loan to BSLS to pay the Judgment.

In preparing for your testimony today, did you look into that question?

A. I did look into that question, and that's not true. The loan that was made from BSJ to BSAM that he's referring to was a completely different purpose. It had different terms, different interest rates, and it was used within the Company for completely different purposes, so it had nothing to do with the arbitration or the payment of the damages.

Q. You've told us previously in your Witness Statements that Bridgestone and Firestone, there's a policy to oppose "-STONE" suffix marks.

A. It's true.

Q. Has the Panama Supreme Court Judgment impacted that strategy?

A. Yes, it has.

You know, we have to--we have to take a closer look at whether we enforce or not, just based on the possibility of in the event we were to lose an opposition in Panama or another, you know, small country, would we potentially face a similar damage award or potentially even greater? This one was

$5 million, but, you know, the next one could be $25 million. It just--you know, we just don't--we're put in this period of uncertainty.

Q. What would the consequences of not opposing a "-STONE" suffix mark be?

A. Well, if we don't oppose, then they'll proceed to register on the trademark registers, and then once we have a few on the register, it would be difficult to stop additional "-STONE" marks from registering, which eventually leads to erosion of our trademark rights in the BRIDGESTONE and FIRESTONE marks.

Q. Since the Supreme Court Judgment, have BSLS and BSJ decided not to oppose any "-STONE" marks in Panama?

A. No. We have proceeded to file oppositions against "-STONE" marks in Panama.

Q. Why did BSLS and BSJ decide to oppose them in light of the Supreme Court Judgment?

A. As we've looked at the subsequent applications, none of them have submitted evidence of use along with the trademark application as there was

with the Riverstone case, or the Riverstone application.

Q. If any "-STONE" applicants had put forward evidence of use, what would you have done?

A. I think we would have to take a closer look. We certainly would have to do a more in-depth use investigation to determine how much use there is, and then, you know, potentially weigh that against a potential damage. It would be a risk-benefit analysis at that point of, you know, do we take a chance to proceed with another opposition, knowing that because there's use that we could potentially face another situation like we had in the Riverstone case.

Q. Thank you. Those are all my questions.

SECRETARY TORRES: Mr. President, if I may, while we get settled, just a small administrative reminder to the Parties. When you're referring to document, better to use the exhibit number; otherwise, the record is not going to be clear on what exhibit number you're referring to.

MR. DEBEVOISE: Shall I proceed, Mr. President?

PRESIDENT PHILLIPS: Yes.

MR. DEBEVOISE: Thank you.

CROSS-EXAMINATION

BY MR. DEBEVOISE:

Q. Good afternoon, Mr. Kingsbury.

A. Hello, again.

Q. Nice to see you again.

And as before, I'll be asking you some questions on behalf of Panama, and if you need a break at any point, please let me know or let the Tribunal President know.

A. Great, thank you.

Q. Before we begin, I noticed that on the list of attendees for the Hearing, there were two other gentlemen from the company. I apologize, I don't--I'm not that familiar with Japanese names. I'm assuming they're gentlemen but they may not--

A. Yeah, one of them is not--one of them is a female, but yes.

Q. Okay, excuse me.

A. They did not--they were not able to make it today.

Q. I see.

A. But they're going to be here, hopefully, tomorrow.

Q. I see. Okay.

So, could you just let us know who they are, Mister--I assume it's Mr. Michinobu Matsumoto?

A. Mr. Matsumoto?

Q. Yes.

A. Yes.

So, Michinobu Matsumoto is a member of the Bridgestone Intellectual Property Department and the Vice President of Bridgestone Licensing Services, Inc.

Q. And I'm sorry, but this afternoon, we're going to have to be a little more precise when we talk about Bridgestone.

A. Oh.

Q. So when you say "Bridgestone," are you referring to Bridgestone Corporation in Tokyo?

A. Yes.

Q. Okay. So that's the case of Mr. Matsumoto--

A. Yes.

Q. --from the Bridgestone Corporation in Japan

Intellectual Property Department.

A. And the Vice President of Bridgestone Licensing Services.

Q. And is that current Vice President?

A. Yes.

Q. Okay. And how long has he been in that job?

A. Oh, I would--you know, I don't, I don't know. It's been a while.

Q. Okay. And so, that means that Akane Mori must be--Ms. Mori.

A. Yes.

Q. And what is her position?

A. She is head of the Bridgestone Corporation Trademark Group and Assistant Secretary for Bridgestone Licensing Services.

Q. Okay. And is she resident in Tokyo?

A. Yes, she is.

Q. I see, okay. And are they essentially your boss?

A. No.

Q. Help us out with sort of the chain between you and them.

A. They work in the Bridgestone Intellectual Property Department and as well for the dual role with Bridgestone Licensing Services. We work within Bridgestone Americas and do do work for Bridgestone Licensing Services. So, I mean, I guess in the fact that if you looked at it from a strict reporting structure, Vice President is, you know, higher than Assistant Secretary, so I guess in some regards the--

Q. Right.

A. --officers.

Q. But I think you mentioned that Mr. Matsumoto has a position as Head of Intellectual Property.

A. No. He's just in the--he's General Manager of one of the departments.

Q. General Manager of one of the departments.

A. Yeah, he's not the head of the department.

Q. I see, okay.

A. He's also one of the Board members. I don't know if we looked at--last time we looked at the number of Board members.

Q. Yes, right.

A. He's one of the three Board members of

Bridgestone Licensing.

Q. Bridgestone Licensing, but resident in Tokyo.

A. Yes.

Q. Yeah. And, as I recall, the last time we had a conversation, we looked at some documents that indicated at one point that you wanted to hire an IP lawyer in the United States, and, as I recall, you had to get approval from someone in Tokyo to make that hire.

A. Hire? I mean, we have a trademark attorney in Nashville that handles the trademarks for the Americas, but that's completely unrelated to Bridgestone Licensing Services.

We had Mallory Smith--I don't know if you remember that name.

Q. I remember that name, yes.

A. She handled the--she handled the trademark work for BSLS out of the Akron offices--

Q. Okay.

A. --if that's what you're referring to.

Q. I seem to recall that the gentleman whose approval was required was a Mr. Kitamura.

A. At the time--hmm.

Q. What would his position be?

A. Kitamura san has been moved. He's head of a the patent prosecution group right now, but at one time he was Head of the Trademark Group.

Q. I see.

A. In the same position that Akane Mori is in right now.

Q. I see.

A. She replaced him.

Q. All right. So Akane Mori is now the one who's sort of keeping an eye on things at--

A. Yes.

Q. --at Bridgestone Licensing in the trademark area.

A. Yeah--I mean, yes.

Q. Um-hmm. And does she also wear that hat for BSAM?

A. No.

Q. I see. Who would be the equivalent at doing that for BSAM?

A. Lynn Hsu, H-S-U.

Q. Um-hmm, also resident in Tokyo.

A. No. She's a trademark attorney in Nashville, Tennessee.

Q. Nashville, I see. Okay, very good.

Now, as I recall, you're a lawyer admitted to the Bar; is that right?

A. Correct.

Q. And where did you attend law school?

A. University of Akron.

Q. Okay. And that's in Ohio; right?

A. It is.

Q. Okay. And that's a common law jurisdiction; right?

A. It is.

Q. Okay. And so you joined Bridgestone Americas in 2006; correct?

A. That's correct.

Q. And--

A. Second--

Q. And starting in 2006, your title was "Senior Intellectual Property Counsel"?

A. Correct.

Q. Okay. And then you were promoted to Associate Chief Counsel of Intellectual Property in 2012?

A. Yes.

Q. And since 2016, you have been Chief Counsel for Intellectual Property; correct?

A. Yes.

Q. Okay. And in your current role and previous ones, one of your responsibilities has been to oversee trademark opposition actions; right?

