

**UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES**

**Bridgestone Licensing Services, Inc. and
Bridgestone Americas, Inc. v. Republic of Panama
(Claimants/Investors)**

v.

**Republic of Panama
(Respondent/Party)**

ICSID Case No. ARB/16/34

**Claimants' Response to Panama's Expedited Objections Pursuant to Article 10.20.5 of the
US-Panama Trade Promotion Agreement**

24 July 2017

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CLA-0002	<i>Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)</i> , I.C.J. Reports 1950, Advisory Opinion, 12 November 1991	<i>Guinea-Bissau v. Senegal</i>
CLA-0003	<i>Bayindir v. Pakistan</i> , Award, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated 14 November 2005	<i>Bayindir v. Pakistan</i>
CLA-0004	<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	<i>Twombly</i> , 550 U.S. 544 (2007)
CLA-0005	<i>Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic</i> , ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999	<i>CSOB v. Slovak Republic</i>
CLA-0006	<i>Corona Materials, LLC v. Dominican Republic</i> , ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections, 31 May 2016	<i>Corona Materials v. Dominican Republic</i>
CLA-0007	<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/09/2, Award, 31 October 2012	<i>Deutsche Bank v. Sri Lanka</i>
CLA-0008	<i>FEDAX N.V. v. The Republic of Venezuela</i> , ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997	<i>FEDAX v. Venezuela</i>
CLA-0009	<i>Case Concerning Gabčíkovo–Nagymaros Project (Hungary/Slovakia)</i> , Judgment, I.C.J. Reports 97/10, 25 September 1997	<i>Hungary v. Slovakia</i>
CLA-0010	<i>Joseph Charles Lemire v. Ukraine</i> , ICSID Case No. ARB/06/18, Award, 28 March 2011	<i>Joseph Lemire v. Ukraine</i>
CLA-0011	<i>Joy Mining Machinery Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004	<i>Joy Mining v. Egypt</i>
CLA-0012	<i>Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)</i> , Judgment, I.C.J. Reports, 3 December 1999	<i>Botswana v. Namibia</i>
CLA-0013	<i>Limited Liability Company Amto v. Ukraine</i> , SCC Case No. 080/2005, Award, 25 March 2008	<i>Amto v. Ukraine</i>

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CLA-0015	<i>Marco Gavazzi and Stefano Gavazzi v. Romania</i> , ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015	<i>Gavazzi v. Romania</i>
CLA-0016	<i>Methanex Corporation v. United States of America</i> , NAFTA/UNCITRAL, Partial Award, 7 August 2002	<i>Methanex v. United States</i>
CLA-0017	<i>Opel Austria GmbH v. Council of the European Union</i> , [1997] E.C.R. II-00039	<i>Opel v. EU Council</i>
CLA-0018	<i>Pac Rim Cayman LLC v. Republic of El Salvador</i> , ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012	<i>Pac Rim v. El Salvador</i> , Jurisdictional Objections
CLA-0019	<i>Pac Rim Cayman LLC v. Republic of El Salvador</i> , ICSID Case No. ARB/09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Article 10.20.4 and 10.20.5, 2 August 2010	<i>Pac Rim v. El Salvador</i> , Preliminary Objections
CLA-0020	<i>Pantechniki S.A. Contractors & Engineers v. Republic of Albania</i> , ICSID Case No. ARB/07/21, Award dated 30 July 2009	<i>Pantechniki v. Albania</i>
CLA-0021	<i>Patrick Mitchell v. Democratic Republic of the Congo</i> , ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006	<i>Patrick Mitchell v. Congo</i>
CLA-0022	<i>Philip Morris Asia Limited v. The Commonwealth of Australia</i> , PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015	<i>Philip Morris v. Australia</i>
CLA-0023	<i>Philip Morris v. Uruguay</i> , ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2003	<i>Philip Morris v. Uruguay</i>
CLA-0024	<i>Phoenix Action, Ltd. v. Czech Republic</i> , ICSID Case No. ARB/06/5, Award, 15 April 2009	<i>Phoenix v. Czech Republic</i>
CLA-0025	<i>Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia</i> , ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012	<i>Quiborax v. Bolivia</i>
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CLA-0027	<i>Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States</i> , ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999	<i>Azinian and others v. Mexico</i>

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CLA-0028	<i>Saipem S.p.A. v. People’s Republic of Bangladesh</i> , ICSID Case No. ARB/05/7, Award, 30 June 2009	<i>Saipem v. Bangladesh</i>
CLA-0029	<i>Sale v. Haitian Centers Council, Inc.</i> , 509 U.S. 155 (1993)	<i>Sale</i> , 509 U.S. 155 (1993)
CLA-0030	<i>Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco</i> , ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001	<i>Salini v. Morocco</i>
CLA-0031	<i>S.D. Myers, Inc. v. Government of Canada</i> , UNCITRAL, Second Partial Award, 21 October 2002	<i>S.D. Myers v. Canada</i>
CLA-0032	<i>Swierkiewicz v. Sorema N. A.</i> , 534 U.S. 506 (2002)	<i>Swierkiewicz</i> , 534 U.S. 506 (2002)
CLA-0033	<i>The Renco Group, Inc. v. Republic of Peru</i> , ICSID Case No. UNCT/13/1, Submission of the United States of America, 10 September 2014	<i>Renco Group vs. Peru</i> , Submission of the United States

Books and Articles

File Reference	Full Citation	Short Citation
CLA-0034	Andrew Sinclair, <i>Substance of Nationality Planning in Investor-State Arbitration</i> .	Sinclair, <i>Substance of Nationality Planning</i>
CLA-0035	Dolzer and Schreuer, <i>Principles of International Investment Law</i> (2d. ed. 2008)	Dolzer and Schreuer, <i>Principles of International Investment Law</i>
CLA-0036	International Law Commission (ILC), <i>Yearbook of the International Law Commission 2001</i>	ILC, <i>Yearbook</i>
CLA-0037	Jan Paulsson, <i>Jurisdiction and Admissibility</i> , in <i>Global Reflections on International Law, Commerce and Dispute Resolution</i> , Liber Amicorum in Honour of Robert Briner (2005)	Paulsson, <i>Jurisdiction and Admissibility</i>

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Exhibit C-0052	Trademark License Agreement dated 1 December 2001
Exhibit C-0053	Certificate of Amendment to Certificate of Formation dated 21 June 2005
Exhibit C-0054	Certificate of Name Change dated 18 December 2008
Exhibit C-0055	Assistant Secretary's Certificate
Exhibit C-0056	Certificate of Amendment to the Amended and Restated Articles of Incorporation
Exhibit C-0057	Certificate of Amendment to Articles of Incorporation
Exhibit C-0058	Sales Director Job Description [SP/ENG]
Exhibit C-0059	Roger Hidalgo Curriculum Vitae
Exhibit C-0060	Licensing Agreement for Bridgestone and Firestone Trademarks
Exhibit C-0061	Trip Authorization Records 2013-2016 [SP/ENG]
Exhibit C-0062	Employment Contract for Sales Services in Panama
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Exhibit C-0073	Road Rescue Warranty Marketing Materials
Exhibit C-0074	PriceSmart Advertisements
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Exhibit C-0076	Brand Study [SP/ENG]
Exhibit C-0077	Support Services Agreement between BSLS and BFAH
Exhibit C-0078	Articles of Incorporation for BSLS
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Exhibit C-0092	BLS Financial Statements for 2014 to 2016
Exhibit C-0093	JP Morgan Chase Bank Statement
Exhibit C-0094	BLS Corporate Tax Declaration (Form 8453-C)
Exhibit C-0095	Delaware Annual Franchise Tax Report
Exhibit C-0096	Tennessee Corporation Annual Report Form for 2016
Exhibit C-0097	Firestone Global Brand Position Funding Proposal
Exhibit C-0098	Letter from ICSID dated 8 May 2017
Exhibit C-0099	Letter from ICSID dated 26 May 2017
Exhibit C-0100	Transcript of First Session, 13:4-9
Exhibit C-0101	Letter from Arnold & Porter Kaye Scholer to ICSID dated 26 June 2017

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Exhibit C-0103	Letter from Akin Gump to ICSID dated 25 October 2016
Exhibit C-0104	Letter from ICSID to Akin Gump dated 28 October 2016
Exhibit C-0105	Letter from ICSID dated 5 December 2016
Exhibit C-0106	Letter from Arnold & Porter LLP to ICSID dated 15 December 2016
Exhibit C-0107	Letter from ICSID dated 3 January 2017
Exhibit C-0108	Email from Akin Gump to ICSID dated 31 March 2017
Exhibit C-0109	Letter from ICSID dated 24 April 2017
Exhibit C-0110	Letter from ICSID dated 27 April 2017
Exhibit C-0111	Email from ICSID dated 29 June 2017
Exhibit C-0112	Letter from Akin Gump to Arnold & Porter Kaye Scholer dated 5 June 2017
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I. INTRODUCTION

1. Bridgestone Licensing Services, Inc. (“BSLS”) and Bridgestone Americas, Inc. (“BSAM”) (together, the “Claimants”) hereby submit their Response (the “Response”) to the Expedited Preliminary Objections submitted by the Republic of Panama under Article 10.20.5 of the US-Panama Trade Promotion Agreement (“TPA”) on 30 May 2017 (the “Objections”), pursuant to the Tribunal’s Procedural Order No. 1 from 11 July 2017.

II. SUMMARY

2. The Republic of Panama brings their Objections under Article 10.20.5 of the TPA.
3. Articles 10.20.4 and 10.20.5 of the TPA, respectively, provide a non-expedited and an expedited regime to determine certain preliminary objections. The nature of the objections for which Article 10.20.5 may be invoked is stated to be “*an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence.*” Article 10.20.4 (*i.e.*, paragraph 4) states “*that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.*” Article 10.20.4 also sets out certain rules as to evidence for these purposes, including at 10.20.4(c) that “*the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)*” and “*the tribunal may also consider any relevant facts not in dispute.*”
4. Articles 10.20.4 and 10.20.5 have their origins in a case under the North American Free Trade Agreement (“NAFTA”), *CLA-0016 – Methanex v United States*.¹ In that case, the United States was confronted with claims that it contended were without legal merit, even assuming the truth of the claimant’s allegations. However, the tribunal determined that there was no procedure by which it could address such objections at a preliminary stage. Following that decision and to avoid this issue in the future, the United States negotiated review mechanisms into its subsequent investment agreements (including the TPA) that permit a respondent state to assert preliminary objections as to whether the claims submitted are claims for which an award in favor of the claimant may be made, and as to the tribunal’s competence.² Since this is a process by which the Respondent can apply to eliminate claims at a very early stage, it is the Respondent that bears the burden of persuading the tribunal that the claims are so lacking in merit that they should be disposed of right at the outset.³ Further, it must do so on the basis that the Claimants’ allegations are assumed to be true and without the hearing becoming a mini-trial.⁴
5. In the present case the Respondent’s Objections purport to dispute factual allegations contained in the Request for Arbitration and the 25 October 2016 supplement thereto and make numerous other factual allegations that are disputed. However, Respondent makes no attempt to explain how raising those issues of fact are consistent with either Article

¹ *CLA-0016 – Methanex v. United States* ¶¶ 109, 126.

² *CLA-0033 – Renco Group vs. Peru*, Submission of the United States ¶ 3.

³ *CLA-0019 – Pac Rim v. El Salvador*, Preliminary Objections ¶ 111.

⁴ *Id.* ¶ 107.

10.20.4(c) or with a summary process that cannot become a mini-trial. The Claimants in correspondence requested clarification, but regrettably the Respondent refused to answer. Therefore, while the Claimant's primary position is that factual disputes must be deemed to be resolved in its favor for present purposes, the Claimant has had little option but to do its best in the limited time available to put together and exhibit responsive evidence. As a result, the Claimant has been put to considerably increased expense and the Tribunal is faced with a significant volume of evidence, much of which is ultimately unlikely to be of assistance. This unnecessary imposition of additional cost on the Claimant and additional burden on the Tribunal is particularly unsatisfactory in circumstances where the Respondent has itself chosen to ignore ICSID's request that it pay its share of arbitral costs.

6. It is submitted that the Respondent should not be permitted to proceed with its Article 10.20.5 application but at the same time fail to pay its share of the advance on arbitral costs necessary to cover the costs of that application. Otherwise no doubt the Claimants will be asked to pay those costs. The Claimants therefore apply below for an order that the Respondent's Article 10.20.5 application be stayed pending payment by the Respondent of its share of the advance.
7. Turning to the substance of the Objections, the Respondent raises five challenges. Those challenges and the Claimants' responses are briefly summarized below. In short, the Respondent comes nowhere close to discharging the burden of proof it assumed in raising the present Objections.
8. *First*, the Respondent argues that BSAM does not have a qualifying "investment" because (i) ordinary commercial transactions such as the sale of goods do not qualify as investments, and (ii) the other examples of investments provided by the Claimants, such as intellectual property rights and licenses, must also have the "characteristics of an investment," but they do not.
9. But the Claimants have already asserted facts as to BSAM's investment in their Request for Arbitration (the "**Request**") and in their letter to ICSID dated 25 October 2016, and the Tribunal must assume these to be true. The only question for the Tribunal should be whether such assets (such as intellectual property rights contained in licenses to use, manufacture, sell and distribute) can be investments under the TPA. The Claimants submit that they can. However, as described above, since the Respondent has indicated that it takes a different approach to the Article 10.20.5 regime (although it has not indicated what that approach is), the Claimants also set out in this Response further details about BSAM's investment. BSAM's core investment is its intellectual property rights. These are in the Panamanian BRIDGESTONE and FIRESTONE trademarks, which are owned by Bridgestone Corporation ("**BSJ**") and BSLs, respectively, but which have been licensed to BSAM for use, manufacture, sale, and distribution. At paragraphs 103 to 123 below and in the witness statements of Roger Hidalgo and Erick Calderon, the Claimants describe the ways in which this investment meets the criteria in the definition of "investment" and the requirements of Article 25(1) of the ICSID Convention. These include (i) the commitment of capital or other resources, including significant marketing spend, training of personnel in Panama and distribution agreements with Panamanian

entities; (ii) expectation of gain or profit; (iii) the assumption of risk, including risk of financial loss; and (iv) duration (BSAM has owned its intellectual property rights since 2001).

10. *Second*, the Respondent argues that even if BSAM did have an investment, the present dispute does not arise directly out of the investment because the claims in this case arise out of the Supreme Court decision which ordered BSLs and BSJ (not BSAM) to pay US\$5.4 million to Muresa. BSAM therefore has nothing to do with this dispute and cannot have any claims arising out of it.
11. But the Claimants do not assert that BSAM's claim is for the US\$5.4 million which the Panamanian Supreme Court ordered BSLs and BSJ to pay. Instead, the Claimants assert that BSAM's loss arises out of the Supreme Court decision, because the decision has made it much more costly for BSAM to maintain its investment in Panama and other countries in the region.
12. *Third*, the Respondent purports to deny the benefits of the TPA to BSLs on the basis that it lacks "*substantial business activities*" in the United States.
13. But Panama's notification of its intent to deny the benefits of the TPA to BSLs was sent to the United States just over a week before the Objections were submitted, contrary to the requirement in the TPA to provide advance notice "*to the maximum extent possible.*" This thereby deprived the United States of any meaningful opportunity to engage in the consultation process in the TPA before the issue fell to be determined by the Tribunal. The Claimants accordingly submit that Panama failed to provide adequate and timely notice of its intent to deny benefits to the United States.
14. The Respondent notified the Claimants of its purported denial of benefits only in the Objections themselves. Because the Claimants did not know that the Respondents were planning to make this objection, they did not include detailed evidence as to BSLs's activities in the United States in their Request, as such information was not at that time relevant to the dispute. Accordingly, there are limited factual assertions on this issue made by the Claimants, and the Respondent has attempted to fill in the gaps itself. However, the Claimants submit that there are sufficient facts asserted in the Request and letter to ICSID dated 25 October 2016 to permit the Tribunal to conclude that denial of benefits is unavailable to the Respondent, and further submits that under the Article 10.20.5 regime, the Tribunal is not permitted to consider facts in dispute which have been asserted by the Respondent. Consequently, if the Tribunal does not consider that the facts asserted by the Claimants permit it to dispose of the objection without more, then the Tribunal is not able to determine the Respondent's objection at this stage. However, because the Respondent's position on the procedure under Article 10.20.5 is unclear, the Claimants, through the witness statement of Mr. Thomas R. Kingsbury, provide further evidence of BSLs's substantial business activities in the United States, including evidence as to BSLs's board of directors, officers, US-based bank account, taxes paid in the United States, contracts with U.S. and non-U.S. parties, and law firms retained by BSLs in the United States. All of this shows that BSLs has substantial business activities in the United States and is accordingly entitled to the protections of the TPA.