A. Yes.

Q. And in your Third Statement, you mention that you also "have been responsible for overseeing any related court proceedings"?

A. Yes.

Q. Is that accurate? Okay.

And "related court proceedings," would that include things like the tort case that took place in Panama?

A. Yes.

Q. Yes okay. So, and as you said, you're Assistant Secretary of Bridgestone Licensing, so you

are familiar with Bridgestone Licensing's corporate structure and business activities; correct?

A. For the most part, yes.

Q. Okay. I think if we look at your First Witness Statement, you said you were thoroughly familiar.

A. Oh, well, I was--

Q. If my memory--

(Overlapping speakers.)

A. I was probably back then but, you know, I moved back into sort of a different role.

Q. I see.

A. And Lynn is handling a lot of the day-to-day work.

Q. Um-hmm.

A. So I don't think I could say that I'm as thoroughly involved in a day-to-day standpoint as I was several years ago.

Q. Um-hmm, I see. Okay. But you have read all of the pleadings that have been submitted in this case.

A. I have.

Q. Okay. And have you also reviewed the evidence?

A. Some of it, but not all of it.

Q. I see, because a few months ago, your counsel in this case argued that you needed to have access to certain documents in order to be able to give proper instructions, and I had sort of taken that to mean that you had to see all of the exhibits.

A. I'm sorry. Could--you know, they instructed me which ones I needed to take a look at in order to be as prepared as I could for this Hearing today.

Q. I see.

But what about in connection with filing of, what we call in arbitration, "memorials" or the "briefs"?

A. Yes. I was--I received copies of all of the Memorials--

Q. You were reading their briefs and signing off on their briefs.

A. Yes.

Q. Um-hmm, okay.

Now, do you speak Spanish?

A. I do not.

Q. Okay. I understand that from Claimant's Request for Arbitration that--this is in Paragraph 15 of the Request for Arbitration--that "a key aspect of the Bridgestone group's business is to protect and maintain the BRIDGESTONE and FIRESTONE trademarks."

I assume you agree with that statement?

A. Yes.

Q. And if we turn to Page 18 of Claimants' Memorial, which I think should be in your binder, this is the Memorial dated 11 May 2018. Do you have a tab there that says that? C-L Memorial?

A. Yes.

Q. Okay.

PRESIDENT PHILLIPS: Which paragraph?

MR. DEBEVOISE: We're going to be looking at Paragraph 18.

PRESIDENT PHILLIPS: 18?

MR. DEBEVOISE: Yes.

BY MR. DEBEVOISE:

Q. So maybe I'll just read the paragraph: "Accordingly, Bridgestone's strategy for protecting

its brand is twofold: First, it monitors trademark registrations all over the world, and any applications for trademarks for tires and related products (i.e., products that compete with its own) that have the "-STONE" suffix, or are otherwise confusingly similar to BRIDGESTONE and FIRESTONE, are opposed. Second, it monitors markets for tires and related products all over the world, and if it finds tires being marketed under brands with a "-STONE" suffix, or that are otherwise confusingly similar to BRIDGESTONE or FIRESTONE, it first asks the company marketing the brand in correspondence to desist from marketing their tires under the confusingly similar brand, and if that fails, it tries to obtain an injunction to prevent the sale of those tires. Both aspects of trademark protection are necessary."

Did I read that correctly?

A. Yes, you did.

Q. So, focusing on the last part of this statement, Bridgestone corresponds with these other parties through Cease and Desist Letters? Is that one way you do that correspondence?

A. Yes.

Q. And you're familiar with cease and eesist letters or what I guess some people in this case have called "reservation of rights letters" and other people have called "demand letters," but you're familiar with the one that was sent in 2004--

A. Yes.

Q. Which is--okay. That was Respondent's Exhibit 111.

A. Yes.

Q. And that letter is an example of Bridgestone carrying out this general policy that you've described; right? And if successful, these letters that you send impact upon competitors; correct?

A. Correct.

Q. And the objective here is to stop another entity from marketing its product.

A. That's true.

Q. But trademark enforcement is subject to certain limits, isn't it?

A. What kind of limits? I mean...

Q. Well, do you accept the notion that

government authorities need to balance the right of the trademark-holder to protect its brand with the right of other entities to conduct business and compete fairly?

A. I guess in general I would agree with that statement.

Q. Okay. Well, I mean, let's take a look at the Respondent's Request for Arbitration. I think there is a tab in your book called "Request for Arbitration," on Page 6, Paragraph 18.

A. Okay.

Q. Do you see in Paragraph 18, about five lines down, it says: "To balance the right of trademark holders to protect its brand with the right of other entities to conduct business and compete fairly"?

A. Yes.

Q. Okay. So, Mr. Kingsbury, have you ever heard of "trademark bullying"?

A. I've heard the term, sure.

Q. Okay. And why don't we turn to Respondent's Legal Authority 92, Page 15. Can you find that? It probably is in RLA-92 in your book.

A. Okay.

What page? I'm sorry.

Q. So, first of all, let's just identify RLA-92. Could you just read on the cover page what it is.

A. Sure. It says: "Report to Congress, Trademark Litigation Tactics and Federal Government Services to Protect Trademarks and Prevent Counterfeiting," April 2011.

Q. Okay. So, we were going to turn to Page 15 of that document.

Actually, I think that's Page 19 of 34 if you're looking at the internet printout, but it's Page 15 of the document.

A. Okay.

Q. Let's focus on Footnote 51.

So, it says that the term "bullies," in quotes, was used and described as "a trademark owner that uses its trademark rights to harass and intimidate another business beyond what the law might reasonably interpreted to allow."

Did I read that correctly?

A. Yes, you did.

Q. Okay. And can we go back to Page 7 of the Report.

You see a heading at the bottom of the page entitled "Evaluating Potential Violations"?

A. Yes.

Q. Okay. Now, if we go on to the following page, on Page 8, there is a statement in the very first carryover paragraph, starting in the second line, which says that: "The first step in determining whether a particular use constitutes potential rights violation is to consider the available legal theories and examine whether the elements of a claim (under Federal or State law) can be established."

Did I read that correctly?

A. Yes.

Q. Okay. And trademark law is not globally uniform; right? I mean, you deal with the whole world; right? And it's not the same in every country.

A. There's nuances in each country, but generally the concepts are the same.

Q. Um-hmm. Okay.

Let's look at the Request for Arbitration on

Page 5. Again, that will be the document called "RFA." And let's go to Page 5, Paragraph 14.

You see Paragraph 14?

A. I do.

Q. Okay. So, in the fourth line, there is a sentence beginning: "While trademark law is not globally uniform."

A. Correct.

Q. And then I guess what you were trying to say is "in most jurisdiction," it allows something to happen. But it is the case that trademark law is not globally uniform.

A. Correct.

Q. Okay. So, the general test, though, as we go around the world, is whether various marks are confusingly similar; right?

A. Yes.

Q. Okay. And we see that in that same Paragraph 14, don't we, down in the very last line on the page?

A. We do.

Q. "Confusingly similar."

A. Um-hmm, yes.

Q. Okay. And this is something that has to be evaluated on a case-by-case basis; right?

A. It does.

Q. Okay. And if a problematic mark is identified before taking enforcement measures, a prudent trademark owner typically would conduct some due diligence; right?

A. It would.

Q. Okay. And after conducting some due diligence, if the mark owner has committed to challenge a particular unauthorized mark, the course of action taken will then depend on the situation; right?

A. Correct.

Q. And a mark owner typically will set forth its demands in one of these letters that we walked about, a "Cease and Desist" or a "Demand Letter," or whatever we're calling them. And the tone of those letters can be either threatening or conciliatory, can't they?

A. They can, yes.

Q. Uh-huh, um-hmm, okay.

So, let's look at another passage from Respondent's Legal Authority Number 92.

Okay, so, we're back to the Report to Congress.

Now, on Page 14 of that document, which, again, if you're using the numbers in the lower right corner is Page 18 of 34, do you see in the third paragraph where it says that owners may "sometimes be too zealous and end up over-reaching"?

A. I do.

Q. Now, let's look some more at that that. Two lines on in the same paragraph, it says: "Other times, they mistakenly believe that, to preserve the strength of their mark, they must object to every third-party use of the same or similar mark no matter whether such uses may be fair uses or otherwise non-infringing." Is that right?

A. That's what it says.

Q. Okay. So let's go now back and look at the Demand Letter in this case, Respondent's Exhibit 111.

A. Okay.

Q. Okay. So, is this the letter from Foley &

Lardner to Mr. Jesus Sanchelima--

A. Yes.

Q. -- of 3 November 2004?

A. Yes, it is.

Q. It's been much talked about in this case.

Okay. I think I probably don't need to read this text. Everyone is pretty familiar with it now. But before sending this letter, did you--or did Bridgestone conduct any kind of country-by-country analysis?

A. Well, I wasn't involved with the letter, but I believe that it says "without conducting a country-by-country analysis." So, on the face of the letter, I would say that it did not.

Q. It did not. Okay.

So it would seem, then, that there was some diligence that was not conducted before this letter was sent.

A. We did not do a country-by-country analysis, if you--if that's the diligence that you're referring to, correct.

Q. Yes, okay. All right.

And that included no analysis of the law in Panama; right?

A. I would assume so, but again I wasn't...

Q. Um-hmm, okay.

And after this letter was sent--

A. Um-hmm.

Q. --an Opposition Proceeding was filed in Panama opposing the registration of the RIVERSTONE mark; correct?

A. Correct.

Q. And were you involved with the filing of that opposition?

A. No. I believe that was filed in 2005.

Q. Yes, okay.

A. And I started in the Company--

Q. It was before you joined the Company. All right.

A. Yes, it was.

Q. Do you know whether any diligence was done on whether there was actual confusion in the market in Panama before that proceeding was filed?

A. I--I don't know.

Q. I see, okay.

And you're familiar, though, with the course of that Opposition Proceeding, are you not?

A. I'm generally familiar with it from this case, yes.

Q. Great, okay. And certainly it's been in the record in this arbitration rather extensively; no?

A. Yes, it has.

Q. Okay. So, in that Panamanian Opposition Proceeding, the Bridgestone Parties--and to be clear here, this was Bridgestone Licensing and Bridgestone Corporation Japan?

A. Yes.

Q. Not BSAM?

A. Correct.

Q. They relied heavily on the well-known mark status of the BRIDGESTONE mark in the market; right?

A. Yes.

Q. And actually, if we look at the evidence submitted in the case, it would appear that the Bridgestone Parties didn't bother to show any evidence of confusion in the Panama market. They seemed to

rely exclusively on the fact that it was a well-known mark, and that kind of carried the day; right?

A. It was--I think there's confusion arguments that exist. Right? I mean confusion is a number of different factors--similarity of the mark, similarity of the goods, similarity of the trade channels. And so, you know, when you say that we made a decision based on confusion by without doing a use investigation or without looking at actual confusion, that's probably a true statement, but I don't know if you need actual use or actual confusion to allege confusion, if that makes sense; right?

Q. But the fact remains that there was not an actual use study done--

A. There was not--well, I'm assuming there was not. I don't know that for a fact.

Q. Okay. Well, I think if you had enough time to read through the whole thing, I can represent to you that that's what you would find.

A. All right.

Q. Okay. Now, the Bridgestone Parties in that Opposition Proceeding--Bridgestone Licensing and

Bridgestone Japan--were represented by Panamanian counsel; right?

A. Yes.

Q. And the lawyer involved was Ms. Audrey Williams; is that right?

A. Yes.

Q. Okay. And she gave a Witness Statement in the earlier part of this case, did she not?

A. Ooh, yes, I believe she did.

Q. Yeah, okay. So, maybe we should take a look at her Witness Statement. I think you'll find that in the book. And why don't we look, in particular, on Page 3 and Paragraph 14.

Have you located Paragraph 14?

A. I have.

Q. Okay. And in the fifth line, there is a sentence which says: "Such evidence may include proof that the confronted marks can coexist if goods bearing the Marks are found in the market (in which case the action would be dismissed because there would be no likelihood of confusion or association)."

Did I read that correctly?

A. You did.

Q. So, that is your counsel in the Opposition Proceeding expressing the view that if there was a competing mark already found in the market that you were likely to lose that Opposition Proceeding; right?

(Witness reviews document.)

A. Okay, so I'm sorry, I wanted to make sure I understood the entire--

Q. I understand. Take your time.

A. I'm just reading through--I forget your question at this point, so I'm sorry.

(Witness reviews realtime Transcript.)

A. "Likely lose the opposition."

Yeah, but there is the "or"; right? "Or by proving that the challenged application registration was being used before the date of first use or registration of the opposing mark (in which case the action would be dismissed for lack of standing.)" Okay, that's--

Q. That's another alternative, and that's a hypothetical.

A. Right.

Q. It doesn't apply to our facts; right?

A. Right. Yes, yeah.

Q. So, the hypothetical that applies to our facts is that the RIVERSTONE mark was legally in use in Panama at the time that you filed the Opposition Proceeding.

A. You know, "legally in use"; right? So, Panama does not recognize--my understanding is that Panama does not understand common-law rights--right?--so their use--I mean, they gained trademark rights through registration only; right? So did they--

Q. That is the Panamanian system, is it not?

A. Did they--yeah, so did they legally have the right to sell products without a registration? If they don't recognize common-law rights, they don't have a valid mark to market products under, so...

Q. But at that point, you had not brought any kind of infringement proceeding against them to stop them.

A. No, we had not been--we had not filed an infringements proceeding, but, you know, based on the

fact that they did not have a registration and we did, our rights pre-dated their rights, right? And they had no, as you say legal right to--

Q. Right.

A. --manufacture, sell their products in the market without a valid registration.

Q. But if return to Paragraph 14, which is the statement by your counsel in the Opposition Proceeding, she is basically saying that if Riverstone can prove that they were already using the mark in the market, you were likely to lose the Opposition Proceeding. That's what that says; no?

A. "Use granted to the Licensee."

(Witness reviews document.)

A. I mean, that's what it says, but I would have to read this entire thing again because it refers in the beginning of that to a licensee, and I don't know what context that's in.

Q. Okay. But the fact is that you did lose the Opposition Proceeding; right?

A. We did, yes.

Q. And one of the major rationales in the

Decision against your petition was that the mark was already in use and that there was no confusion in the marketplace between your mark and their mark.

A. That's true.

Q. Thank you.

Now, after you lost the Opposition Proceeding--I say "you"--after Bridgestone Japan and Bridgestone Licensing Services, they initially appealed but then they withdrew the appeal; correct?

A. Correct.

Q. I think that the narrative in this case of Bridgestone Licensing Services is to the effect that withdrawal was actually a responsible act on the Bridgestone Parties' part because when you examine the situation, you realized that you didn't really have a chance to win on appeal; is that correct?

A. That's correct, yes.

Q. Okay. And we talked, though, about the strategy you had pursued in the Opposition Proceeding, which was to rely primarily on the fact that you had a well-known mark and not to submit any evidence on a marketing study; correct?

A. Yes.

Q. All right. So, your conclusion that basically without the marketing study evidence that you just were going to lose?

A. I was not part of that. I--

Q. Okay.

A. I don't know if--I don't know if the lack of a marketing study was it.

Q. Um-hmm.

A. I think just the general law reading the Decision, and the general law field from the case was that we had a low likelihood of success on the appeal.