15. *Fourth*, the Respondent argues that BSLS’s claim amounts to an abuse of process because BSLS is said to have manipulated its own nationality, the nationality of the investment and/or the nationality of the claim. The success of this argument depends in part on whether the Tribunal accepts that Panama was able to deny the benefits of the TPA to BSLS. BSLS is said to have abused the process by paying the US\$5.4 million it was ordered by the Supreme Court to pay, but, citing its own Objections as evidence, the Respondent asserts that it was illogical for BSLS to have done so because BSLS is an entity that lacks “*substantial business activities*” in the United States.
16. But BSLS was held jointly and severally liable by the Panamanian Supreme Court for the US\$5.4 million damages award, and it can hardly be said that BSLS abused the process of international arbitration by paying a sum it was ordered to pay. Moreover, the main reason the Respondent considers that BSLS should not have paid is because the Respondent has also asserted, without any basis, that BSLS is merely a shell company with no assets. As described above, this assertion is patently incorrect.
17. *Fifth*, the Respondent argues that the Claimants cannot claim for loss and damage in excess of US\$5.4 million because excess loss incurred as a result of actions taken by other states cannot be attributed to Panama.
18. The Claimants submit that this objection should be dismissed because the Claimants set out four possible grounds for loss under this head of damage, and the Respondent has only raised its objection in relation to two of them. Therefore, even if the Respondent succeeded in its arguments, the remaining two grounds for damages are left intact. In addition, the Respondent has misunderstood the Claimants’ case. The TPA does not preclude loss suffered in states outside of the United States and Panama. Loss suffered in other countries can still be claimed by the Claimants as long as it meets the basic requirements of the test for causation. To the extent this objection is really an objection on grounds of causation, it is not one that can be determined under the Article 10.20.5 regime, because it is not an objection on jurisdictional grounds and would require extensive factual and expert evidence to resolve.
19. It appears that the fifth objection is not directed to the facts of causation and loss, which would be outside the Article 10.20.5 regime.
20. It is respectfully submitted that the Objections should be dismissed. Further, in view of the Respondent’s uncooperative conduct, which has resulted in the costs of its application being unnecessarily but significantly increased, it is respectfully requested that the Tribunal order that the Respondent pay the Claimants’ costs of the application immediately rather than waiting until a final award.

III. APPLICATION TO STAY

21. The Claimants hereby seek an order that the present application by the Respondent in the Objections be stayed pending its payment of the costs ordered by ICSID, pursuant to the Tribunal’s discretion under Article 10.20.8 of the TPA and Rules 19 and 39 of the ICSID Arbitration Rules.

22. On 8 May 2017, ICSID wrote to the parties pursuant to ICSID Administrative and Financial Regulation 14(c), requesting that each party make an initial advance payment to ICSID of US\$150,000 on account of expenses over the first three to six months of the proceeding.⁵ Payment was due on 7 June 2017. The Claimants duly paid this sum to ICSID on 25 May 2017.⁶ At the first session of the parties (“**First Session**”), the Respondent was asked to provide an indication of when it expected to make payment. Counsel for the Respondent stated,

*The payment has not been made. My understanding from our client is that the payment is in process. I think that the Tribunal will understand that this process of payment inside a government is not always a swift process, but it is on track*⁷

23. In its letter to the Tribunal of 26 June 2017, the Respondent further stated, “we understand that payment will be made in the next two to three weeks.”⁸ As of today’s date (over 6 weeks since payment became due), no payment has been made, and yet almost all of the costs so far incurred by ICSID and the Tribunal and all of the costs to be incurred in the next few months relate solely to the Respondent’s Objections.
24. It is submitted that it would be unjust and wrong in principle for the Respondent to be permitted to proceed with an application under Article 10.20.5 of the TPA that will result in substantial cost (not least due to it raising inappropriate factual disputes) but at the same time for it to fail to pay its share of the advance on arbitral costs that will be applied to the costs of its own application. Were the present situation to be permitted it would mean that the Claimants are in practice likely to have to pay the Respondent’s share of the advance and so end up funding all of the costs of the Respondent’s application.
25. Accordingly, the Claimants hereby apply for an order that (a) the Respondent’s Article 10.20.5 application be stayed unless and until it pays the advance of costs requested of it by ICSID on 8 May 2017 and (b) should the Respondent’s Article 10.20.5 application thereby not be heard on 4 to 6 September 2017, that the Respondent pay the Claimants’ costs of such application, such costs to be assessed by the Tribunal at the earliest opportunity if not agreed and paid forthwith. The Claimant requests that the above stay application be decided on the papers without a hearing prior to 4 September 2017.

IV. OUTLINE OF THE SUBSTANTIVE DISPUTE

26. This arbitration concerns an extraordinary and unprecedented decision by the Supreme Court of Panama to order BSLS and BSJ to pay damages to a Panamanian company for simply invoking, in good faith, Panama’s own trademark opposition procedure. This final and binding decision was fundamentally unfair and outrageously wrong, and cannot be justified on any rational basis.

⁵ **Exhibit C-0098** – Letter from ICSID dated 8 May 2017.

⁶ **Exhibit C-0099** – Letter from ICSID dated 26 May 2017.

⁷ **Exhibit C-0100** – Transcript of First Session, 13:4-9.

⁸ **Exhibit C-0101** – Letter from Arnold & Porter Kaye Scholer to ICSID dated 26 June 2017.

27. The Bridgestone group has had trademark registrations in Panama since 1921.⁹ Owning intellectual property rights in jurisdictions like Panama is a key feature of its business strategy, as it is necessary to protect and maintain the reputation and recognition of the brands it has spent decades developing. As with other well-known brands, Bridgestone spends significant time and money monitoring the tire markets and trademark registries in all jurisdictions in which it has a presence and then takes appropriate measures to protect its brands from competitors who attempt to register and use confusingly similar marks, and accordingly has a general policy of opposing all tire marks with the “STONE” suffix, as it considers that they are confusingly similar to BRIDGESTONE and FIRESTONE.¹⁰
28. On 4 February 2005, the General Directorate of Registration of Industrial Property for the Panamanian Trademark and Patent Office published an application for the registration of the RIVERSTONE trademark in the Industrial Property Bulletin. The application had been filed by a Panamanian entity, Muresa Intertrade, S.A. (“**Muresa**”).¹¹
29. On 5 April 2005, BSLs and BSJ filed an opposition to the RIVERSTONE mark in Panama on the grounds that it was confusingly similar to the BRIDGESTONE and FIRESTONE marks.¹² Muresa defended the opposition and L.V. International and Tire Group of Factories Ltd (“**TGFL**”) joined the dispute as third parties.
30. On 21 July 2006, the Eighth Civil Circuit Court of the First Judicial Circuit of Panama found that the RIVERSTONE mark was not capable of causing confusion among consumers and denied the opposition, while expressly noting that Bridgestone’s claim was brought in good faith.¹³
31. On 12 September 2007, Muresa and TGFL commenced proceedings against Bridgestone in the Eleventh Circuit Civil Court of the First Judicial Circuit of Panama (the “**Eleventh Circuit Court**”), claiming US\$5,000,000 in damages plus attorney’s fees and costs.¹⁴ Muresa and TGFL alleged that Bridgestone’s good faith trademark opposition proceedings had caused them to cease sales of RIVERSTONE tires in Panama and other countries, resulting in loss of revenue in excess of US\$5,000,000.
32. The Eleventh Circuit Court rejected Muresa and TGFL’s claims, finding (i) that the mere fear of seizure of tires was not enough to support a claim for damages, and (ii) Muresa and TGFL had not in fact suffered any loss because they had continued to sell tires.

⁹ Request ¶ 14. The FIRESTONE trademark was originally registered in Panama on 20 December 1921 (**Exhibit C-0007**) and the BRIDGESTONE trademark was originally registered in Panama on 11 October 1966 (**Exhibit C-0006**).

¹⁰ *Id.* ¶¶ 14-16.

¹¹ *Id.* ¶ 24 (citing **Exhibit C-0014** – Judgment 48 of the Eighth Civil Circuit Court from 21 July 2006).

¹² *Id.* ¶ 25 (citing **Exhibit C-0014** – Judgment 48 of the Eighth Civil Circuit Court from 21 July 2006).

¹³ *Id.* ¶ 26 (citing **Exhibit C-0014** – Judgment 48 of the Eighth Civil Circuit Court from 21 July 2006).

¹⁴ *Id.* ¶¶ 28-29 (citing **Exhibit C-0016** – Civil Complaint filed by Muresa Intertrade, S.A.).

33. Muresa and TGFL appealed this decision on 5 January 2011.¹⁵ On 23 May 2013, the First Superior Court of the First Judicial District (the “**First Superior Court**”) dismissed the appeal, finding that Muresa and TGFL had not demonstrated recklessness, fraud or gross negligence by Bridgestone in opposing the trademark.¹⁶
34. On 3 January 2014, Muresa and TGFL appealed to the Supreme Court of Panama (“**Supreme Court**”), arguing (i) that there was error in connection with the existence of evidence on the file that would have substantially influenced the court’s decision (*i.e.*, that certain important evidence put forth by them at trial had not been “*appreciated*” by the Eleventh Circuit Court;¹⁷ and (ii) that there was a direct violation of Article 217 of the Panamanian Judicial Code.¹⁸ The Supreme Court issued its judgment on 28 May 2014, and overturned the decisions of the Eleventh Circuit Court and the First Superior Court. The Supreme Court agreed with Muresa that certain evidence¹⁹ put forward by Muresa and TGFL had not been appreciated by the lower courts, and awarded Muresa and TGFL US\$5,000,000 in damages plus US\$431,000 in attorney’s fees. BSLS and BSJ, the parent company in the Bridgestone group, were held jointly and severally liable for this award. The Supreme Court’s decision was patently unjust, awarding an arbitrary sum in damages as to which, as the dissenting justice wrote, “*there was no analysis based on arguments on how it was possible to derive the penalty of five million balboas, which is issued with little juridical foundation.*”²⁰
35. BSLS and BSJ attempted to overturn the Supreme Court judgment by using all means available to them in Panama: they filed a motion for clarification and modification on 16 June 2014²¹ and a second motion challenging the judgment on 30 September 2014.²² Both of these motions failed.²³
36. Bridgestone made attempts to resolve the matter through diplomatic channels between July 2014 and September 2016, and presented its concerns to the United States Government in February 2015, and the United States Trade Representative’s Special 301 Report for 2015 in turn reported,

¹⁵ *Id.* ¶ 34 (citing **Exhibit C-0022** – Appeal to Judgment No. 70).

¹⁶ *Id.* ¶¶ 36-37 (citing **Exhibit C-0024** – Decision by the First Superior Court dated 23 March 2013).

¹⁷ *Id.* ¶ 38 (citing **Exhibit C-0025** – Appeal to the Panamanian Supreme Court by Muresa and TGFL).

¹⁸ *Id.*

¹⁹ *Id.* ¶¶ 40-43 (citing **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, dated 28 May 2014). Such evidence included a letter from BFS Brands LLC’s lawyers (a Bridgestone group company) to L.V. International dated 3 November 2004, putting L.V. International on notice of BFS Brands LLC’s objection to L.V. International’s future attempts to register the RIVERSTONE mark and its use of the RIVERSTONE mark in the United States and worldwide (**Exhibit C-0013**); Muresa’s accounting expert reports; the notice of withdrawal of the appeal against the trademark registration by BSLS and BSJ; and evidence of Muresa’s employees. *See Exhibit C-0027.*

²⁰ **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, dated 28 May 2014, p.24 (dissent by Magistrate Harley J. Mitchel D., 5 June 2014).

²¹ Request ¶ 44 (citing **Exhibit C-0028** – First Appeal Motion).

²² *Id.* ¶ 45 (citing **Exhibit C-0029** – Second Appeal Motion).

²³ *Id.* ¶¶ 46-47 (citing **Exhibit C-0030** and **Exhibit C-0031** – decisions denying post-judgment motions).

Of additional concern is a report that significant punitive damages were imposed on the owner of a trademark registered in Panama in connection with that owner's efforts to oppose the registration and use of a second mark which has been found to be confusingly similar in other markets [T]he damage award may discourage other legitimate trademark owners from entering the market out of concern that defending their marks will result in punitive action.²⁴

37. Muresa and TGFL demanded payment from Bridgestone on 15 June 2016.²⁵ As non-payment would have resulted in enforcement action against their assets in Panama, on 19 August 2016 BSLS paid the full amount of the award to Muresa and TGFL.²⁶
38. Having exhausted all possible remedies in Panama to overturn the unfair Supreme Court judgment, and concerned about the effect such judgment may have on intellectual property protection in the region and around the world, Bridgestone was left with no recourse but to bring a dispute against Panama in investor-state arbitration.

V. PROCEDURAL HISTORY

39. The Claimants submitted their Request for Arbitration to ICSID on 7 October 2016. In their request, the Claimants nominated Dr. Horacio Grigera-Naón as an arbitrator.
40. On 19 October 2016, ICSID wrote to the Claimants requesting certain information in order to assist with its review of the Request, before registering the arbitration.²⁷ The Claimants responded by letter of 25 October 2016,²⁸ and ICSID wrote to the Claimants on 28 October 2016, notifying them that the Request had been registered and assigned ICSID Case Number ARB/16/34. In that letter, ICSID stated, "*the request, as supplemented, was registered today.*"²⁹
41. On 5 December 2016, Dr. Horacio Grigera-Naón accepted his appointment as arbitrator.³⁰ The Respondent nominated Mr. J. Christopher Thomas, QC as arbitrator on 15 December 2016.³¹ Mr. Thomas accepted his appointment on 2 January 2017.³² The parties agreed to a method for the selection of the President of the Tribunal and this was communicated to Dr. Grigera-Naón and Mr. Thomas by ICSID on 31 March 2017.³³ On

²⁴ *Id.* ¶ 49 (citing page 16 of **Exhibit C-0033** – 2015 Special 301 Report).

²⁵ *Id.* ¶ 52.

²⁶ *Id.* ¶ 53 (citing **Exhibit C-0036** – Letter from Bridgestone to Muresa and TGFL dated 19 August 2016).

²⁷ **Exhibit C-0102** – Letter from ICSID to Akin Gump dated 19 October 2016.

²⁸ **Exhibit C-0103** – Letter from Akin Gump to ICSID dated 25 October 2016.