Q. And the low likelihood of success may well have had something to do with what your counsel said in Paragraph 14 about the fact that the RIVERSTONE mark was already in use; is that right?

A. That's--yeah, I mean based on the Decision in the opposition, yes.

Q. Yes. Okay, thank you.

Now, let's turn to the Supreme Court Judgment itself, which is the object of your Request for Arbitration in this case. That's Respondent's

Exhibit 34.

A. Okay.

Q. You've read this Decision; right?

A. I have.

Q. When did you first read it?

A. Hmm, probably on May 28th, 2014.

Q. I see.

But you said you didn't read Spanish, right, so you would have had to wait for an English translation?

A. Well, that's true. There was kind of other--

(Overlapping speakers.)

A. Yes, that's true, yes. Then it would have been a couple of days after--

Q. A couple of days after you got it.

A. Yes.

Q. Okay. So, in your Third Statement, in Paragraph 15, you said that you were "shocked" when you learned of the Panamanian Supreme Court Judgment of 28 May 2014; right?

A. Yes.

Q. And we've established that you attended law

school in a common-law jurisdiction; correct?

A. Yes.

Q. And you do know that Panama is a civil-law country; correct?

A. Yes.

Q. And do you have any expertise in Panamanian Law?

A. I do not.

Q. So, following the issuance of the Supreme Court Judgment, you expressed your dismay at a Special 301 hearing at the U.S. Trade Representative's Office; correct?

A. I did.

Q. So, let's turn to Claimants' Exhibit 32 in your materials.

A. Okay.

Q. Do you recognize this as your hearing statement at that USTR--

A. I do.

Q. --Special 301 Subcommittee Meeting?

A. Yes.

Q. Okay.

So, on Page 3, the first sentence at the top of the page says: "More importantly, the Supreme Court's Decision severely penalized Bridgestone simply for utilizing an ordinary opposition mechanism to protect its intellectual property as provided for under Panamanian Law."

Is that correct?

A. That's correct.

Q. Okay. So let's look a little further down at the Decision on Page 17.

A. I'm sorry, what was the exhibit number again?

Q. It's--R-34 is the exhibit number.

A. Okay.

Q. So, it's on Page 16, excuse me, of 26.

At the bottom of the page, do you see a paragraph that begins "It is not"?

A. I do.

Q. So, it says: "It is not this Chamber's intention to say that initiating a legal action to claim a right may be interpreted as a synonym for the damages that may be caused to a plaintiff--thus creating a coercion element for anyone who feels

entitled to a claim and to use the means provided by the law to do so."

Is that correct?

A. That's what it says.

Q. Okay. Now, do you remember reading that sentence?

A. I do.

Q. And that sentence really says that the mere filing of an Opposition Proceeding cannot lead to damages, does it not?

A. That's what it says on its face, yes.

Q. Okay. And did you consider the relevance of that sentence when you made your USTR statement?

A. Yeah, I did consider the entire--the entire decision when I made my USTR statement. The relevance of that sentence--I mean, it's within the Decision, so yes, but I think I would go back to some of the other language that said that there is no legal basis to file the opposition and that we did so negligently and recklessly, I think is very telling from the Decision.

Q. And you proceeded or someone on behalf of Bridgestone proceeded to write Senators and

Congressmen with the same message; is that right?

A. I believe so.

Q. Um-hmm. Would that have been organized by your counsel Akin Gump or your own internal--

A. I don't recall.

Q. --public affairs people?

A. It could have been either, I guess.

Q. Okay. And we discussed before too about the fact that each jurisdiction has the authority to make its own decisions based on its own assessment of the facts of each trademark case; right?

A. Yes.

Q. Okay. The statements that you made at that hearing at the USTR made their way into USTR Annual Reports; right?

A. Yes. Well--

Q. And they made their way into letters from U.S. Senators and Congressmen to the USTR; right? If you like on that, we can look at Claimants' Exhibit 35.

A. Yes.

Q. Have you located that?

A. I have.

Q. Okay. So, the first document is a letter from the two Senators from Ohio, Sherrod Brown and Ron Portman, to Ambassador Froman, the United States Trade Representative?

A. Correct.

Q. Okay. And the second paragraph there reads, begins: "As you know, the Panama Supreme Court ordered Bridgestone to pay a $5.4 million fine for legitimately challenging a trademark application."

A. That's true.

Q. But it wasn't a fine, was it?

A. No, that was a damage award.

Q. "It was a damage award."

But somehow the Senators got the impression that it was a fine.

A. Apparently they did.

Q. And that might have been at the instance of Bridgestone.

A. It may be them misunderstanding or misinterpreting whatever we sent to them or whatever the conversations we had with them.

Q. Okay.

A. I don't know what.

Q. All right. So, is that the way politics works here in Washington?

A. I will plead the fifth on that.

Q. And the second document in this exhibit, you see that, is this a letter from Tim Ryan and Darin Lahood?

A. Yes.

Q. And two other members of Congress to Mr. Froman. And the first sentence says: "We are writing to express concern that a Panamanian Supreme Court Decision resulting in a substantial penalty against Bridgestone Americas simply for utilizing legal mechanisms provided under Panamanian Law to protect its 'intellectual property' rights in Panama."

Is that correct?

A. That's what it says.

Q. Okay. And I guess this message is getting a little bit distorted as it moves along; right?

A. Apparently, yes. Apparently, it has been probably mischaracterized is a better way to put it.

Q. It's not a tort judgment for money damages.

A. Yes.

Q. It's now a substantial penalty. And it was imposed on Bridgestone Americas, which was not a party to the proceeding?

A. Yeah, that could very well be a misunderstanding by Congressmen who didn't quite have all the facts.

Q. Okay. But this was part of a campaign that "Bridgestone Inc.," shall we call it, orchestrated here in Washington; right?

A. Yes.

Q. Thank you.

So, let's talk a little bit about the policy of going after "-STONE" suffix marks.

This policy was adopted around 2005; right?

A. Yes.

Q. And you've described this as an "aggressive" policy; right?

A. Yes.

Q. You've also said that you have never heard of a proceeding like this one, where someone was held

reckless and liable for merely bringing trademark Opposition Proceedings; right?

A. That's correct.

Q. And you mentioned earlier that you're a member of the Ohio bar; right?

A. Yes.

Q. And your specialty is intellectual property?

A. Yes.

Q. And you focus on trademarks in the U.S.?

A. Yes.

Q. And in the U.S., one of the main treatises on trademarks is McCarthy on Trademarks and Unfair Competition; right?

A. Yes.

Q. And the Claimants have cited this as an authority. I think it's Claimants' Legal Authority 58, and there are some more excerpts at 143.

Are you familiar with this treatise?

A. I know generally of the McCarthy treatise, yes, but I haven't read these specific sections.

Q. Okay. And in McCarthy it talks about unfair competition and gives some examples; right?

A. I guess, again...

Q. All right. So, why don't we take a look at Respondent's Legal Authority 224.

A. Okay.

Q. So, this is Chapter 1 from the McCarthy treatise; is that right?

A. Oh, I'm sorry. I'm on the wrong one. 224?

Q. Yeah. Respondent RLA-224.

A. Yes.

Q. Up at the top it says one McCarthy on trademarks and unfair competition, Section 1.1.

A. Yes.

Q. Okay. Can you turn to Section 1:10 on Page 24 of this document. And do you see a Section 1:10, "Examples of unfair competition"?

A. Yes.

Q. Okay. And you see an entry that says "filing a groundless lawsuit," maybe about 10 or 12 bullets down the list there?

A. I do.

Q. So, filing a groundless lawsuit would be an example of unfair competition; right?

A. Yes.

Q. And Footnote 14, let's look--I think that's over on the next page--Footnote 14 is the backup support for the statement that filing a groundless lawsuit can be an example of unfair competition; right?

A. Yes.

Q. And there is a case cited there, Microsoft Corporation versus Action Software, 136 F. Supp. 2d 735, et cetera, with the citation, Northern District of Ohio, decision in 2001. It says: "Ohio was one of the first states to recognize that lawsuits implemented with the design to gain an unfair advantage over a competing business are a basis for a common lawsuit for unfair competition."

Did I read that correctly?

A. You did.

Q. Okay. You said that you were shocked by the decision in Panama, but this is not the first time that Bridgestone entities have been held responsible for unfair practices; right?

A. That's true.

Q. Okay. Mr. Kingsbury, the Supreme Court Judgment was rendered on 28 May 2014; correct?

A. Yes.

Q. And, in its 2014 Decision, the Panamanian Supreme Court held Bridgestone Japan and Bridgestone Licensing Services jointly and severally liable to Muresa and Tire Group for $5 million in compensatory damages and $431,000 in attorneys' fees; correct?

A. Yes.

Q. Okay. And as we discussed a minute ago, in some of this looser talk here in Washington, and at some point it may have even been described as an award of punitive damages; right? I think if--well, we went over some of those examples, but it wasn't punitive damages, was it?

A. No, not according to the Decision.

Q. Okay. So, when the Decision came down, the various Bridgestone entities; Bridgestone in Tokyo, Bridgestone Americas, Bridgestone Licensing Services, all started looking for ways to overturn the Supreme Court Judgment; correct?

A. That's correct.

Q. Okay. And in February of 2015, while various appeals of that Supreme Court Judgment were pending in Panama, you were also considering claims under the Treaty with Panama; correct?

A. We--I don't know the dates off the top of my head, but yes, we were considering the current investor-State action at some point.

Q. Okay. I mean, maybe if we go back and look at your statement to USTR, which is Claimants' Exhibit 32.

Again, is this your statement to the USTR hearing?

A. It is.

Q. And on Page 3, do you see a paragraph halfway down the page that begins "Third"?

A. I do.

Q. And the last sentence of that paragraph reads: "Thus, the Supreme Court failed to respect due process, as required under Article 15.11 of the TPA and Articles 41(2), 41(3), and 62(4) of the TRIPS Agreement." Correct?

A. That's what it says, yes.

Q. Okay. So, the TPA refers to the Trade Promotion Agreement between the United States and Panama which is the basis for your claim here today; right?

A. Yes.

Q. Okay. So, in February of 2015, you already had this in mind?

A. Yes.

Q. Okay. So, not only did you have it in mind, you had actually kind of outlined some of the substantive claims that you might be able to make.

Oh, I'm sorry, my colleague is saying you nodded your head, but I think we need an actual answer.

A. I didn't know if it was a question or not.

Q. My apologies.

A. It's just kind of a statement.

Q. The quote I just read you, you referred to Article 15.1 of the TPA, so?

A. I did, yes.

Q. So, does that mean that you started to identify claims that you might bring?

A. Yes.

Q. Thank you.

And if you were analyzing substantive claims, then you must have known about the jurisdictional requirements at that point as well; no?

A. Yes.

Q. And the situation progressed to such an extent that on 30 September 2015, BSLS and BSAM submitted a Notice of Intent to submit a claim to arbitration; correct?

A. We did.

Q. And, in that Notice of Arbitration, you claimed $10 million in damages; correct?

A. That was an initial assessment.

Q. Pardon?

A. That was our initial assessment, yes.

Q. Okay. And we can find that in the Notice of Arbitration I just referred to at Page 8 in Paragraph 22.

So, during the Hearing on Expedited Objections, the last time we had the pleasure of talking to each other, you testified that you and

other Bridgestone executives understood that, if BSJ, "Bridgestone Japan," paid the Judgment that Bridgestone Licensing Services wouldn't have a claim under the TPA; correct?

A. Yes, that's what I testified to, correct.

Q. At one point, Bridgestone Japan contemplated paying expenses evenly with Bridgestone Licensing Services--right?--50:50.

A. For the--

Q. To pay the 5,431,000.

A. I don't know if Bridgestone--yeah. I guess we probably--well, can we go to the 2016 Agreement?

Q. Um, sure.

A. Do we have that? Do you have that in your exhibits?

Q. You said that's defined in the Corporate Resolution; right?

A. Right.

Q. Which is exhibit number--

A. I mean, just to answer your question, we looked at all the different possibilities; right?

Q. Okay. But we've heard today that there was a

2010 Agreement which provided for a 50:50 split of the costs?

A. For--

Q. So, if that was the starting point when you were confronted with this liability, that was the initial working assumption of people within the Bridgestone organization; no?

A. It might have been, but I don't know that the 2010 Agreement necessarily applied to the civil case.

Q. Well, maybe we should look at some documents, then.

A. Sure.

Q. So...

(Pause.)

Q. I think it should be Respondent's 206.

Let me come at this another way. I think the last time we talked together, we talked about a $31 million loan that Bridgestone Japan had made to Bridgestone Licensing Services quite a few years ago.

A. Correct.

Q. And, as I recall, at that moment in time--we're talking here about 2016--there was an

outstanding balance on that loan of about 2.3 or maybe 2.1 million?

A. That sounds about right.

Q. Does that sound right? Okay.

Was there any consideration within the Bridgestone family of merely rolling that loan over?

A. No. I think we viewed it as two completely separate transactions.

Q. All right. Well, there I think we are going to have to look at some documents, so if you'll give me a second, I think we'll find it.

(Pause.)

Q. Let's go to--

A. 203?

Q. 203.

A. Yeah, I just find it, you're right. The last page.

Q. Yes.

A. Third paragraph down in the last e-mail.

Q. Yes.

A. At present BSLS has an outstanding debt of $2.1 million from BSJ, but hypothetically, if they

repaid this amount to BSJ in November, they anticipate long-term funding. So yes, I guess there was within the Bridgestone group of families.

Q. So, one option for getting to roughly 50 percent of the 5.4 would have been to just roll over that loan?

A. Yes.

Q. But, in the event that was discarded as an option; is that correct?

A. It was.

Q. Okay. So, I think in that same exhibit, Exhibit 2003, if we look at the second e-mail--and this is an e-mail from Mr. Hayato Shiraishi.

Who is he?

A. I don't know who he is.

Q. Okay.

A. I don't know who he is, but the second e-mail starting from the--starting from the first page; right?

Q. Yes.

So, the second e-mail which is just about 2 inches down the page, Shiraishi Hayato, I believe

he's a person in Nashville; no?

A. It says BSA Shiraishi, so yes, it would appear he has--

Q. And is he one of these Bridgestone finance people who's kind of on loan to Nashville? I think there are Bridgestone Japan people who rotate through Nashville, which we discussed the last time; right?

A. He most likely is, but I don't know him.

Q. I see. Okay.

And this is an e-mail to Tetsuo Kenmochi; right?

A. Yes, it is.

Q. Copied to some other people, regarding BSLS funding. And it starts out: "1631 Kenmochi."

I guess there is some kind of a code system at Bridgestone; right?

A. Everybody has a number.

Q. Everyone has a number.

A. Yes.

Q. Right. Okay. So we will come back to these numbers in the future.

So, it says: "Regarding the matter of the

BSAM loan I consulted you about below, it has been decided that it will be BSLS's responsibility alone to pay a total of approximately $8 million in Panama related damage compensation and international arbitration expenses which had initially been planned for an even split between BSJ and BSLS." Is that correct?

A. That's what it says, yes.

Q. Okay. So, 8 million would cover the 5.431 plus maybe counsel fees for the arbitration fees; right?

A. Attorney's fee, yes.

Therefore, the funding need--

Q. The funding need has increased to $6 million, so I guess initially there was talk that maybe the funding need was 2.7 or something like that to pay 50 percent of the damage award; correct?