²⁹ **Exhibit C-0104** – Letter from ICSID to Akin Gump dated 28 October 2016 (emphasis added). The underlined words referred to the Claimants' letter of 25 October 2016.

³⁰ **Exhibit C-0105** – Letter from ICSID dated 5 December 2016 and Acceptance Letter by Horacio Grigera-Naón dated 5 December 2016.

³¹ **Exhibit C-0106** – Letter from Arnold & Porter LLP to ICSID dated 15 December 2016.

³² **Exhibit C-0107** – Letter from ICSID dated 3 January 2017.

³³ **Exhibit C-0108** – Email from Akin Gump to ICSID dated 31 March 2017.

24 April 2017, ICSID informed the parties that the party-appointed arbitrators had selected Lord Nicholas Phillips, Baron of Worth Matravers as the presiding arbitrator.³⁴ Lord Phillips accepted his appointment on 27 April 2017, and the Tribunal was deemed to have been constituted and the proceedings to have begun.³⁵

42. On 8 May 2017, ICSID wrote to the parties pursuant to ICSID Administrative and Financial Regulation 14(3), requesting that each party make an initial advance payment to ICSID of US\$150,000 on account of expenses over the first three to six months of the proceeding.³⁶ Payment was due on 7 June 2017. The Claimants duly paid this sum to ICSID on 25 May 2017.³⁷ As of today's date, the Respondent has not made any payment to ICSID.
43. Regardless, on 30 May 2017, Panama submitted its Objections.
44. On 6 June 2017, the first session of the parties ("**First Session**") was held by videoconference. At the First Session, the parties agreed that the hearing of the Objections would take place during the week beginning 11 December 2017, and the parties agreed a timetable for the pleadings. The parties agreed that the Tribunal would issue its ruling on the Objections by 31 January 2017. This was longer than the 180-day maximum time period permitted by Article 10.20.5 of the TPA, but at the First Session, the parties agreed to waive such provision of the TPA.³⁸
45. However, on 26 June 2017, the Respondent wrote to the Tribunal, indicating that it had changed its mind about waiving the provision in Article 10.20.5 and proposing either that the Tribunal issue a ruling by 26 December 2017 (with grounds stated but without any reasoning), or suggesting that the hearing be moved to September to accommodate the timing issue in Article 10.20.5.³⁹ The Tribunal determined on 29 June 2017 that the hearing should take place on 4-6 September 2017.⁴⁰ An amended timetable was drawn up, and Procedural Order No. 1 was issued on 11 July 2017.⁴¹

VI. THE NATURE OF THE ARTICLE 10.20.5 REGIME

46. Article 10.20 paragraphs 4 and 5 of the TPA state as follows:

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim

³⁴ **Exhibit C-0109** – Letter from ICSID dated 24 April 2017.

³⁵ **Exhibit C-0110** – Letter from ICSID dated 27 April 2017.

³⁶ **Exhibit C-0098** – Letter from ICSID dated 8 May 2017.

³⁷ **Exhibit C-0099** – Letter from ICSID dated 26 May 2017.

³⁸ **Exhibit C-0100** – Transcript of First Session, 45:8-9, 46:5-7, 58:11-14, 58:18-22, 59:1-5, 61:10-20, 62:5-14, 69:1-22.

³⁹ **Exhibit C-0101** – Letter from Arnold & Porter Kaye Scholer to ICSID dated 26 June 2017.

⁴⁰ **Exhibit C-0111** – Email from ICSID dated 29 June 2017.

⁴¹ Procedural Order 1 dated 11 July 2017.

submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

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

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days."

VII. BURDEN OF PROOF

47. Article 10.20.5 was intended to allow an arbitral tribunal to dispose of frivolous claims or claims for which a tribunal has no jurisdiction on an expedited basis. According to the summary of the TPA sent by the President of the United States to the United States Congress, "*The TPA includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, i.e., the claimant has failed to state a claim upon which relief may be granted) and for the*

dismissal of claims based on jurisdictional objections.”⁴² This is far from a frivolous case. Decisions such as this have impact in the region and around the world. As noted earlier, we are unaware of any prior cases in Panama or elsewhere that penalized an entity for merely filing an opposition to a potentially confusing similar trademark application.

48. Rule 12 of the Federal Rules of Civil Procedure governs motions to dismiss, which are motions that allow defendants to dismiss some or all of a plaintiff’s claims at the beginning of a dispute. Rule 12(b) specifically governs motions to dismiss arising from defenses to a claim for relief. A defendant can file a motion under 12(b)(6) requesting that the court dismiss the claim because a plaintiff did not state a claim upon which relief can be granted, whether due to lack of cause of action or lack of legal basis.⁴³
49. A court reviewing a motion to dismiss brought under 12(b)(6) must assume that all facts are true, even if the facts are doubtful.⁴⁴ If the facts suggest misconduct, the motion to dismiss fails.
50. The nature of the Article 10.20.4 and 10.20.5 regime was considered in *Pac Rim Cayman LLC v El Salvador*.⁴⁵ That case concerned Article 10.20 of the Free Trade Agreement between the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, the United States of America and the Dominican Republic (“CAFTA”), which is in identical terms to Article 10.20 of the TPA. The Tribunal in *Pac Rim* found that in order for an objection under Articles 10.20.4 and 10.20.5 to succeed the Tribunal “*must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the [Claimants’] claim at the very outset of the arbitration proceedings, without more.*”⁴⁶ The Tribunal in *Pac Rim* further noted that, at all times during the expedited procedure, “*the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection,*

⁴² **Exhibit C-0051** – U.S.-Panama FTA Final Environmental Review, United States Trade Representative (Sept. 2011), at 20.

⁴³ Rule 12(b)(6) of the Federal Rules of Civil Procedure provides as follows:

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction;(2) lack of personal jurisdiction;(3) improper venue;(4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

⁴⁴ **CLA-0004** – *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); **CLA-0032** – *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (“*We must accept as true all of the factual allegations contained in the complaint.*”).

⁴⁵ **CLA-0019** – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 110.

⁴⁶ *Id.*

*namely the respondent*⁴⁷ and that the exercise must not be permitted to become a “*mini-trial*.”⁴⁸

51. Therefore it is not for the Claimants to prove that the Tribunal does have jurisdiction, rather it is the Respondent that has the burden of proving it does not. The Respondent has not met this burden, as described further below.

VIII. DEEMED TRUTH OF THE CLAIMANTS’ PLEADED FACTUAL ALLEGATIONS

52. Article 10.20.4 is a non-expedited procedure and at paragraph (c) provides that: “*the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) . . . The tribunal may also consider any relevant facts not in dispute.*”⁴⁹ In contrast, Article 10.20.5 is an expedited procedure under which “*the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence,*” but includes no express reference to whether the claimants’ factual allegations for those purposes are to be assumed to be true.⁵⁰
53. The Respondent appears to contend that under the expedited procedure no such assumption is to be made, whereas the Claimants contends that on a proper construction of the TPA such an assumption does arise. This is an important point, not only because it goes to the nature of the exercise the Tribunal is asked to perform, but also because it will determine the nature and volume of evidence that is to be adduced and hence the length of hearing that will be required.

A. The Parties’ Positions

54. In its Objections, the Respondent does not refer to the question of whether Article 10.20.4(c) applies to the expedited procedure under Article 10.20.5. However, the Objections contain numerous allegations of fact. These may conveniently be divided into three categories:
- (a) Where the Respondent disputes factual allegations contained in the Request for Arbitration itself. For example, at paragraph 41 of the Objections, the Respondent states, “*Bridgestone Licensing is a shell company with no discernible assets of its own,*”⁵¹ yet at paragraph 6 of the Request, the Claimants stated, “*BLS is the owner of the FIRESTONE trademark in all countries outside of the United States.*”⁵²

⁴⁷ *Id.* ¶ 111.

⁴⁸ *Id.* ¶ 107.

⁴⁹ **Exhibit C-0117** – TPA, Art. 10.20.4.

⁵⁰ **Exhibit C-0117** – TPA, Art. 10.20.5.

⁵¹ Objections ¶ 41.

⁵² Request ¶ 6.

- (b) Where the Respondent disputes factual allegations contained in the Claimants’ letter to ICSID of 25 October 2016. As indicated above, this was a letter by which the Claimants responded to ICSID’s request for clarification of the Request for Arbitration. For example, at paragraph 16 of the Objections, the Respondent states, “*Because the TPA states that it is only the “asset[s] that an investor owns or controls” that qualify as an “investment” – and it is clear that Bridgestone Americas does not own or control either the BRIDGESTONE or FIRESTONE trademarks – the only “intellectual property” rights that Bridgestone Americas could even attempt to style as an “investment” would be those that were created by means of the three license agreements that Claimants appended to their 25 October 2016 Submission on Registration.*”⁵³ However, at page 4 of the letter to ICSID, the Claimants wrote, “*BSAM is the parent company for various Bridgestone business units in North, Central and South America, including Panama. BSAM, including through its subsidiaries, is authorized to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas.*”⁵⁴
- (c) Where the Respondent makes its own stand-alone allegations of fact. For example, at paragraph 34 of the Objections, the Respondent makes a number of allegations about BSL’s activities in the US, such as “*Does not appear to own any assets (or registered trademarks) in the United States.*”⁵⁵
55. By a letter to the Respondent’s counsel dated 5 June 2017, the Claimants’ counsel flagged its understanding that Article 10.20.4(c) applies to the expedited procedure, asked the Respondent to confirm that this was accepted and noted that if it was not then this raised procedural issues that would have to be ventilated with the Tribunal.⁵⁶
56. The Respondent’s counsel has not responded in writing to the Claimants’ 5 June 2017 letter. However, the issue of construction was raised at the 6 June hearing in the context of the procedural timetable for the Objections and the length of hearing required, and the Respondent’s counsel clarified that it is indeed their position that 10.20.4(c) does not apply to a 10.20.5 expedited procedure. Specifically:

MS. GEHRING FLORES: *Mr. President, pardon the interruption. We are aware that Claimants sent a letter to us, but they copied to the Secretary of the Tribunal as well, last night on this point. This point is not on the Agenda for the First Session, and we believe that if Claimants have arguments regarding the substance of our expedited objections, that they should be appropriately found in their response, in their written response to our expedited objections. Panama is not prepared to discuss those at the First Session, and we don’t believe it appropriate to discuss right now, particularly because Claimants’ position amounts to a response to Panama’s expedited objections.*

⁵³ Objections ¶ 16.

⁵⁴ **Exhibit C-0103** – Letter from Akin Gump to ICSID dated 25 October 2016.

⁵⁵ Objections ¶ 34.

⁵⁶ **Exhibit C-0112** – Letter from Akin Gump to Arnold & Porter Kaye Scholer dated 5 June 2017.

We would prefer to continue discussing what is on the agenda, which is the calendar associated with addressing Panama's expedited objections.

PRESIDENT PHILLIPS: *Yes. Speaking for myself, I would agree that it would be quite inappropriate for the issue or any issues raised as to facts or the admissibility of facts in relation to the jurisdiction issue to be the subject of an opinion expressed by the Tribunal.*

What we need to do, however, is to consider the scope of the Hearing in relation to the jurisdiction issue, and I express the view that it doesn't seem to me, at the moment, there is likely to be lengthy evidence of fact involved in the Hearing.

MS. GEHRING FLORES: *Mr. President, Claimants are taking a position under Article 10.20.4 of the Treaty.*

PRESIDENT PHILLIPS: *Yes.*

MS. GEHRING FLORES: *Our expedited objections are being submitted under Article 10.20.5, which are objections that are subject to a different standard than the one that Claimant is citing in its letter from last night. This discussion is, as a general matter, simply inappropriate at this state. Bridgestone is objecting or responding to the substance of our expedited objections, and they're doing it at a First Session when we were alerted to this response last evening after 8:00 p.m.*

*I'm sure Claimants would very much like you to take the position that the Tribunal may not consider any factual evidence whatsoever in contemplating our expedited objection. That is part of its response that it submitted last night at 8:00 p.m. That, however, is not the correct position when considering expedited objections submitted under Article 10.20.5 of this Treaty.*⁵⁷

57. On 29 June 2017, the Claimants wrote to the Tribunal in relation to the proposed timetable for submissions in light of the change to the date of the hearing of the Objections. On the subject of the deemed truthfulness of the Claimants' pleaded facts, the Claimants wrote:

Additionally, Panama's position appears to be that none of the factual points set out in the Claimants' Request for Arbitration and the clarification of the same to ICSID by way of letter dated 25 October 2016 should be deemed to be true for the purposes of their Expedited Preliminary Objections. The question of deemed truthfulness is in dispute, and since it has not been resolved, the Claimants have no option but to put in responsive evidence on all the factual matters raised in the Expedited Preliminary Objections. On this point, Panama has said, 'Claimants presumably confirmed the truth of the

⁵⁷ **Exhibit C-0100** – Transcript of First Session dated 6 June 2017, 35:19 to 39:9 (emphasis added).

allegations asserted in their Request for Arbitration before submitting it.’ This rather misses the point. All of the Claimants’ factual allegations in their Request were confirmed to be true before submitting it, and the Claimants’ primary position will be that the facts in the Request and letter dated 25 October 2016 should be deemed to be true. But if the Respondent will not agree to proceed on the basis that all of the facts set out in the Request and letter dated 25 October 2016 are deemed to be true, then the Claimant needs to provide further evidence in support of those allegations, since they will be challenged by the Respondent at the hearing.⁵⁸

58. In response, in its letter to the Tribunal on 30 June 2017, the Respondent still refused to engage with this subject, although its comments in relation to the facts provided by the Claimants in their Request and letter to ICSID dated 25 October 2017 hint for the first time that perhaps the Respondent does not intend to dispute the facts already pleaded:

Four of these five objections relied exclusively on factual information derived from the Request for Arbitration, Claimants’ 25 October 2016 Submission to ICSID on Registration, and the exhibits that accompanied those two submissions. The only objection for which Panama introduced evidence – and therefore, the only objection for which Claimants would need to submit “responsive” evidence – was the “denial of benefits” objection, where the inquiry turns on whether Bridgestone Licensing has “substantial business activities in the territory of the [United States].”⁵⁹

59. In other cases, tribunals have been asked to consider the scope of the two limbs of Article 10.20.5: (i) objections that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 (*i.e.*, an objection under Article 10.20.4), and (ii) objections that the dispute is not within the tribunal’s competence.⁶⁰ As to the second of these, it has been argued that the tribunal is not required to assume the claimant’s factual allegations in support of any claim to be true because Article 10.20.4(c) only applies to objections brought under Article 10.20.4, or objections under Article 10.20.5 made on the same basis.⁶¹ Both objections are on points of law. However, objections as to competence relate to the ability of the tribunal to hear a particular claim, whereas objections as to the legal basis for the claim are objections that a particular claim should not be heard at all. As Jan Paulsson has argued:

To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:

⁵⁸ **Exhibit C-0113** – Letter from Akin Gump to the Tribunal dated 29 June 2017 (citing Email from Arnold & Porter Kaye Scholer to Akin Gump dated 29 June 2017).

⁵⁹ **Exhibit C-0114** – Letter from Arnold & Porter Kaye Scholer to the Tribunal dated 30 June 2017.

⁶⁰ **CLA-0033** – See *Renco Group vs. Peru*, Submission of the United States, ¶¶ 4-12; *Corona Materials v. Dominican Republic*, ¶ 56.

⁶¹ **CLA-0006** – *Corona Materials v. Dominican Republic* ¶ 56.