A. Yes, apparently.

Q. Yes.

A. I guess.

Q. Okay. And then it says at the end of that paragraph: "Depending on developments on the

Plaintiff's side in Panama, it is possible that the timing could change for the payment of damage compensation." That refers to the fact that the prevailing Party in Panama just hadn't requested payment yet?

A. "Pending on developments on the Plaintiff's side in Panama, it is possible that the timing could change for the payment for damage compensation."

Yeah, I think that in order to get payment, they had to submit documents to the Court and go through an official process.

Q. Okay. So, then in the third paragraph of that same message, it says: "With regard to the payment of dividends, it is expected that there will be no dividend for Fiscal Year 2016 due to negative profit after tax deduction, because of the responsibility to pay damage compensation." Correct?

A. Yes, that's what it says.

Q. Right. So, is there a general rule about when BSLS pays a dividend to Bridgestone Corporation?

A. I don't know if there's a general rule. I know typically they do, but there are occasions where

they don't. There's been times when they have paid more of the principal off on the loan and then they will forego a dividend payment, but I don't know what the formula is that they would operate under.

Q. Right. Okay. It's kind of too bad that your colleagues aren't here because, you know, you brought this whole case for years and years and you're the only witness tendered--

A. Tell me about it.

Q. --by the Claimants.

You are an IP person not a finance person; right?

A. Yes.

Q. And we went through that the last time, but it seems like a bit of a hole in your case, so we will have to do the best we can.

So, I think as we discussed last time, the Bridgestone Japan Treasury is kind of like the mothership; right? The orchestrater of things?

A. They are the Treasury Department for the parent company, yes.

Q. But they also send money where it's needed

around the--around the organization; no?

A. I don't--I mean, if that's what the typical parent-subsidiary relationship is, then that's what they would do, yes, but...

(Pause.)

MR. DEBEVOISE: Where's Gaela's exhibit for the cash flow for Bridgestone? Do you remember the number of that? The cash levels of Bridgestone, what number is that?

BY MR. DEBEVOISE:

Q. Well, suffice it to say, would it be fair to say that Bridgestone Licensing Services is kept on a short leash financially? They're not allowed to accumulate millions and millions of dollars sitting around; right?

A. They have a limited income stream; right? And then they have limited expenses, and then they have the dividend payments, so it doesn't fluctuate a lot where they're going to have the ability to generate this huge surplus of cash. We looked at the dividend statement in the MTP that kind of had that laid out.

Q. Okay.

A. I don't know if we want to go back to that--

Q. Sure. Where is the MTP here? Let's get that.

A. That was in our direct. I don't know if you have a copy in your--

Q. You have a copy of that in your direct.

A. Yes.

Q. Let's go back and look at that. Okay. So, this is Respondent's Exhibit 2006.

And remind us again what "BSLS 16MTP" stands for?

A. That would be the 2016 "Mid-Term Plan," as we call it, and that's--Mid-Term Plan, we don't necessarily do them anymore, but there used to be a five-year rolling Business Plan for each of the business units.

Q. Right. Okay.

And on Page 2 at the bottom, do you see a reference to "dividends"?

A. I do.

Q. And it says: "No dividend due to Net Loss in

FY 2016."

A. Correct.

Q. And FY 2016 would have covered the payment of the Award in this?

A. It would have, yes.

Q. Okay. And then for FY 2017, it says: "Even though the group recorded a net profit, there was no dividend due to the exclusion from the group company dividend implementation guidelines because there were net borrowings that exceeded Working Capital."

So, when I asked you earlier about guidelines, in fact, there are guidelines?

A. Apparently there are guidelines, yes.

Q. Okay. Very good.

A. I have never seen those guidelines.

Q. Okay. Very good.

MR. DEBEVOISE: R-206, yes.

(Comments off microphone.)

MR. DEBEVOISE: Yes, and that was in the binder of the Witness.

BY MR. DEBEVOISE:

Q. Okay. Now, you were also pointed to some

bank statements in your direct testimony which you said demonstrated the payment of interest--

A. Yes.

Q. --on the BSAM loan.

A. Yes.

Q. Was that because Bridgestone just made a mistake in their Reply and they put in the wrong evidence of interest payments?

A. I don't understand.

Q. There were some exhibits included with the Reply which actually showed payments going from BSAM to BSLS.

A. Yes, I think those were a mistake, that's correct.

Q. "Those were a mistake"?

A. Those payments from BSAM to BSLS were the royalty payments from the Licensing of the trademarks.

Q. I see.

A. Yes.

Q. Okay. And those were the full royalty?

A. They would have been whatever--yes. We didn't discount it, if that's what you're getting at.

We didn't discount the royalty based on some other payment due, so it would have been the full royalty.

Q. Okay. All right.

And then if we go back to Respondent's Exhibit 2003 again, in the second e-mail message, in the second paragraph, it says: "At present, together with José and Tim from the BSAM team, you have incorporated execution of a BSAM loan in July (one-year loan rolling, five years) in the 16RB MTP, and we are rapidly proceeding with preparations for execution (draft of a loan agreement, establishment of interest condition, et cetera)." Correct?

A. Yes.

Q. Okay. So, already in 2016, you were contemplating that this loan was going to be rolled for at least five years?

A. Yes.

Q. And what was the basis for that?

A. The conclusion of this arbitration.

Q. Um-hmm.

And I believe you testified in your direct testimony that this loan would be repaid in all

circumstances?

A. Yes.

Q. And what is the basis for that statement?

A. The 2016 MTP.

Q. I see.

And does that statement you just made assume that Bridgestone Licensing Services will recover at least $6 million in this arbitration?

A. No.

Q. No?

A. No. No, it doesn't.

Did you want to look at the numbers again?

Q. All right.

Well, I think what we would like to do is go back and look at the Resolution.

A. Okay.

Q. So, I think that's Respondent's 95.

A. Tab 10?

Q. Tab 10 in your book, yes.

And at the bottom of the page there's a "WHEREAS" clause; right?

A. Yes.

Q. And it has two Subclauses, (i) and (ii). The first one deals with: "Despite the 2010 Agreement," that's the 50:50 agreement, "the corporation," referring here to Bridgestone Licensing Services "will pay and bear the entire financial burden of such payment."

But then there's a (ii), and it says: "The Corporation will be entitled to initiate, and keep the entire financial benefit of any recovery from any investor State, arbitration, or any other acts against the Republic of Panama."

What if there are no benefits?

A. Then we would--I mean, if you go back and look at the MTP, you can see from now until 2020, we are building up a cash balance in that--in the BSLS account to pay off the $6 million.

Q. Right. But wouldn't it be more accurate to say that it would be subject to the normal system that you've had in place at BSLS for a long time, which is that you have some notion of an acceptable level of financial health for BSLS; and if it goes below that level, then some provision is made and money magically

appears, whether it comes from BSAM or from Tokyo?

A. No. Did you look at the--I mean, I'm not sure I follow what you're asking.

Q. So, maybe I can show you the first of your sample report, Figure 4--

SECRETARY TORRES: Mr. Debevoise, the microphone.

BY MR. DEBEVOISE:

Q. This is Slide 179 in the presentation that was made earlier today.

And do you see outstanding cash levels for BSLS there through the years?

A. We have 2012, '13, '14, '15, '16. Okay. Then you have the loan amount.

Q. Right.

A. Right? And then we pay off the loan--no, then we have the loan amount carried forward--oh, this is just one year. Okay.

Q. So, there seems to be some notion that Bridgestone Licensing sort of has to have a certain amount of money on hand at all times; right?

A. Based on this?

Q. Yeah. This is the history going back to 2012 running through 2017.

A. Right.

Q. And, you know, it never--

A. Cash balance--

(Overlapping speakers.)

Q. It never gets--2.9 million is the lowest it ever gets.

A. That's what that says, but does that mean that there's a policy that they have to have so much money--I don't know the answer to that.

Q. I see. Okay.

A. If you look at the Dividend Plan on Page 5 of the MTP, you can see that--I mean, there is, at least from 2016 forward, a cash balance, but it seems that they plan on building up the cash in the account in preparation to pay the loan off after this arbitration.

Q. I see. Okay.

Let's look at a few more e-mails, and then we're almost finished.

We were looking at R-203; right? And on

Page 3, there's a paragraph about two-thirds of the way down the page that says: "When we consulted with José, the BSAM Treasurer, regarding this matter, as to the possibility of borrowing from BSAM, we received the following advice: It should be possible from the BSAM side to loan under conditions of U.S. dollars denomination/one-year loan roll/external procurement of dollar-denominated funds (for) the loans capital/lending Interest Rate around 1 percent but at the same time, you would need to confirm with the parent company BSJ."

A. Yes.

Q. Is that correct?

A. Yes.

Q. You're not doing anything without BSJ's involvement and consent; correct?

A. That's what that would appear to say, yes.

Q. Well, is that the realty?

A. In day-to-day operations, I mean, I'm sure there's--

Q. Was this a day-today operation, a $6 million loan?

A. Well, that's what I'm saying. There's exceptional circumstances where you do need to get the parents company's involvement, but there are also day-to-day operations where--so when you say nothing gets done without BSJ, are you referring to this specific issue, or in general? I mean--

Q. Well, this is a paragraph in the body of an e-mail discussing the possibility of this $6 million loan, is it not?

A. It is.

Q. So, it's fair to say that this loan wasn't going to happen without BSJ's approval; correct?

A. That's true.

Q. Thank you.

Now, you said you didn't know who some of these people are. Do you know who Mr. Hosokawa is?

A. I do not know--I'm looking for his name to see if maybe the pronunciation is--

Q. All right. Let's move over to R-210, then.

Do you see that now?

A. Yes, I do, yes.

Q. We have an e-mail from Mr. Tetsuji Hosokawa

to Mr. Yukari Sato.

Do you know who Mr. Hosokawa is?

A. I do not know who Mr.--

Q. Do you know who Mr. Sato is?

A. I don't know who Mr.--no, I don't know either of those two.

I know Mr. Kitamura on the cc line.

Q. Okay. But Mr. Sato appears to be 9922; right?

A. 9922. I'm sorry, where--okay. 9922 Sato.

Q. And Mr. Hosokawa seems to be 1220C; right?

A. That's--yes. 1220C.

Q. Do you have any ideas or functions are associated with 1220C?

A. I don't. It's secret code.

Q. A secret code.

A. I don't know what--all I know--all I know is that the less (sic) numbers, the higher up you are in the organization.

Q. Okay.

A. The number itself doesn't matter. So the fact that it's 9922 versus 1220, isn't important.

It's a four-digit number, and they're all treated basically within the same class or...

Q. Okay.

So, Mr. Sato is a BSJ person; right?

A. Oh, let me look at his--well, he's got a number, so I would assume, so.

Again, I would assume that he is, but I was looking to see if his e-mail address--

Q. And Mr. Kitamura, who we've talked about before, is copied on the e-mail, isn't he?

A. He is.

Q. Yeah. And he's in Tokyo. He's a big trademark person; right?

A. He was.

Q. Yeah, okay.

Well, he was in 2016 when this e-mail was sent.

A. Yes.

Q. May the 10th. Okay.

So, on Page 2 of R-210, in the third paragraph--

A. Second--the first full e-mail?

Q. It says--this is in the new e-mail that begins on that page.

A. Okay.

Q. In the third paragraph it says: "In light of the situation noted above, in order to avoid a shortfall in BSLS finances."

A. Yes.

Q. What do you think that "shortfall" refers to? Isn't that what we were talking about a moment ago, about how the cash doesn't go too low? They keep an eye on it from Tokyo?

A. I'm sure they do. I don't know what that means, though. Would it be, you know, if we paid $6 million, it would go, you know, below--I mean, we don't carry $6 million in the account; right?

Q. Yeah.

And it goes on to say: "We are considering execution of a new group loan: BSAM loan."

A. Yes.

Q. So, the idea of this loan is not spontaneous from the head of the BSAM Zeus, is it? It's coming from Tokyo.

A. I don't know. When was that? What was the date of that other e-mail?

Q. We are still in the same R-210, on the second page.

A. Yeah. No, I was just looking at the dates and see when again, there's two separate e-mail threads here, and I don't know if they're intertwined or what the date ranges are. So this one is--

Q. Well, what is the date of this e-mail?

A. This one is May 9th.

Q. May 9, 2016.

A. Right?

And so the original one from Hayato Shiraishi was May 6th; right? So there were multiple e-mail strings going on at the same time.

Q. Yeah, because the people in Tokyo were trying to figure out how they were going to get money to BSLS so that BSLS could bring the arbitration; right?

A. So, it could pay the Judgment and--

Q. Pay the Judgment--

A. --yes, and bring the arbitration.

Q. --and then bring the arbitration.

A. Yes.

Q. Okay.

And it says: "We are considering the execution of a new group loan, BSAM loan." So who is the "we"? That would be the Treasury function in Tokyo; no?

A. I don't know.

If you look at the first e-mail in--or the last page of R-203, dated May 6th, it says they already had consulted with José, the BSAM Treasurer, so it sounds like it was a collective "we."

Q. Well--

A. And this was three days later.

Q. Let's go back to the one we were talking about, if you don't mind--

A. Sure.

Q. --which is R-210, and José appears in the very same paragraph we were just looking at, so--and it just says there's an execution of a new group loan.

A. Yes.

Q. Yeah, okay. And--

A. But you said--

Q. --it goes on to say: "It should be noted that the execution of a BSAM loan and not a parent-subsidiary loan from BSJ has been confirmed with 1613."

So, that's some big shot; right, somewhere?

A. It's a four-digit number, so they're all the--they're all upper level.

Q. Okay. All right.

All right. So, then--all right.

Let's look at now a document--I think it's the last document in your binder, VP-43.

A. Okay.

Q. This is an e-mail from Rintaro Akiyama to you and to Lynn Hsu; is that right?

A. That's true.

Q. And it's dated June 20, 2017; right?

A. It is.

Q. And BSJ, Bridgestone Corporation in Tokyo, through Rintaro Akiyama is telling you and Lynn Shu that he is preparing to re-enter the Loan Agreement between BSAM and BSLS; right?

A. That's true.

Q. He's getting ready to roll it over.
A. Correct.
Q. Okay. And this is the same $6 million Loan Agreement that BSAM signed with BSLS--
A. Correct.
Q. --to pay the Supreme Court Judgment.
And then Mr. Akiyama says: "We," again, referring to Tokyo, right, "plan to renew this Loan Agreement until 2020." Is that right?
A. I don't know who "we"--
Q. Do you see the last--
A. Yes, I understand what you're saying, but you interjected "we" being Tokyo and I don't--I mean, yes, they're located in Tokyo, but I don't know--
Q. Well, who is the sender of the e-mail?
A. It's Mr. Akiyama.
Q. And what does it say to identify him underneath his signature?
A. Yeah. So he says Bridgestone Corporation. But he also does work on behalf of Bridgestone Licensing Services; right?
So, just like Lynn Hsu is a member of

Bridgestone Americas, she does work on behalf of Bridgestone Licensing Services.

Q. So as we discovered before, there are a lot of dual-hatted people--

A. There are.

Q. --in the Bridgestone organization; right?

A. Correct.

Q. Yeah. And this particular one happens to work in Tokyo; right?

A. He does.

Q. Okay. All right.

So, we've had some conversation today about Claimants' Exhibit 318. Is that in your binder?

That's in your smaller binder, I guess, that your counsel gave you. That's the 50:50 agreement from 2010?