- *If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.*
- *If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final.*⁶²

60. The Respondent has not explained under which of the two limbs of Article 10.20.5 it brings each of its objections, so it is difficult for the Claimants to respond on this issue in any detail. However, it would not be sensible for objections as to competence that are brought on an expedited basis to have a broader scope than objections brought on an expedited basis under Article 10.20.4. Furthermore, issues of the Tribunal's competence are likely to be questions of law, and so while there may be an interesting academic discussion to be had about the two limbs, in practice, there is no difference because they are both questions of law. Notwithstanding the foregoing, if the Tribunal takes the view that all or any of the Objections are raised under the competence limb of Article 10.20.5 so that the Article 10.20.4 regime does not apply, then the Tribunal should nevertheless (i) assume that factual allegations contained in the Claimants' Request and letter to ICSID dated 25 October 2016 are true and (ii) resolve disputes of fact in favor of the Claimants as a matter of the Tribunal's discretion pursuant to Rule 34 of the ICSID Arbitration Rules. The alternative to this is that disputes of fact would need to be resolved but these could only be satisfactorily resolved at trial, and this procedure is not intended to be a "mini-trial."⁶³
61. Whilst the Respondent has made clear that it contends that Article 10.20.4(c) does not apply to a 10.20.5 expedited procedure, regrettably it has refused to explain the basis for that contention. This means that the parties have been unable to resolve the matter by agreement and the Claimants must address in their Response a position that is not understood. Further, in circumstances where there is an outstanding issue on what should be deemed to be true, the Claimants are left with little option but to protect themselves by submitting evidence in relation to all of the numerous factual matters raised in the Objections (without prejudice to their primary position that such evidence is unnecessary). As a result, Claimants have been put to substantially greater effort and cost than would have been the case if Respondents had been open to a more cooperative approach. The Tribunal, also, is faced with a substantially greater volume of submissions and evidence. This is particularly egregious in circumstances where (a) the Respondent repeatedly sought at the First Session and thereafter to minimize the amount of time the Claimants would have to prepare their evidence and submissions in response to the Objections (presumably for tactical reasons) and (b) the Respondent has declined to pay its share of the initial advance payment to ICSID which will almost exclusively relate to the cost of the Respondent's own Objections. The Tribunal will be invited to take the above matters into consideration when it comes to allocate the costs of the Objections

⁶² CLA-0037 – Jan Paulsson, *Jurisdiction and Admissibility*, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (2005), at 617.

⁶³ CLA-0019 – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 107.

and, to show the Tribunal's disapproval of the Respondent's conduct, an order will be sought that the Respondent pay the costs of the Objections immediately, rather than waiting until a final award is issued at the conclusion of the present proceedings.

62. Should the Tribunal decide it is necessary to determine whether as a matter of construction of the TPA Article 10.20.4(c) applies to an Article 10.20.5 expedited procedure and, if so, what the implications are in relation to the three categories of factual allegations in the Objections outlined above, we offer the following discussion.

B. Principles of Treaty Interpretation

63. In all matters of construction in investor-state arbitration, one must first look to the principles of treaty interpretation required by international law.
64. As the Tribunal is well aware, the body of international law for interpreting international agreements is codified in the Vienna Convention on the Law of Treaties (“VCLT”).⁶⁴ The International Court of Justice (“ICJ”) has held that the rules of interpretation in the VCLT constitute customary international law,⁶⁵ and international tribunals and national courts rely on the VCLT for the purposes of treaty interpretation.⁶⁶
65. The VCLT contains two primary provisions on treaty interpretation: Article 31 (“General Rule of Interpretation”) and Article 32 (“Supplementary Rule of Interpretation”). Article 31 provides that a treaty “*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”⁶⁷
66. In its commentary to this provision, the International Law Commission stated, “*Once it is established – and on this point the commission was unanimous – that the starting point of interpretation is the meaning of the text, logic indicates that the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of its objection and purpose’ should be the first element to be mentioned.*”⁶⁸
67. The International Court of Justice has confirmed that, “*the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they*

⁶⁴ **Exhibit C-0115** – Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980).

⁶⁵ **CLA-0012** – *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, at 1045, ¶ 18; **CLA-9** – *Gabčíkovo–Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, at 7, ¶ 46.

⁶⁶ **CLA-0017** – *See, e.g., Opel Austria GmbH v. Council of the European Union*, [1997] E.C.R. II-00039, at 84; **CLA-29** – *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993).

⁶⁷ **Exhibit C-0115** – VCLT, Art. 31.

⁶⁸ **CLA-0036** – International Law Commission (ILC), Yearbook of the International Law Commission 2001, vol. II, at 220, ¶ 9.

occur.”⁶⁹ However, “Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed upon it.”⁷⁰

68. In circumstances where the application of Article 31 of the VCLT “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable,” Article 32 of the VCLT provides that recourse may be had to supplementary means, such as “the preparatory work of the treaty and the circumstances of its conclusion” in order to determine the meaning of a provision.⁷¹
69. Accordingly, when considering the meaning of Article 10.20 and the procedures set out therein, the Tribunal must first look to the ordinary meaning of the terms of the treaty in their context, object and purpose, and, if that produces an ambiguous or absurd result, look to supplementary materials such as the preparatory work of the TPA.

C. The Natural and Ordinary Meaning of the TPA

70. Article 10.20.5 refers directly to 10.20.4: “In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence.”⁷²
71. On any view the words “the tribunal shall decide on an expedited basis an objection under paragraph 4” can only mean that under 10.20.5 a respondent may require that an objection under 10.20.4 be expedited. It follows that under this procedure the provisions of 10.20.4 (including sub-paragraph (c)) apply, save to the extent 10.20.4 is inconsistent with the requirements of 10.20.5.
72. However, the following words “and any objection that the dispute is not within the tribunal’s competence” are added to paragraph 5, making it clear that there are two sorts of expedited objection, namely (a) a 10.20.4 objection that may be expedited pursuant to 10.20.5, and (b) an objection “that the dispute is not within the tribunal’s competence” that is brought solely under 10.20.5.
73. Were 10.20.5 to be construed such that an objection “that the dispute is not within the tribunal’s competence” might be brought solely under paragraph 5 without application of any of the framework of 10.20.4, that would produce an outcome that would be both “incompatible with the spirit, purpose and context of the clause” and “manifestly absurd or unreasonable” (in the phraseology referenced above). Specifically, 10.20.4(c) gives rise to an assumption that facts pleaded by the Claimant are true – no doubt in order to

⁶⁹ **CLA-0002** – *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 12 November 1991, at 69 (citing *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion*, I.C.J. Reports 1950, at 8).

⁷⁰ **CLA-0002** – *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, 12 November 1991, at 69 (citing *South West Africa, Preliminary Objections, Judgment*, I.C.J. Reports 1962, at 336).

⁷¹ **Exhibit C-0115** – VCLT, Art. 32.

⁷² **Exhibit C-0117** – TPA, Art. 10.20.5.

ensure that preliminary objections are streamlined and do not become “*mini-trials*.”⁷³ But it would be entirely inconsistent with the purpose of 10.20.5 (*i.e.*, an expedited procedure) if 10.20.5 permitted “*mini-trials*” and 10.20.4 did not.

74. Accordingly, the natural and ordinary meaning of Article 10.20 is that the terms of 10.20.4 apply to the 10.20.5 expedited procedure, save to the extent the provisions at 10.20.4 as to timing are superseded by 10.20.5.
75. That conclusion is supported by authority. The question of whether 10.20.4 should apply to a 10.20.5 expedited procedure was considered in a previous ICSID case, *Pac Rim Cayman LLC v El Salvador*.⁷⁴ As noted above, that case concerned CAFTA and Article 10.20 of CAFTA is in identical terms to Article 10.20 of the TPA. The Tribunal in *Pac Rim* considered the procedure under Articles 10.20.4 and 10.20.5, (the Respondent brought preliminary objections under both Articles because it considered that objections as to competence could only be brought under Article 10.20.5) and found that it was the same as that under Article 10.20.4, but with an additional ground of objection as to competence, and a faster process. The Tribunal stated that the Article 10.20.5 expedited procedure was “*twinned with the procedure under Article 10.20.4.*”⁷⁵ Accordingly the same requirement to treat facts alleged in the request for arbitration as true applied.
76. It is respectfully submitted by the Claimants that the Tribunal should follow the decision in *Pac Rim* with regard to this point.

D. Tribunal’s Discretion

77. To the extent that the Tribunal concludes that Article 10.20.4(c) does not apply to factual disputes in the present application, the Tribunal has a wide discretion as to the approach to be taken to evidence.⁷⁶
78. Article 10.20.5 is a process by which a claim may be disposed of right at the outset of a dispute and without a full trial. It is necessarily “summary” in nature, and it is submitted that the usual approach in such circumstances is to work on the basis of an assumption that what is alleged by the Claimant is true – since any other approach would require a factual inquiry that could only satisfactorily be undertaken at a full trial. Certainly, and as found in the *Pac Rim* case, it would be contrary to the intent of a summary process for the hearing to become a “*mini-trial*.”⁷⁷
79. In this context the Tribunal should consider last sentence of paragraph 4(c): “*The tribunal may also consider any relevant facts not in dispute.*” On its face this suggests the inverse, namely that the Tribunal shall not consider relevant facts that are presently in dispute.

⁷³ CLA-0019 – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 107.

⁷⁴ CLA-0019 – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 106.

⁷⁵ *Id.*

⁷⁶ Rule 34 of the ICSID Rules of Procedure for Arbitration Proceedings.

⁷⁷ CLA-0019 – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 107.

80. These considerations become yet more powerful in circumstances such as the present where the Respondent has elected that its objections be subject to the expedited procedure at Article 10.20.5 (rather than 10.20.4).
81. The Claimants are conscious of the observation by the President, Lord Phillips, at the 6 June 2017 hearing: “*What we need to do, however, is to consider the scope of the Hearing in relation to the jurisdiction issue, and I express the view that it doesn’t seem to me, at the moment, there is likely to be lengthy evidence of fact involved in the Hearing.*”⁷⁸
82. In light of the above it is respectfully submitted that not only should facts pleaded by the Claimant be deemed to be true, but other factual disputes that have arisen from the Objections be assumed for present purposes to be resolved in favor of the Claimant.

E. Application to the Present Allegations of Fact

83. As noted above, there are three categories of factual allegations that fall to be considered.
84. *First*, there are a significant number of factual allegations contained in the Request for Arbitration itself, and therefore are to be assumed to be true. These are referenced below as appropriate, together with the corresponding instances where the Respondent’s Objections dispute such allegations. Consistent with Article 10.20.4(c) and/or the Tribunal’s discretion, it is respectfully submitted that such factual disputes by the Respondent are to be ignored.
85. *Second*, other factual allegations are contained in the Claimants’ letter to ICSID of 25 October 2016. As indicated above, this was a letter by which the Claimants responded to ICSID’s request for clarification of the Request for Arbitration, before ICSID had registered the arbitration. Following receipt of the Claimants’ letter of 25 October 2016, ICSID wrote to the Claimants on 28 October 2016, informing them that “*the Request, as supplemented*” had been registered.⁷⁹
86. In *Pac Rim Cayman LLC v El Salvador*, the Tribunal held,

*It is to be noted that these factual allegations can extend beyond the original notice of arbitration to include further factual allegations in an amended notice of arbitration up to the time of the tribunal’s decision. The ability of a claimant to cure a notice of arbitration by pleading further factual allegations confirms that the procedure is not intended to be a technical pleading exercise where mere linguistic form should prevail over substance to the detriment of an ill-pleaded notice of arbitration.*⁸⁰

⁷⁸ **Exhibit C-0100** – Transcript of First Session dated 6 June 2017, 37:20 to 38:2.

⁷⁹ **Exhibit C-0104** – Letter from ICSID to Akin Gump dated 28 October 2016.

⁸⁰ **CLA-0019** – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 89.

87. While the Request in this case was not formally amended, the letter of 25 October 2016 comprised the formal provision of further information in respect of the Request pursuant to ICSID's written request, and that information was relied on by ICSID in registering the arbitration. As set out above, the language used in ICSID's letter of 28 October 2016 indicates that ICSID considered the letter to be a supplement to the Request. As noted by the Tribunal in *Pac Rim*, the paragraph 5 procedure is "not intended to be a technical pleading exercise"; and it is submitted that the factual allegations contained in the 25 October letter should be deemed to be true for the purposes of the present Objections – either as a matter of the proper construction of paragraph 4(c) or pursuant to the Tribunal's discretion as to evidence. Likewise, it is respectfully submitted that such factual disputes by the Respondent are to be ignored.
88. *Third*, the Respondent in its Objections makes its own stand-alone allegations of fact that do not directly contradict allegations contained in the Claimants' pleading, in particular as to the nature of BSLS's operations in the United States, for the purposes of invoking the denial of benefits clause in the TPA. Those stand-alone allegations cannot be ignored on the footing that there is a contrary pleaded allegation that must be deemed to be true. However, for the reasons indicated above, it is submitted that, to the extent the Claimants dispute allegations of fact raised by the Respondent, such dispute should, for the limited purpose of the present Objections, be deemed to be resolved on favor of the Claimants.

F. Conclusion

89. The disputes of fact introduced by the Respondent in its Objections are contrary to Article 10.20.5 of the TPA read together with Article 10.20.4(c) and/or are inappropriate for the current expedited summary process and risk a "*mini-trial*." For present purposes it is respectfully submitted that the Tribunal has neither the evidence nor the time satisfactorily to determine disputes of fact, and for present purposes any dispute of fact should be deemed to be resolved in the Claimants' favor.
90. The Respondent has chosen to put in issue numerous factual matters but, despite the Claimants' requests, has done so without explaining its position on the deemed truth provision at Article 10.20. As a result, the Claimants have little option but, as a matter of precaution, to put in responsive evidence. However, we do so without prejudice to our position that any dispute of fact should be deemed to be resolved in the Claimants' favor. Further, in light of the Respondent's uncooperative approach, it is submitted that the costs of such evidence should be borne by the Respondent in any event and paid now (rather than waiting for the final award).

IX. PANAMA'S FIRST OBJECTION: BSAM DOES NOT HAVE A "COVERED INVESTMENT"

91. The Respondent's first objection is that BSAM does not have an "*investment*" within the meaning of Article 25(1) of the ICSID Convention and Articles 2.1, 10.1 and 10.29 of the TPA. This is said to be the case for the following reasons: (i) because ordinary commercial transactions such as the cross-border sale of goods do not qualify as investments; (ii) any licenses, revenue sharing rights or intellectual property rights

identified by BSAM must also meet the criteria set out in the TPA's definition of investment, *i.e.*, they must have the “*characteristics of an investment;*” and (iii) the intellectual property rights (in the form of licenses) asserted by the Claimants are not rights that are located in Panama, as they are based on United States or Japanese law licenses and as such do not create rights protected under domestic law.

A. Defining “Investment”

92. As the Respondent notes, ICSID tribunals apply a double-barrelled test for investment.⁸¹ First, the activity in question must be covered by the treaty, and second, the activity must meet the requirements of Article 25 of the ICSID Convention. It is therefore necessary to briefly examine the criteria for investment under both the ICSID Convention and the TPA.

93. The TPA defines investment at Article 10.29 as follows:

Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) *an enterprise;*

(b) *shares, stock, and other forms of equity participation in an enterprise;*

(c) *bonds, debentures, other debt instruments, and loans;*

(d) *futures, options, and other derivatives;*

(e) *turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*

(f) *intellectual property rights;*

(g) *licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and*

(h) *other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.*

94. Accordingly, there are two elements to a potential investment under Article 10.29 of the TPA. First, the investment must be “*an asset*” that is “*owned or controlled*” by an investor. Second, it must have “*the characteristics of an investment.*” The words “*Forms that an investment may take*” confirm that the list of possible forms that an

⁸¹ Objections ¶ 11, n.34.

investment may take is intended to be non-exhaustive. This approach has been taken by previous tribunals interpreting clauses with similar or identical wording.⁸² Furthermore, the words “*every kind of asset*” in Article 10.29 have been interpreted to mean that the provision is intended to have a broad scope of application, and can include any contribution that has economic value.⁸³

95. The “*characteristics of an investment*” include “*the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*” These characteristics echo the components of the *Salini* test,⁸⁴ which numerous tribunals have applied to determine whether investors have an investment within the meaning of the applicable treaty and under Article 25 of the ICSID Convention. However, while some tribunals have held that all of the components listed in the *Salini* test have to exist in order to find an investment, the language of the TPA, given its natural and ordinary meaning, makes clear that the criteria are merely *examples* of the characteristics of an investment, such that an investment may include some of these characteristics but not necessarily all of them. The list is also non-exhaustive, so other characteristics may be taken into account; clearly, the intention of the drafters was that “*investment*” be interpreted broadly.
96. In an ICSID arbitration, the claimant must also have an “*investment*” within the meaning of Article 25(1) of the ICSID Convention. Article 25(1) provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

97. The word “*investment*” in Article 25(1) is not defined and so ICSID tribunals have taken different approaches to its meaning.
98. First, the “subjective school” – certain tribunals have applied the *Salini* test and give Article 25(1) a meaning that is independent of the treaty text. This test, introduced in *Fedax v. Venezuela*⁸⁵ and reproduced in *Salini*, establishes four criteria that must be present in an investment: (i) duration; (ii) assumption of risk; (iii) substantial

⁸² CLA-0026 – *RDC v. Guatemala* ¶ 140 (concluding that the identical language used in CAFTA established a non-exhaustive list).

⁸³ CLA-0003 – *Bayindir v. Pakistan* ¶ 116. There the BIT included wording which referred to “*every kind of asset.*” The tribunal considered that the Claimant’s contribution of “*know how, equipment and personnel clearly has an economic value and falls within the meaning of “every kind of asset.”*” *Id.*

⁸⁴ CLA-0030 – *Salini v. Morocco* ¶ 52 (“[C]ontributions, a certain duration of performance of the contract and a participation in the risks of the transaction In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”).

⁸⁵ CLA-0008 – *FEDAX v. Venezuela* ¶ 43 (“*The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.*”).

commitment; and (iv) contribution to the host State's development.⁸⁶ The tribunal in *Fedax v. Venezuela* also included a fifth element, the regularity of profit and return. Other tribunals have added elements such as a requirement that the investment be made in accordance with the laws of the host State and in good faith.⁸⁷ According to this school of thought, the text of the treaty is not the only determining factor in considering the scope of the term "investment." The tribunal in *Joy Mining v. Egypt*⁸⁸ noted that there is a limit, arising out of Article 25 of the ICSID Convention, to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals. The *ad hoc* annulment committee in *Mitchell v. DRC* further considered that "before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT."⁸⁹

99. *Second*, certain tribunals have applied a modified *Salini* test, by removing some of its elements. For example, in *Quiborax v. Bolivia*⁹⁰ the tribunal held that the fourth *Salini* criterion, contribution to the host State's development, was not a mandatory requirement.
100. *Third*, other tribunals defer to the contracting parties in defining the concept of "investment" and do not give Article 25 of the ICSID Convention any independent meaning. If the activity in question is covered by the applicable treaty, then there is an investment for the purposes of the ICSID Convention.⁹¹
101. It is clear that the definition of investment in the TPA and Article 25(1) of the ICSID Convention must be understood together, and where a treaty contains a comprehensive and expansive definition of "investment," as is the case with the TPA, it would make little sense if Article 25(1) of ICSID operated to limit the scope of the TPA. It would be absurd if an activity was considered an investment under the TPA because it had certain characteristics of an investment which are included in the *Salini* test, such as the assumption of risk and the commitment of capital; but was then not considered an investment under the ICSID Convention because it did not meet all of the criteria in the *Salini* test. This is particularly so given that the United States and Panama expressly agreed the terms of the regime in the TPA (in contrast to other bilateral investment treaties which do not contain a detailed definition of "investment"),⁹² and it is unlikely that they would have intended that matters not agreed to in the TPA (such as the ICSID Convention) would operate to narrow the scope of what they had expressly agreed. Indeed, as Professor Christoph Schreuer notes, "A rigid list of criteria that must be met in

⁸⁶ CLA-0030 – *Salini v. Morocco* ¶ 52.

⁸⁷ CLA-0024 – *Phoenix v. Czech Republic* ¶ 114.

⁸⁸ CLA-0011 – *Joy Mining v. Egypt* ¶ 49.

⁸⁹ CLA-0021 – *Patrick Mitchell v. Congo* ¶ 31.

⁹⁰ CLA-0025 – *Quiborax v. Bolivia* ¶ 220 ("The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong *Salini* test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement.").

⁹¹ CLA-0020 – See *Pantechniki v. Albania* ¶ 42 ("For an ICSID arbitral tribunal to reject an express definition desired by two States-party to a treaty seems a step not to be taken without the certainty that the Convention compels it.")

⁹² Exhibit C-0118 – See, e.g., Switzerland-Uruguay Bilateral Investment Treaty.

every case is not likely to facilitate the task of tribunals or to make decisions more predictable. The individual criteria carry a considerable margin of appreciation that may be applied at the tribunal's discretion."⁹³ Interpreting Article 25(1) in accordance with its ordinary meaning would cover "a wide range of economic operations," specifically including "rights to royalty payments" and "trademarks."⁹⁴ It has been found that only those transactions that involve a "simple sale and like transient commercial transactions"⁹⁵ are excluded from the Centre's jurisdiction.

B. If BSAM's Pleaded Allegations of Fact are Deemed to be True, Then on the Respondent's own case BSAM's Assets are Covered Investments

102. Turning now to BSAM and its investment in Panama, the Claimants stated in their Request, "*BLS and BSAM's investments in Panama, being intellectual property rights and distribution licenses and agreements with Panamanian entities, constitute "investments" under the FTA (Article 10.29(f) and (g) in particular).*"⁹⁶ In its letter of 19 October 2016, ICSID asked the Claimants:

2. Pursuant to Article 25 of the ICSID Convention and ICSID Institution Rule 2(1)(e) please elaborate on:

(a) Whether there is an investment within the meaning of Article 25(1) of the ICSID Convention, for each BLS and BSAM.

(b) Whether each BLS and BSAM has an "investment" meeting the definition of Article 10.29 of the US-Panama FTA, and the notion of "covered investment" referred to in Articles 10.2 and 2.1 of the US-Panama FTA."

103. In their response dated 25 October 2016, the Claimants replied to this question as follows:

Additionally, as set out at ¶ 7 of the Request, BSAM is the parent company for various Bridgestone business units in North, Central and South America, including Panama. BSAM, including through its subsidiaries, is authorized to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas. BSAM's subsidiaries include Bridgestone Costa Rica ("BSCR"), which sells BRIDGESTONE and FIRESTONE brand tires to third party dealers and distributors in Panama. Profits from sales to Panamanian dealers and distributors are paid to BSCR and reported on BSAM's consolidated financial statements. These assets and

⁹³ Christoph H. Schreuer, et al., *The ICSID Convention: A Commentary*, (2d ed. 2009), Article 25, ¶ 172 (cited by Respondents at **RLA-002**).

⁹⁴ **CLA-0023** – See *Philip Morris v. Uruguay* ¶¶ 183, 200, 209 (concluding that Claimants' assets in Uruguay, which included rights to royalty payments and trademarks, qualified as investments under Article 25(1) of the ICSID Convention).

⁹⁵ **CLA-0014** – See *Malaysian Historical Salvors v. Malaysia*, Decision on Annulment ¶ 69.

⁹⁶ Request ¶ 72.

activities fall within the broad wording of Article 25(1) and the interpretation given by ICSID Tribunals as indicated above, as well as within the express meaning of “investment” under the US-Panama FTA as explained at 2(b) below – which is relevant to analysis under Article 25(1). Further, these assets in Panama possess the characteristics of an “investment” as this term is understood in the context of Article 25(1) of the Convention. Specifically, they involve an assumption of risk (as to the volume of sales of tires in Panama) and require substantial capital expenditure in the form of corporate services to conduct tire sales in Panama. These activities also involve an expectation of gain, since profits from sales to Panamanian dealers and distributors are paid to BSCR and reported on BSAM’s consolidated financial statements. Lastly, BSAM has engaged in commercial activity in Panama under its name since 2001 and has sold into Panama for decades through its predecessor, The Firestone Tire and Rubber Company. Accordingly, BSAM’s investment in Panama involves a long-term investment, which cannot be characterized as a transient commercial transaction or simple sale.

Both BSLS and BSAM are US-incorporated entities. As indicated in our response to question 2(a) above, the claims brought in the Request in the present case arise directly out of (a) BSLS and BSAM’s respective intellectual property rights in Panama and hence fall within the definition of “investment” at Article 10.29(f) of the US-Panama FTA and (b), in respect of BSAM, its revenue-sharing and license rights in Panama and hence fall within the definition of “investment” at Article 10.29(e) and Article 10.29(g) of the FTA. Further, those rights themselves possess the characteristics of an investment within the meaning of that term under Article 10.29, namely “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” In that context, we again refer to the description of BSLS’s and BSAM’s respective assets stated in response to question 2(a) above.

For completeness, and as described at ¶ 12 of the Request, the rights to the FIRESTONE trademark in Panama were assigned to BSLS in 2002, and BSLS continues to hold those rights. Therefore, BSLS’s investment in Panama was in existence as of the date of entry into force of the US-Panama FTA, and is accordingly a “covered investment” pursuant to Article 2.1 of the US-Panama FTA. Additionally, BSAM’s rights are in the form of revenue sharing rights and authorizations conferred on Panamanian entities, which are expressly protected in Article 10.29(e) and Article 10.29(g) of the U.S.-Panama FTA. BSAM has had this role with BSCR in Panama since 2001 and for decades under BSAM’s predecessor The Firestone Tire and Rubber Company. Therefore BSAM’s investment in Panama was in existence as of the date of entry into force of the US-Panama FTA, and is accordingly a “covered investment” pursuant to Article 2.1 of the US-Panama FTA.

104. In their Request, as supplemented by the letter of 25 October 2016, the Claimants have made clear factual allegations about the nature of the investments held by BSAM and BSLS. In particular, the Claimants have asserted that BSAM has (i) intellectual property rights; (ii) revenue sharing rights; (iii) and license rights in Panama, and that these assets involve (i) an assumption of risk; (ii) substantial capital expenditure; and (iii) an expectation of profit or gain. The Claimants also note that BSAM has held these investments for over 16 years in its own name. In accordance with the mechanism in Article 10.20.5 of the TPA, the Tribunal is required to assume that these factual allegations are true. The only question for the Tribunal could be whether these assets can properly be considered to be covered investments. In relation to at least some of BSAM's activities, the Respondent accepts that they can – “*Licenses, revenue sharing contracts, and intellectual property rights certainly are among the [f]orms [identified by the TPA] that an investment may take.*”⁹⁷
105. Therefore, applying the requirement under Article 10.20.4(c) that pleaded allegations of fact are to be deemed to be true, on the Respondent's own case BSAM's assets are covered investments.
106. The Respondent does not engage at all with the process under the expedited summary procedure it has elected to invoke and does not appear to accept that the facts that the Claimants have alleged should be deemed to be true for the purposes of their Objections. Therefore, without prejudice to their contention that the facts set out in their Request, as supplemented by the letter of 25 October 2016, should be deemed to be true, the Claimants have addressed the various arguments raised by the Respondents that relate to these factual allegations below.

C. BSAM's Activities in Panama

107. As described in the Request and letter to ICSID dated 25 October 2016, BSAM is involved (itself and through its wholly-owned direct and indirect subsidiaries) in various activities in Panama. Each of these activities will be discussed further below, but the Claimants contend that it is the totality of these activities that together amount to BSAM's investment, and each activity should be examined in light of the others. As the tribunal in *CSOB v Slovak Republic* held: “*An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.*”⁹⁸ However, there must be a core investment, around which these other activities revolve: “*It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.*”⁹⁹ In BSAM's case, the “*basis of the investment*” is its intellectual property rights.

⁹⁷ Objections ¶ 13.

⁹⁸ **CLA-0005** – *CSOB v. Slovak Republic* ¶ 72.

⁹⁹ Christoph H. Schreuer, et al., *The ICSID Convention: A Commentary*, 109 (2d ed. 2009) (cited by Respondents at **RLA-002**) (referring to *Holiday Inns S.A., Occidental Petroleum Corporation et al. v. Government of Morocco*, ICSID Case No. ARB /72/1 ¶ 95).

108. The Respondent – although it does not explain the applicable standard or engage at all with the process under the expedited procedure it has elected to use – accepts that intellectual property rights can constitute an investment for the purposes of the TPA, but argues that the intellectual property rights owned by BSAM do not constitute such an investment. This is so, the Respondent argues, because “*Bridgestone Americas does not own or control either the BRIDGESTONE or FIRESTONE trademarks – the only “intellectual property” rights that Bridgestone Americas could even attempt to style as an “investment” would be those that were created by means of the three trademark licensing agreements that Claimants appended to their 25 October 2016 Submission on Registration.*”¹⁰⁰ As the tribunal in *Pac Rim v El Salvador* made clear, a claimant is not required to present all the evidence at the request for arbitration stage – “*The initial pleading cannot and is not required to be a complete documentary record of the claimant’s factual evidence and legal argument. Indeed, a notice may contain few factual exhibits and still fewer legal materials.*”¹⁰¹ The request would normally be followed by a full pleading, including all the evidence on which the claimant intends to rely. A respondent is entitled to challenge the claimant at that stage, on the basis of the evidence. But here, the Respondent has elected not to wait until it has all the evidence before it.
109. The Claimants appended certain trademark licenses to their letter to ICSID of 25 October 2016. Those were provided as an illustration of the intellectual property rights held by BSAM. For the reasons set out above, the Claimants do not consider that any further evidence is required at this stage because they have made a factual assertion about BSAM’s intellectual property rights investment, and included documents that evidence the assertion, and the Tribunal is required to deem this assertion to be true. However, because the Respondent does not appear to accept that this is the correct approach to take to its Article 10.20.5 Objections, the Claimants set forth in the following paragraphs further information regarding BSAM’s intellectual property investment in Panama.

1. Licensing and Use of Bridgestone and Firestone Intellectual Property

110. As the Claimants explained at paragraph 6 of the Request, BSLS and BSJ each own trademarks in Panama, for FIRESTONE and BRIDGESTONE, respectively.¹⁰² These trademarks are merely owned by BSLS and BSJ, who are not involved in using, selling, marketing or manufacturing tires with the BRIDGESTONE or FIRESTONE trademarks in Panama. Instead, BSLS and BSJ have licensed various rights under their Panamanian trademarks to other entities.
111. There are two key licenses which comprise BSAM’s intellectual property rights: first, the trademark license granted by BSJ to Bridgestone/Firestone North American Tire, LLC on 1 December 2001 (the “**BRIDGESTONE Trademark License**”).¹⁰³

¹⁰⁰ Objections ¶ 16.

¹⁰¹ CLA-0019 – *Pac Rim v. El Salvador*, Preliminary Objections ¶ 96.

¹⁰² Exhibit C-0006 and Exhibit C-0007.

¹⁰³ Exhibit C-0052 - Trademark License Agreement dated 1 December 2001.

112. Bridgestone/Firestone North American Tire, LLC is the predecessor of an entity now known as Bridgestone American Tire Operations, LLC (“**BATO**”).¹⁰⁴ BATO is a wholly-owned subsidiary of BSAM.¹⁰⁵ The BRIDGESTONE Trademark License relates to “*BSJ Trademarks*,” which is defined at Article 1.1 of the BRIDGESTONE Trademark License as “*all present and future trademark registrations, applications and renewals thereof, as well as unregistered trademarks, anywhere in the world, in the form, among others, of names, phrases, letters, numbers, logos, combinations thereof and trade dress belonging to BSJ, together with additional registrations and unregistered trademarks authorized for use by the parties hereunder, relating to and within the definition of “Tire Products” in Section 1.2 hereof.*”¹⁰⁶ BSJ owns trademarks in Panama,¹⁰⁷ and therefore BSJ’s Panamanian trademarks are included within the definition of “*BSJ Trademarks*” in the BRIDGESTONE Trademark License.
113. The BRIDGESTONE Trademark License gives BATO the “*non-exclusive and non-transferable right and license, with the limited right to sublicense as identified in this Article, to use for the term of this Agreement (i) BSJ Trademarks in relation to all Tire Products within the United States of America and elsewhere as provided for in Article 2.2 provided that the designs, including trade dress, construction and quality of such Tire Products, are approved by BSJ and (ii) the term “Bridgestone” as part of a corporate name or trade name.*”¹⁰⁸ It is under this provision of the BRIDGESTONE Trademark License that BASM undertakes all of its activities in Panama – the sale and distribution of tires bearing the BRIDGESTONE mark, and the marketing and training activities that it does in support of its investment. It does so in accordance with Article 4.1 of the BRIDGESTONE Trademark License: “*BFNT shall actually use BSJ Trademarks licensed hereunder and identify Tire Products with one or more BSJ Trademarks in accordance with the laws relating to the marketing of goods for the purpose of giving adequate trademark notice in the jurisdiction of intended use.*”¹⁰⁹
114. The position in relation to the FIRESTONE mark is similar. BSLS holds the FIRESTONE trademarks in Panama,¹¹⁰ and granted a trademark license to Bridgestone/Firestone Americas Holding, Inc. on 1 December 2001 (the “**FIRESTONE Trademark License**”).¹¹¹ Bridgestone/Firestone Americas Holding, Inc. is the

¹⁰⁴ On 21 June 2005, Bridgestone/Firestone North American Tire, LLC changed its name to Bridgestone Firestone North American Tire, LLC. **Exhibit C-0053** – Certificate of Amendment to Certificate of Formation dated 21 June 2005. On 18 December 2008, Bridgestone Firestone North American Tire, LLC changed its name to Bridgestone American Tire Operations, LLC. **Exhibit C-0054** – Certificate of Name Change dated 18 December 2008.

¹⁰⁵ **Exhibit C-0055** – Assistant Secretary’s Certificate.

¹⁰⁶ **Exhibit C-0052** – Trademark License Agreement dated 1 December 2001, Art. 1.1.

¹⁰⁷ **Exhibit C-0006**.

¹⁰⁸ **Exhibit C-0052** – Trademark License Agreement dated 1 December 2001, Art. 2.1.

¹⁰⁹ *Id.* Art. 4.1.

¹¹⁰ **Exhibit C-0007**.

¹¹¹ **Exhibit C-0048** – FIRESTONE Trademark License.

predecessor of BSAM.¹¹² The FIRESTONE Trademark License relates to the FIRESTONE trademark, the forms of which are included therein, and gives BSAM the right to “*use the Marks*”¹¹³ on items such as tires in the Western Hemisphere except in the United States.

2. *Rights under Panamanian Law*

115. The Respondent argues that the FIRESTONE Trademark License does not create any revenue sharing, license or intellectual property rights protected under Panamanian domestic law.¹¹⁴ This is not right. The definition of “*investment*” in the TPA includes “*licenses, authorizations, permits, and similar rights conferred pursuant to domestic law,*” and there is a note to this sub-paragraph which provides, “*among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law.*”¹¹⁵ This note relates specifically to this sub-paragraph (g), and not to sub-paragraph (f), “*intellectual property rights.*” Accordingly, there is no requirement in the TPA that an intellectual property right create a right protected under domestic law. The FIRESTONE Trademark License may be a license, but it also confers on BSAM intellectual property rights. In any event, as described below, the FIRESTONE Trademark License does create a right protected under domestic law.
116. The FIRESTONE Trademark License is indeed governed by U.S. law. It would be strange if it were not, because the licensor and the licensee are both U.S.-incorporated entities and the agreement relates to all of the trademarks held by BSLS worldwide. However, each of the trademarks to which the FIRESTONE Trademark License relate are intellectual property rights created pursuant to the relevant jurisdiction, and so, in relation to the Panamanian FIRESTONE trademark, the FIRESTONE Trademark License is a contract that operates to pass Panamanian law intellectual property rights from BSLS to BSAM. It is notable that the TPA refers to “*intellectual property rights*” at Article 10.29(f), rather than just “*intellectual property*” – the TPA therefore expressly contemplates rights in intellectual property, such as the right to use, sell, distribute and market that BSAM has, and not just the intellectual property itself. BSLS’s FIRESTONE trademark in Panama is a trademark created and protected under Panamanian law. The FIRESTONE Trademark Agreement licenses that Panamanian law right to BSAM. Similarly, the BRIDGESTONE Trademark Agreement licenses the BRIDGESTONE Panamanian law right to BATO, BSAM’s subsidiary. BSAM and BATO’s rights are recognized under Panamanian law. In particular, Article 121 of the Trademark Law (Law No. 35 of 1996) provides:

¹¹² On 30 December 2002, Bridgestone/Firestone Americas Holding, Inc. changed its name to Bridgestone Americas Holding, Inc. **Exhibit C-0056** – Certificate of Amendment to the Amended and Restated Articles of Incorporation of Bridgestone/Firestone Americas Holding, Inc. On 1 January 2009, Bridgestone Americas Holding, Inc. changed its name to Bridgestone Americas, Inc. **Exhibit C-0057** – Certificate of Amendment to Articles of Incorporation.

¹¹³ **Exhibit C-0048** – FIRESTONE Trademark License § 1.

¹¹⁴ Objections ¶ 18.

¹¹⁵ **Exhibit C-0117** – TPA, Article 10.29, n.9.

*The owner of a registered trademark can grant, by means of a contract, a license to use the trademark in favor of one or several persons in connection with all or part of the goods or services covered by the registration. The owner of the registered trademark can reserve the right to simultaneously use the trademark.*¹¹⁶

3. Sales and Marketing Activities in Panama

117. As explained above, the intellectual property rights contained in the BRIDGESTONE Trademark License and the FIRESTONE Trademark License are BSAM’s core investments. BSAM and its wholly-owned subsidiaries carry out a wide variety of activities in support of these investments. BSAM sub-licenses its intellectual property rights to its wholly-owned subsidiary, Bridgestone Costa Rica S.A. (“**BSCR**”), which manufactures, sells, markets and distributes BRIDGESTONE and FIRESTONE tires throughout the region, including in Panama.¹¹⁷ Roger Hidalgo, Sales Director for BSCR and Erick Calderon, Marketing Manager of BSAM for the Latin American North region, describe the various activities undertaken by BSAM’s subsidiaries in Panama in their witness statements.¹¹⁸
118. With respect to sales activities in Panama, Mr. Hidalgo states that BSCR has been responsible for sales of Bridgestone and Firestone tires in the Panama market since about 2000, and maintains a strong relationship with a distributor named Tambor, S.A., (“**Tambor**”)—a company that has sold Bridgestone tires in Panama for nearly 60 years.¹¹⁹ Tambor, as well as other distributors,¹²⁰ place orders for tires with BSCR. BSCR then ships tires to the relevant distributor in Panama under the FCA Incoterms 2010.¹²¹ Payment for the tires is due after they are received and is usually made within 120 days. Tires sold in Panama have a warranty provided by Bridgestone under Panamanian law, and certain lines of tires are sold with an additional road hazard warranty provided by BSAM.¹²² Between 2013 and 2017 BSCR has sold over 200,000 tires to distributors in Panama, generating net sales of over US\$27,000,000.¹²³

¹¹⁶ Article 121 of Law No. 35 1996. The Spanish-language version states as follows: “*Artículo 121. El propietario de una marca registrada podrá, por contrato, otorgar licencia de uso de la marca, a una o varias personas, sobre la totalidad o sobre parte de los productos o servicios que ampara el registro. El propietario puede reservarse el derecho al uso simultáneo de la marca.*”

¹¹⁷ **Exhibit C-0049**.

¹¹⁸ Witness Statement of Roger Hidalgo (job description and curriculum vitae provided in **Exhibit C-58** and **Exhibit C-0059**, respectively); Witness Statement of Erick Calderon (job description provided in **Exhibit C-0067**).

¹¹⁹ Roger Hidalgo Witness Statement ¶¶ 10, 16 (citing **Exhibit C-0063** - Tambor Distribution Agreement).

¹²⁰ Other distributors in Panama include: Bandag, Empresas Melo, Recauchado RaTracTa, IIASA Panama, Centro de Llantas, and Comercializadora OM. A summary of sales to these entities in Panama between 2013 and 2017 is provided in **Appendix C** of the Witness Statement for Roger Hidalgo.

¹²¹ Roger Hidalgo Witness Statement ¶ 17.

¹²² *Id.* ¶¶ 22-25.

¹²³ *Id.* **Appendix C** – Summary of Sales to Panamanian Distributors 2013-2017.

119. BSCR has a sales team that travels to Panama frequently to sell Bridgestone and Firestone products sold by BSAM (consumer, truck and bus, and industrial and agricultural) and to grow the business in the Panama market.¹²⁴ Apart from Mr. Hidalgo, this team consists of three sales managers (one for each product line), three salesmen, two sales engineers and a country manager. A representative of this team travels to Panama at least every two to three weeks to meet with distributors and potential customers.¹²⁵ At such meetings, the sales managers review business plans and sales strategies, and provide training to personnel in Panama on the products and warranties offered by Bridgestone.¹²⁶ Between 2013 and 2016, BSCR's sales team, collectively, made a total of 112 trips to Panama.¹²⁷ Furthermore, since May 2017, BSCR has employed a new sales representative who lives and works in Panama and has exclusive oversight of the Panama market across all three product lines.¹²⁸
120. Marketing activities in Panama are set at the regional level by BSAM and implemented locally by marketing managers at BSCR (pre-October 2015) and Bridgestone Latin America North ("BS-LAN") (post-October 2015).¹²⁹ For the Panama market specifically, Mr. Calderon works out of the Costa Rica offices of BSCR and receives marketing support by the regional marketing team for BS-LAN based in Mexico City, Mexico.¹³⁰ He oversees the marketing strategy for BRIDGESTONE, FIRESTONE, and BANDAG products in Panama, which includes investment in the following marketing activities:
- (a) advertisements in various forms of media that specifically target the Panamanian market (e.g., advertisements in regional magazines, product catalogues, point of purchase materials, radio and television commercials);¹³¹
 - (b) web-based tools, such as webpage for BRIDGESTONE and FIRESTONE products to advertise these products to online consumers;¹³²
 - (c) seasonal promotions that involve season-specific advertisements and customer discounts (e.g., "buy three tires, get the fourth free" sales);¹³³

¹²⁴ *Id.* ¶ 13.

¹²⁵ *Id.*

¹²⁶ *Id.* ¶¶ 13-14.

¹²⁷ *Id.* ¶ 13. Trip authorization records evidencing these trips are provided in **Exhibit C-0061**. For ease of reference, these trips are summarized by year for each sales team representative in **Appendix B** to the Witness Statement for Roger Hidalgo.

¹²⁸ *Id.* ¶ 15 (citing **Exhibit C-0062** - Employment Contract for Sales Services in Panama).

¹²⁹ Erick Calderon Witness Statement ¶ 6. BS-LAN is a sub-regional business unit formed in October 2015 to consolidate and share resources among BSAM subsidiaries more efficiently, such as human resources and marketing services. BS-LAN includes the territories covered by the three BSAM subsidiaries that comprise the "North" of Latin America, such as Bridgestone Mexico ("**BSMX**"), Bridgestone Colombia ("**BSCO**"), and BSCR.

¹³⁰ *Id.* ¶ 2.

¹³¹ *Id.* ¶ 9 (citing **Exhibit C-0068** - Panama-specific Advertisements).

¹³² *Id.* ¶ 10 (citing **Exhibit C-0069** - Web-based marketing).

¹³³ *Id.* ¶¶ 11-12 (citing **Exhibit C-0070** - Christmas marketing campaign materials).

- (d) marketing campaigns for the Panama market, such as the “*Bridgestone: Time to Perform*” campaign,¹³⁴ the “*Bridgestone Expert*” campaign,¹³⁵ and the “*Road Rescue*” campaign;¹³⁶
 - (e) new product launches where customers and potential customers are invited to attend and learn about new tires;¹³⁷
 - (f) merchandising co-sponsorships with Panamanian stores, such as PriceSmart;¹³⁸
 - (g) attendance at the Latin America Tyre Expo in Panama City, Panama;¹³⁹ and
 - (h) commissioning market research studies to better understand the position of BRIDGESTONE and FIRESTONE brands in Panama and their market share as compared to other tire brands.¹⁴⁰
121. Since 2013, BSAM (through BSCR and BS-LAN) have spent an estimated US\$469,417 on the above-referenced marketing activities in Panama.¹⁴¹
122. In addition to the above, BSAM also has revenue sharing rights and licenses in Panama through its wholly-owned indirect subsidiary, Bridgestone Bandag, LLC. BANDAG is a brand associated with Bridgestone’s tire retreading business, which is part of BSAM’s wholly owned subsidiary, BATO. BATO’s wholly-owned subsidiary Bridgestone Bandag, LLC has a franchise agreement with a Panamanian entity known as Bandag de Panama S.A. (“**Bandag Franchise Agreement**”).¹⁴² Pursuant to the Bandag Franchise Agreement, Bandag de Panama S.A. uses the Bandag patented method and BANDAG trademarked apparatus and supplies to offer retreading services as a franchisee in Panama. Pursuant to that agreement, Bandag de Panama S.A. pays royalties to Bridgestone Bandag, LLC, and is required to make minimum purchases of supplies such as rubber and retreading materials from Bridgestone Bandag, LLC.
123. Sales services and marketing for BANDAG are carried out by BSCR in the same way as described above for the BRIDGESTONE and FIRESTONE brands, but there are certain differences. Marketing for BANDAG is limited to point of purchase materials and signage. Customers buying BRIDGESTONE or FIRESTONE tires from distributors in

¹³⁴ *Id.* ¶ 14 (citing **Exhibit C-0071** - Copa Libertadores marketing materials).

¹³⁵ *Id.* ¶ 15 (citing **Exhibit C-0072** - Bridgestone Expert campaign marketing materials).

¹³⁶ *Id.* ¶ 16 (citing **Exhibit C-0073** - Road Rescue marketing materials).

¹³⁷ *Id.* ¶ 17.

¹³⁸ *Id.* ¶ 18 (citing **Exhibit C-0074** - PriceSmart Advertisements).

¹³⁹ *Id.* ¶ 19 (citing **Exhibit C-0075** - Latin American Tyre Expo information).

¹⁴⁰ *Id.* ¶ 20 (citing **Exhibit C-0076** - Brand Study).

¹⁴¹ *Id.* ¶¶ 9-20 (referencing the money spent on Panama-specific marketing activities from 2013 to 2017).

¹⁴² Roger Hidalgo Witness Statement, ¶ 21 (citing **Exhibit C-0064** - Franchise Agreement between Bandag Incorporated and Rodelag S.A. dated 27 September 1965). On 16 May 1972, Rodelag S.A. assigned the Franchise Agreement to Bandag de Panama. *See Exhibit C-0065*. Bandag Incorporated changed its name to Bridgestone Bandag, LLC on 1 June 2007. *See Exhibit C-0066*.

Panama will be made aware of the retreading services offered by Bandag de Panama which will extend the life of their tires. Sales personnel from BSCR travel to Bandag de Panama in addition to visiting distributors in Panama, and provide similar support services including training on the products.¹⁴³

D. Commitment of Capital or Other Resources

124. BSAM's assets in Panama also have the "*characteristics of an investment.*"
125. As described above in relation to the marketing and sale-related activity at paragraphs 109-112, BSAM has committed a substantial amount of capital to its investment in Panama, as well as "*other [non-monetary] resources.*" Contributions of money, as well as other resources such as know-how and personnel, are to be considered. For example, the tribunal in *Bayindir v. Pakistan* considered contribution in terms of know-how, equipment and personnel, and found that the requirement for a commitment of capital or other resources was fulfilled.¹⁴⁴ In the same vein, the tribunal in *Deutsche Bank v. Sri Lanka* considered that a contribution could take any form, and that it is not limited to financial contributions, but can also include know-how, equipment, personnel and services.¹⁴⁵ Further, the tribunal in *Gavazzi v. Romania* noted that the ICSID Convention imposes no monetary threshold to the notion of investment and also took the view that actual plans to invest may qualify as "*investments*" under the ICSID Convention.¹⁴⁶ Additionally, the TPA also does not include any monetary threshold; therefore, the requirement for commitment of capital should not be understood to mean that only large expenses should qualify, as long as the investor's commitment has some economic value.
126. As described above in paragraphs 109-112, BSAM has contributed substantial monetary and non-monetary resources to its investments in Panama. In addition, BSCR has contributed non-monetary resources to its investments by employing personnel who are tasked specifically with Panamanian sales and marketing, and requiring them to travel extensively to Panama to perform their duties. Such duties include the provision of knowhow to local distributors and customers, who are trained in the use of Bridgestone's products and how to assess warranty claims.¹⁴⁷

E. Expectation of Gain or Profit

127. It goes without saying that BSAM's investments in Panama were made with the expectation of gain or profit. BSJ and BSLS licensed the use of their trademarks to BSAM (and BSAM's subsidiary) so that BSAM could make money in Panama by selling tires. Similarly, BSAM's subsidiary entered into a franchise agreement with Bandag de Panama with the expectation that it would earn money from Bandag de Panama. In that case, there is a guaranteed minimum payment due to BSAM's subsidiary, because

¹⁴³ Roger Hidalgo Witness Statement ¶ 21.

¹⁴⁴ CLA-0003 – *Bayindir v. Pakistan* ¶¶ 115-21

¹⁴⁵ CLA-0007 – *Deutsche Bank v. Sri Lanka* ¶ 297.

¹⁴⁶ CLA-0015 – *Gavazzi v. Romania* ¶ 105.

¹⁴⁷ Roger Hidalgo Witness Statement ¶ 14.

Bandag de Panama is required to pay royalties of at least US\$6,000 a year.¹⁴⁸ As with most businesses, in order to make a profit, BSAM has a substantial outlay of capital, as described above, in personnel and marketing costs, amongst other things, but all of these activities are done with the expectation of profit.

F. Assumption of Risk

128. Previous tribunals have held that the very existence of an investment dispute can be seen as an indication of a risk.¹⁴⁹ As the Claimants have explained in their Request, the Panamanian Supreme Court decision gave rise to immediate financial loss (*e.g.*, liability in damages and costs) and has created a significant level of risk for the BSAM: the risk that the dilution of the value trademark caused by the judgment will result in trademark infringements, competing registrations, and ultimately reduced sales and decreased profits in Panama because the barrier to entry into the market is reduced. Additionally, BSAM faces risk in its activities including payment risk – it ships tires to Panamanian customers and distributors before being paid for them.

G. Duration

129. Tribunals have also considered the duration of an activity in order to determine whether such activity amounts to an investment. There is no set period of time in the TPA (or in the ICSID Convention), but it has been held by one tribunal that the minimum length of time is between two and five years for an activity to amount to an investment.¹⁵⁰ BSAM easily meets this criterion, as it has held its investments in Panama based on the BRIDGESTONE Trademark License and the FIRESTONE Trademark License in Panama under its name since 2001, and has sold into Panama for decades through its predecessor, The Firestone Tire and Rubber Company. Further, BSAM's wholly-owned subsidiary BSCR has been in charge of the Panama market since 1997, and has been sending personnel to the market and developing its relationship with Tambor and other distributors from the beginning of their operations.¹⁵¹ Also, the distribution agreement with Tambor to sell Bridgestone tires dates back to 1979,¹⁵² and the Bandag Franchise Agreement dates back to 1965.¹⁵³ Accordingly, BSAM's investment in Panama involves a long-term investment.

H. Conclusion

¹⁴⁸ **Exhibit C-0064** – Franchise Agreement between Bandag Incorporated and Rodelag S.A. dated 27 September 1965 (stating, under Section VIII, that Bandag de Panama pays a royalty of 10 cents per pound of rubber (section II), and must pay a royalty on at least 60,000 pounds of rubber each year).

¹⁴⁹ **CLA-0008** – *FEDAX v. Venezuela* ¶ 40.

¹⁵⁰ **CLA-0030** – *Salini v. Morocco* ¶ 54.

¹⁵¹ Roger Hidalgo Witness Statement ¶¶ 16-17.

¹⁵² **Exhibit C-0063** – Tambor Distribution Agreement.

¹⁵³ **Exhibit C-0064** – Franchise Agreement between Bandag Incorporated and Rodelag S.A. dated 27 September 1965.

130. The Respondent has argued that BSAM has no qualifying “investment” because ordinary commercial transactions are not investments, and because the assets identified by the Claimants in their Request and letter to ICSID dated 25 October 2016 do not have the requisite characteristics of an investment. The Claimants submit that the Tribunal’s approach to this objection should be to consider the facts alleged by the Claimants in their Request and letter to ICSID dated 25 October 2016, and determine whether the investments identified by the Claimants therein are “investments” for the purposes of the TPA. The Claimants respectfully submit that they are. Alternatively, the Claimants have provided further evidence of the nature of their investments in Panama, and the Tribunal is invited to conclude that BSAM has a qualifying investment under the TPA and Article 25(1) of the ICSID Convention.

X. PANAMA’S SECOND OBJECTION: BSAM’S DISPUTE DOES NOT ARISE OUT OF AN INVESTMENT

131. The Respondent’s second objection is that even if BSAM did have an investment, it cannot show that its dispute arises directly out of BSAM’s investment, as required by Article 25(1) of the ICSID Convention. The Respondent argues that because the claims in this case arise out of the Supreme Court decision which ordered BSLs and BSJ (and not BSAM) to pay US\$5.4 million to Muresa, BSAM has nothing to do with this dispute and cannot have any claims arising out of it.
132. The second objection is misconceived because the Respondent has misunderstood the Claimants’ case as it relates to BSAM.
133. Paragraphs 54 to 58 of the Request set out the loss suffered by the Claimants. Paragraph 54 of the Request stated:

As a consequence of the Supreme Court decision and the penalty imposed therein, BSAM and BSLs have suffered loss and damage in excess of USD 16,000,000. This sum includes the USD 5,431,000 in damages and fees that were ordered by the Supreme Court, as well as an estimate of the loss that has been and will be incurred by BSLs and BSAM as a result of the decision.¹⁵⁴

134. As the Respondent correctly identifies, the Supreme Court penalty of US\$5.4 million was made against BSJ and BSLs, who were held jointly and severally liable for the total. BSLs ultimately paid the whole sum. Thus, it is BSLs who has lost that US\$5.4 million and BSLs claims the return of that sum. BSLs’s investment was in the form of its ownership of the FIRESTONE trademark, and its dispute arises directly out of that investment. BSAM’s core investment, as described above is its intellectual property rights – its licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama. Its dispute is that its intellectual property rights have been diluted as a consequence of the Supreme Court decision. It claims (together with BSLs, which also suffers some loss in excess of the US\$5.4 million for the same reason) loss resulting from the Supreme Court decision because the Supreme Court decision has ultimately made it much more costly

¹⁵⁴ Request ¶ 54.

for BSAM to maintain its investment in Panama and in other countries in the region. The reasons for this are set out at paragraphs 55 to 58 of the Request: (i) payment of the damages has had a direct impact on the ability of the U.S. Bridgestone entities to reinvest in their business; (ii) the Supreme Court decision may be followed in other neighboring countries as a matter of government policy, leading to a reduction in trademark protections and ultimately a reduction in sales and market share; (iii) the Supreme Court decision may establish a precedent that is likely to be followed within and outside of Panama; and (iv) it is likely that there will be more trademark applications that are similar and confusingly similar to the BRIDGESTONE and FIRESTONE marks, by Muresa's group of companies and by unrelated competitors.

135. While BSLS earns a small amount of trademark royalties for use of the FIRESTONE brand in Panama, as described above, and suffers some loss of royalty because of the dilution of its trademark, it is BSAM and its subsidiaries that license the BRIDGESTONE and FIRESTONE trademarks that carry out activities in Panama, spend money in connection with their investment with Panama, and ultimately stand to substantially lose if the trademarks that are at the center of their investment are devalued. Similarly, the BANDAG retreading business relies on a strong system for the protection of intellectual property. When cheap tires flood the market due to weak intellectual property protection, the retread market suffers, because customers decide to buy cheap tires and replace them with other cheap tires, rather than buy high quality brands like BRIDGESTONE and then have them retreaded by Bandag. Sales of retreads by Bandag de Panama S.A. (and consequently the amount of rubber and supplies Bandag de Panama S.A. acquires from Bridgestone) have decreased, which is due in part to the weaker intellectual property protection in Panama resulting from the Supreme Court decision. BSAM's claims therefore arise directly out of their investment in Panama.
136. In summary, this objection is misconceived, does not take account of the realities of international businesses and the ways in which entities within a group are interrelated and appears to arise out of the Respondent's misunderstanding of the Claimants' case. BSAM does not claim the loss of the US\$5.4 million which the Supreme Court ordered that BSLS and BSJ pay to Muresa. Instead, BSAM (which is the main entity carrying out business activities in Panama, both by itself and through its wholly-owned subsidiaries) claims loss arising directly out of the measure adopted by Panama, *i.e.*, the Supreme Court decision, because that decision has had the immediate effect of making it much more costly for BSAM to do business in Panama. Accordingly, the Claimant respectfully submits that BSAM's dispute arises directly out of its investment.

XI. PANAMA'S THIRD OBJECTION: PANAMA PURPORTS TO DENY THE BENEFITS OF THE TPA TO BSLS

137. The Respondent purports to deny the benefits of the TPA to BSLS under the provision in Article 10.12.2 of the TPA, which provides:

Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments

*of that investor if the enterprise has no substantial business activities in the territory of the other Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.*¹⁵⁵

138. In order to effectively deny the benefits of the TPA to BSLS, the following requirements must be satisfied, pursuant to Article 10.12 of the TPA:
- (a) Panama must have provided adequate notice to the United States of its intention to deny the benefits of the TPA to BSLS, pursuant to Article 18.3 of the TPA, and engaged in any consultations with the United States pursuant to Article 20.4 of the TPA;
 - (b) Panama must show that BSLS is owned or controlled by persons of a non-Party or of Panama; and
 - (c) Panama must show that BSLS has “*no substantial business activities*” in the United States.
139. BSLS is owned by a Japanese-incorporated entity, as the Claimants explained at paragraph 1 of the Request. Other than that, the requirements for denial of benefits have not been met by the Respondent. Panama’s notification to the United States of its intention to deny the benefits of the TPA to BSLS was inadequate, since it was sent around one week before submitting its Objections, and when the current proceedings were underway, thereby depriving the United States of any meaningful opportunity to engage in the consultation procedure in the TPA before the Tribunal must consider this issue. The Respondent also cannot show that BSLS has “*no substantial business activities*” in the United States, having applied a set of random criteria to determine this issue (such as a search of online databases) rather than following the approach set out in case law and considering whether BSLS meets the criteria therein. In paragraphs 144 to 162 below, and in the witness statement of Thomas R. Kingsbury, the Claimants describe the relevant criteria, and provide the relevant evidence of BSLS’s business activities in the United States.

A. Notification of intention to deny benefits to the US

140. As to the first requirement, Article 18.3 provides:

1. To the maximum extent possible, each Party shall notify the other Party of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party’s interests under this Agreement.

2. On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not the other Party has been previously notified of that measure.

¹⁵⁵ Exhibit C-0117 – TPA, Art. 10.12.2.

3. Any notification or information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.¹⁵⁶

141. Panama was required to provide advance notification to the United States of its intention to deny the benefits of the TPA to BSLS “to the maximum extent possible.” The language of the TPA, “to the maximum extent possible” implies that the notifying party needed to do everything in its power to provide advance notice. This language must be contrasted with language in other agreements to which the United States is a party, such as the US-Korea Free Trade Agreement, which requires a denying party to notify “to the extent practicable.”¹⁵⁷ Here, the Respondent notified the United States by letter on 22 May 2017,¹⁵⁸ even though the Respondent has known about BSLS’s involvement in this dispute for around twenty months—since at least 30 September 2015, when the Claimants wrote to Panama’s Chief of International Trade Negotiations at the Ministry of Commerce and Industry, enclosing their notice of intent to submit a claim to arbitration under the TPA.¹⁵⁹ Even if the Respondent wanted to wait until it had received a request for arbitration before attempting to deny benefits to BSLS, it has had the Request since it was registered, on 28 October 2016, which is almost seven months before its notification to the United States. The Respondent certainly did not notify the United States as promptly as it could have done, and has provided no explanation either in the Objections or in the notice to the United States of the denial of benefits for the delay.
142. Indeed, Panama’s delay in notifying the United States effectively deprives the United States of the opportunity to respond to Panama and engage in consultations on this important issue before it is considered by the Tribunal. This appears to be a tactical move on the part of the Respondent. In *Pac Rim v El Salvador*, the respondent notified the United States five months before invoking the denial of benefits provision in its jurisdictional objections. The United States accordingly had the opportunity to decide whether it wanted to engage in consultations with the Republic of El Salvador, and had the opportunity to submit a non-disputing Party submission.¹⁶⁰ In this case, since the United States was notified of the denial of benefits a mere one week before the Respondent submitted its Objections, and since the Respondent has elected to use an expedited procedure to deal with its jurisdictional objections (along with a truncated timetable for submissions) there has been no realistic or proper opportunity for the United States to engage in consultations with Panama before this issue falls to be determined by the Tribunal.

B. Ownership or Control by a Non-Party or by Panama

¹⁵⁶ Exhibit C-0117 – TPA, Art. 18.3.

¹⁵⁷ Exhibit C-0116 – US-Korea Free Trade Agreement, Article 11.11.2

¹⁵⁸ Objections ¶ 31 (citing Exhibit R-013 - Notification of the Government of Panama to the Government of the United States of America of Denial of Benefits to Bridgestone Licensing Services, Inc. under Article 10.12.2 of the TPA).

¹⁵⁹ Exhibit C-0043; Request ¶ 81.

¹⁶⁰ CLA-0018 – *Pac Rim v. El Salvador*, Jurisdictional Objections 4.51-4.62.

143. As the Claimants stated in their Request, BSLS is an entity incorporated in Delaware,¹⁶¹ and is a wholly-owned subsidiary of BSJ, which is incorporated in Japan.¹⁶² Accordingly, the Claimants accept that BSLS meets this condition, but of course this alone cannot permit Panama to deny the benefits of the TPA to BSLS.

C. Substantial Business Activities in the United States

144. The Respondent cannot prove that BSLS lacks substantial business activities in the US.

145. *First*, the Claimants have asserted facts and evidence in their Request and the Letter to ICSID dated 25 October 2016 regarding BSLS’s business activities in the United States. The Respondent ignores these completely, but as explained above, the Tribunal is required to assume that these facts are true for the purposes of determination of the Respondents’ Objections. The asserted facts are as follows:

- (a) At paragraph 4 of the Request, the Claimants stated, “*The Claimants are U.S.-incorporated companies. BSLS is incorporated in the State of Delaware and BSAM is incorporated in the State of Nevada. Both Claimants maintain their principal place of business at 535 Marriott Drive, Nashville, Tennessee 37214, United States of America.*” The Claimants exhibited BSLS’s incorporation documents at **Exhibit C-0004**, which show that it has a Board of Directors, is duly constituted under the laws of the State of Delaware, and has a physical location in the United States. In *Pac Rim v El Salvador*, the tribunal held that a company with a substantial presence in the claimant’s state would have a Board of Directors – the claimant in *Pac Rim* did not.¹⁶³
- (b) In the Claimants’ letter to ICSID dated 25 October 2016, the Claimants described BSLS’s ownership of the FIRESTONE trademark in Panama and the fact that the use of such trademark had been licensed to BSAM.¹⁶⁴ The Claimants exhibited a copy of the license agreement between BSLS and BSAM.¹⁶⁵ The license agreement is governed by U.S. law, a fact of which the Respondent is well aware, because this forms the basis of another of its objections: “*All of the “revenue sharing”, “license,” and “intellectual property” rights described in this document were created under U.S. law, are expressly governed by U.S. law, and are performed under U.S. law.*”¹⁶⁶ Thus, on the Respondent’s own case, BSLS is engaged in business activity in the United States, as it enters into contracts such as this one, which also includes a notice provision requiring notices under the contract to be delivered to BSLS at its address in the United States.¹⁶⁷

¹⁶¹ Request ¶ 4.

¹⁶² Request ¶ 1.

¹⁶³ **CLA-0018** – *Pac Rim v. El Salvador*, Jurisdictional Objections ¶ 4.72.

¹⁶⁴ **Exhibit C-0103** – Letter to ICSID dated 25 October 2016, at 4.

¹⁶⁵ **Exhibit C-0048** – FIRESTONE Trademark License.

¹⁶⁶ Objections ¶ 18.

¹⁶⁷ **Exhibit C-0048** – FIRESTONE Trademark License § 22.

146. *Second*, instead of addressing the facts and evidence described above, the Respondent asserts that no evidence on this question has been provided by the Claimants. Not only is this inaccurate, the Respondent attempts to deal with this by making unfounded factual assertions of their own regarding BSLS’s business activities in the United States. As explained above, the Respondent is not entitled to do this, as it is limited by the procedure contained in Article 10.20.5. The Respondent says in its Objections, “*The only question that is not expressly answered in the Request for Arbitration is whether Bridgestone Licensing has “substantial business activities in the territory” of the United States.*”¹⁶⁸ Since Panama chose not to provide advance notice of its purported denial of benefits to BSLS, the Claimants did not know that the Respondent would bring an objection on these grounds. Consequently, and unsurprisingly, they did not include detailed evidence or assertions of fact in the Request as to the business activities of BSLS (or BSAM) in the United States, because such information was not relevant to the facts and matters in dispute. However, the Claimants did provide certain evidence of BSLS’s business activities and presence in the United States, which the Respondent has chosen to ignore, as described above.
147. Under the procedure in Article 10.20.5, (i) the Tribunal is required to assume that facts alleged in the Request are true, and (ii) the Respondent is not entitled to introduce new facts for determination by the Tribunal. The Claimants submit that the evidence already provided of BSLS’s activities in the United States, as described above, should satisfy the Tribunal that denial of benefits is unavailable to Panama. Alternatively, if the Tribunal considers the evidence submitted by the Claimants in the Request, as supplemented by the letter to ICSID dated 25 October 2016, is insufficient for these purposes, then the Claimant submits that the Tribunal is unable to determine the Respondent’s objection on this ground given that to do so, the Tribunal would need to consider the additional factual assertions made by the Respondent, which is not permitted under Article 10.20.5.
148. However, the Respondent takes a different view of the process under Article 10.20.5, as noted earlier, although it has refused to explain its position. Therefore, the Claimants set out in the following paragraphs additional evidence on BSLS’s business activities in the United States, in the event that the Tribunal does consider it appropriate to make a determination on this issue at this stage.
149. The matter of whether a claimant lacks substantial business activities in its home State is the core factual question in a denial of benefits claim, and is intended to ensure that there is a “*bond of economic substance between the corporation and the state.*”¹⁶⁹ Such economic bond is designed to exclude from arbitration those claimants that lack a “*factual business connection*” and operate merely as a “*mailbox*” or “*shell*” company in the territory of the host State,¹⁷⁰ with the purpose that persons of a non-Party do not “*freeload*” off the rights granted under a treaty.¹⁷¹

¹⁶⁸ Objections ¶ 31.

¹⁶⁹ CLA-0035 – Dolzer and Schreuer, *Principles of International Investment Law* 55 (2d. ed. 2008).

¹⁷⁰ CLA-0034 – Andrew Sinclair, *Substance of Nationality Planning in Investor-State Arbitration* 378.

¹⁷¹ *Id.* at 385.

150. Whether a company maintains “*substantial business activities*” in the host state has been the subject of extensive debate in prior disputes, and, as the Respondent notes, “*there is no bright-line standard for determining whether an enterprise has “substantial business activities” in a particular country.*”¹⁷² The Respondent cites the decision in *Pac Rim v. El Salvador*, but this award does not assist the Respondent as that case dealt specifically with a self-described “*holding company.*”¹⁷³ While the tribunal did not make any pronouncements as to whether or not a holding company, by its nature, fails to meet the substantiality requirement, it nonetheless serves as a useful benchmark. The tribunal found that the claimant there was “*not a traditional holding company actively holding shares in subsidiaries but more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities.*”¹⁷⁴ The tribunal referred to the claimant’s witness evidence, which revealed that the claimant (i) did not have employees; (ii) did not lease office space; (iii) served only to hold assets of the company; (iv) did not have a bank account; and (v) did not have a board of directors.¹⁷⁵ Moreover, the tribunal noted that the claimant’s activities in the U.S. were indistinguishable from those when it was registered in the Cayman Islands, suggesting no material territorial nexus with the United States apart from nationality.¹⁷⁶ As explained further below, these facts are materially different to BSLs’s position and presence in the United States.
151. Denial of benefits was further considered in **CLA-0013 – *Amto v. Ukraine***. In that case, the tribunal considered the position of a financial investment company with limited business activities in its state (Latvia), including holding shares in various companies, agreements and share certificates related to these investments, and a preliminary purchase agreement involving a real estate acquisition. In finding that the respondent could not deny the benefits of the Energy Charter Treaty (“**ECT**”) to the claimant, the tribunal emphasized that the word “‘*substantial*’ in this context means ‘of substance, and not merely of form’. It does not mean ‘large’, and the materiality not the magnitude of the business activity is the decisive question.”¹⁷⁷ The tribunal concluded that the claimant engaged in substantial business activities because it conducted activities “*from premises in Latvia and employ[ed] a small but permanent staff.*”¹⁷⁸ Additionally, the claimant paid taxes in Latvia, held a multi-currency account in a Latvian bank, and rented office space in Latvia. Similarly, as described further below, BSLs conducts business activities from Akron, Ohio, USA and Nashville, Tennessee, USA, pays federal and state taxes in the United States, and holds a bank account with JP Morgan Chase Bank in the United States.
152. The Respondent advances several factual assertions in its Objections which it claims proves that BSLs lacks “*substantial business activities*” in the United States. These facts are based on a review of “*a broad range of databases including corporate directories,*

¹⁷² Objections ¶ 32.

¹⁷³ **CLA-0018 – *Pac Rim v. El Salvador***, Jurisdictional Objections ¶ 4.75.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶ 4.69.

¹⁷⁶ *Id.* ¶ 4.73.

¹⁷⁷ **CLA-0013 – *Amto v. Ukraine*** ¶ 69.

¹⁷⁸ *Id.*

trade journals, and trademark registration databases,” which according to the Respondent, show that BSLS does not have “*any business activities in the United States.*”¹⁷⁹ The Respondent says that BSLS “*does not appear on the “Subsidiaries and Business Units” page of the Bridgestone Americas website, which is described as the “Regional Headquarters” and would presumably list all regional subsidiaries and Bridgestone Units.*”¹⁸⁰ This is not so. The BSAM website lists a small number of its subsidiaries and does not provide a full structure chart of BSAM or BSJ. But the BSAM website would naturally only list subsidiaries of BSAM, and since BSLS is not a subsidiary of BSAM, it is hardly surprising that BSLS is not mentioned. As the Claimants stated at paragraph 1 of the Request, BSLS is a wholly-owned subsidiary of BSJ, and so is BSAM. The two companies are sister companies with a common parent.

153. The Respondent has the burden of proving that the Claimant has no “*substantial business activities*” in the United States. The relevant standard is not whether or not BSLS appears in the selection of databases that the Respondent has apparently searched, or the volume of BSLS’s activity as compared with BSAM. As explained below, when considered in relation to the sorts of criteria that previous tribunals have looked at in denial of benefits cases (rather than the arbitrary selection of criteria the Respondent has advanced), it is abundantly clear that BSLS easily meets this requirement.
154. As discussed by Thomas R. Kingsbury, Assistant Secretary of BSLS, BSLS is a U.S. company that is incorporated in Delaware and maintains a registered address in Nashville, Tennessee, USA.¹⁸¹ The company “*owns the intellectual property rights to the FIRESTONE trademark, as well as other FIRESTONE-related trademarks, registered in countries around the world.*”¹⁸² As the owner of this intellectual property, BSLS must manage these trademarks on a coordinated basis, and it does so from the United States: it registers trademarks, it monitors its trademarks and the registration of competing trademarks, and it protects its trademarks by engaging in court processes in various jurisdictions, such as the one in Panama involving Muresa that was the precursor to the Supreme Court decision.¹⁸³ The structuring of Bridgestone’s business in this way is historical. As explained at paragraph 10 of the Request, BSJ acquired the Firestone Tire & Rubber Company, an Ohio-based business which owned the FIRESTONE brand in 1988. On the acquisition BSJ retained the corporate structure which had all of the non-United States FIRESTONE trademarks held and administered by one company, and therefore transferred all of the non-United States FIRESTONE trademarks to BSLS.¹⁸⁴
155. BSLS has a Board of Directors, the members of which change from time to time. The current Board of Directors consists of Mr. Mistsuru Araki, Mr. Tomoki Akiyama, and Mr. Michinobu Matsumoto. Messrs. Araki and Matsumoto are based in Tokyo, Japan, and Mr.

¹⁷⁹ Objections ¶ 33 (emphasis added).

¹⁸⁰ Objections, n.112.

¹⁸¹ Witness Statement of Thomas R. Kingsbury ¶ 3 (citing **Exhibit C-0078** - Articles of Incorporation for BSLS).

¹⁸² *Id.* ¶ 8.

¹⁸³ *Id.* ¶¶ 9-13.

¹⁸⁴ *Id.* ¶ 11.

Akiyama is based at BSLS's headquarters in Nashville, Tennessee.¹⁸⁵ While they do not typically have annual meetings, the directors hold regular telephone conferences to discuss business and strategy.¹⁸⁶ The Board of Directors have issued written resolutions which authorize them to take various actions on behalf of the company, such as executing contracts and strategizing regarding lawsuits in which BSLS is involved.¹⁸⁷

156. The Claimants exhibited one contract to which BSLS is a party when they submitted their letter to ICSID dated 25 October 2016, as discussed above at paragraph 8.¹⁸⁸ In addition to this contract, BSLS is also a party to a number of other contracts with many U.S.-based counterparties, such as Microsoft and Mattel.¹⁸⁹ A table summarizing these agreements is included in **Appendix A** of the Witness Statement of Thomas R. Kingsbury dated 21 July 2017.¹⁹⁰ As Mr. Kingsbury explains at paragraph 14 of his witness statement, some of BSLS's contracts are license agreements pursuant to which BSLS earns royalties (which are paid into BSLS's U.S. bank account), and others are product placement agreements (*i.e.*, no royalty is paid to BSLS but the FIRESTONE trademark is used by companies such as Microsoft in video games, which serves as a form of advertising for FIRESTONE). According to BSLS's financial statements, between 2014 and 2016, BSLS generated a total of USD \$18,448,801 in trademark-related income.¹⁹¹
157. There are officers of BSLS, including Mr. Kingsbury (Assistant Secretary) and Mr. Crothers (Assistant Treasurer), who are U.S. citizens based in the United States.¹⁹² All of the Bridgestone entities work closely together. Accordingly, even though Mr. Kingsbury is employed by BSAM, ever since he joined the company, part of his duties have involved work for BSLS.¹⁹³ As described above in paragraph 154, BSLS's role is to register, maintain and protect the FIRESTONE trademark held in foreign jurisdictions. To this end, since the company's inception (and dating back to the Firestone Tire & Rubber Company days), BSLS has retained the New York law firm, Ladas & Parry LLP, to monitor its trademarks and to supervise any necessary local proceedings.¹⁹⁴ Ladas & Parry provide a trademark monitoring service to BSLS called "Watch Services" which tracks trademark registrations around the world, and allows BSLS to find out whether competing trademarks have been registered. If trademark opposition actions are required, Ladas & Parry may instruct local counsel on BSLS's behalf with respect to appropriate

¹⁸⁵ *Id.* ¶ 4.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citing various resolutions of the BSLS Board of Directors: **Exhibit C-0079**, **Exhibit C-0080**, **Exhibit C-0081**, **Exhibit C-0082**, and **Exhibit C-0083**).

¹⁸⁸ **Exhibit C-0048**.

¹⁸⁹ Witness Statement of Thomas R. Kingsbury ¶¶ 14-16 (citing **Exhibit C-0089** – Licensing Agreements); *see also* **Exhibit C-0090** Microsoft Licensing Agreement and **Exhibit C-0091** - Mattel Licensing Agreement.

¹⁹⁰ *Id.* **Appendix A**.

¹⁹¹ *Id.* ¶ 17 (citing **Exhibit C-0092** - BSLS Financial Statements for 2014 to 2016). BSLS's financial statements show that the company had income of US\$7,665,330 in 2014, US\$5,762,590 in income in 2015, and US\$5,020,881 in 2016. *Id.*

¹⁹² *Id.* ¶ 5 (citing **Exhibit C-0084** – passport photocopies for Thomas R. Kingsbury and James Crothers).

¹⁹³ *Id.* ¶¶ 9-13.

¹⁹⁴ *Id.* ¶ 11 (citing **Exhibit C-0088** – Ladas & Parry payment documentation).

action—such was the case in Panama where Ladas & Parry instructed local firm Benedetti & Benedetti for the trademark opposition action against Muresa.¹⁹⁵ Mr. Kingsbury provided similar intellectual property law services for BSLS and has overseen the relationship with Ladas & Parry. Between 2010 and 2013, Mr. Kingsbury did most of the legal work for BSLS with the assistance of an intellectual property attorney and