A. Okay. That's Tab 11?

Q. Yeah, tab 11. Claimants' Exhibit 318.

A. Yes.

Q. Okay. And Paragraph 3 of that agreement says: "BSJ," Bridgestone Corporation Japan; right?

A. Yes.

Q. --"will pay on behalf of itself and BSLS, the entire fees due under the invoices from law firms, investigation companies, and other entities which have been retained for taking the trademark actions, and then BSJ will charge 50 percent of such fees to BSLS."

Is that right?

A. Yes, that's what it says.

Q. Okay. And 4 says: "For charging above, BSJ," again, Bridgestone Corporation in Tokyo, "will issue its invoice to BSLS either quarterly or monthly, at BSJ's option, and in Japanese yen or any other currency of its choice." Correct?

A. Yes.

Q. So the Bridgestone Corporation treasury is reserving full optionality to itself; is that correct?

A. Well, this is signed by two members--well, signed by--

Q. Well, I didn't ask you who signed it. We can get to that in a minute.

A. But you're saying Treasury; right?

Q. Pardon?

A. You said Treasury. I don't know the Treasury

Department is a part of this Decision.

Q. Well, I'm just asking you based on the reading of Point 4: "BSJ will issue its invoice to BSLS."

A. Right.

Q. And then it has a number of options, "either quarterly or monthly, at BSJ's option, and in Japanese yen or any other currency of its choice." Correct?

A. That's what it says, yes.

Q. Right. So, that means there is optionality.

A. Yes, monthly or quarterly.

Q. Monthly or quarterly?

A. Or yen or--

Q. Yen or some other currency.

A. Right.

Q. Okay. And is the trademark department going to be making decisions whether to invoice in yen or some other currency?

A. That, I don't know. Are they getting directions from the--

Q. Is that likely?

A. What's that?

Q. Is that likely that the trademark department is going to be--

A. They may ask somebody in accounting. Is it Treasury? I don't know. Is it accounts payable? Is it--I don't know who--again, it's so broad, I don't know who they're conversing with to make this Decision.

Q. What does your common--

A. But you're making a definite fact that BSA Treasury said, and I don't know--

Q. Doesn't your common sense tell you that this would be a Treasury call?

A. It would probably be somebody in finance; right? I mean, probably--again, as we saw in some of the other ones, it could depend on exchange rates, it could depend on monthly, quarterly--

Q. But it would be someone in Tokyo; right? Because it's BSJ's option.

A. Yes.

Q. Okay. Now, Paragraph 2 says: "The above trademark actions include but are not limited to." Is that correct?

A. That's what it says, yes.

Q. Right.

But I think you testified that this only applied narrowly to the items that are listed there; right?

A. It says the trademark--well, I'd have to look at what my testimony was, but--if you want to go back to it, I'm happy to--

Q. But--

A. Because there's other--there's other potential actions that could happen.

Q. Right. And that's what "but not limited to" means; right?

A. Yes.

Q. Yes, okay.

And that could include actions like the tort case, could it not?

A. Let's think about that. Let's talk this through.

So, the court case was a damage--it wasn't really a trademark action; right? It was a civil case brought for damages. It was indirectly related to a

trademark action, but I don't know that it would necessarily be considered a trademark action as defined here.

Q. I see. So, when you went and told USTR that the sky was falling on trademarks, it was actually completely incorrect.

A. No, the Supreme Court Decision--

Q. Because this was a damages action. This was not a trademark action; right?

A. The Supreme Court issued a trademark decision; right? Are you talking about the trademark--

Q. No.

A. Are you talking about this action or the Supreme Court Decision?

Q. No, I asked you whether the damage, the tort claim that was made against Bridgestone Licensing Services and Bridgestone Corporation Japan was a type of action that could be included in the "are not limited to," and you--

A. Could it be? I don't know. Is the Supreme Court Judgment a trademark action? It was the result

of a trademark action; right?

Q. But I think you testified a minute ago that it was a tort case. It was not a trademark action.

A. It was a tort case involving a trademark action. How's that? Right?

Q. I think we--nobody disagrees about that.

A. All right.

Q. All right.

PRESIDENT PHILLIPS: We can't sit beyond 6:00. Choose your moment.

BY MR. DEBEVOISE:

Q. Let's just talk for one minute about the chronology of this 2010 Agreement.

A. Okay.

Q. This Agreement was entered into on January 1, 2010; correct?

A. Yes.

Q. And that was prior to the Decision in the tort case; correct?

A. That's correct.

Q. Okay. So, during the life of the tort case, there was, in fact, an agreement that stated that the

costs of all these actions should be split 50:50 by BSJ and BSLS.

A. Correct.

Q. So, I think you said before you were in charge of IP litigation; correct?

A. Yes.

Q. And you're in charge of running this case, this arbitration, at BSAM and BSLS; right?

A. Yes.

Q. And did you review their Reply before it was filed?

A. I probably skimmed it and read it, yes.

Q. Okay. And if we look at Page--Paragraph 83 of the Reply?

A. Where are we at?

Q. I think that's in your binder.

Have you located that?

A. I have.

Q. About halfway down the paragraph there's a sentence that begins in the far-right margin: "Whether this 'insurance policy' would cover this joints liability depends on the language of the

insurance policy itself (here, the TPA) but the TPA is silent on this matter. In the absence of any guidance from the TPA, the Tribunal may look to any agreement made between the Parties as to how they would apportion loss. There are no documents that demonstrate any formal agreement between BSLS and BSJ, but the Loan Agreement between BSLS and BSAM and the evidence of Mr. Kingsbury as to his role in dealing with litigation matters for the Americas shows the approach taken by Bridgestone group--BSAM and BSJ are generally responsible for matters in the Americas, not BSJ."

Is that what the Reply says?

A. Yes, that's true.

Q. Right, okay.

But this business about the loan being arranged this way because BSAM and BSJ are generally responsible for matters in the Americas turns out to be a fiction, doesn't it? That's just kind of a make-weight, it's a convenient argument that...

A. The loan itself? Is that what you're talking about, the loan from BSA to BSLS?

Q. No. I'm referring to the point about no formal agreement.

A. Oh. Well, it says but this business about the loan being arranged this way.

Q. All right. Well, let's just focus on the sentence that says: "There are no documents that demonstrate any formal agreement between BSLS and BSJ."

But, in fact, we know that there was such a document; correct?

A. I do now. I didn't then.

Q. Okay.

And did you play any role in the document production process that we undertook in this case?

A. Yes, we produced the document.

Q. Right.

And when were documents produced to us? It was long before this Reply; no?

A. I would assume so.

Q. Almost a year ago, in fact; right?

A. Okay.

Q. Okay. Thank you.

MR. DEBEVOISE: Okay. I have no further questions at this point.

(Comments off microphone.)

MS. HYMAN: Sir, yes, just two quick questions.

PRESIDENT PHILLIPS: Very well.

REDIRECT EXAMINATION

BY MS. HYMAN:

Q. Firstly, when Mr. Debevoise earlier was talking to you about the Foley letter, I think he asked you whether the objective of the letter was to stop the competition from selling their products.

A. Yes.

Q. Did you mean that the objective was to put them out of the tire business?

A. No. It was not to put them out of the tire business. It was to prevent them from infringing our trademarks.

Q. And then just the document--the two--the letters from Congress and the Senators--

A. Yes.

Q. --did you write those letters?

A. I did not write those letters.

Q. Okay. Thank you. That's all.

PRESIDENT PHILLIPS: Well, thank you. That's extremely good timing. You are now free to discuss the case as you wish.

THE WITNESS: Thank you.

PRESIDENT PHILLIPS: And we shall adjourn until 9:00 tomorrow morning.

THE WITNESS: Excellent. Thank you.

(Witness steps down.)

(Whereupon, at 6:02 p.m., the Hearing was adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

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

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN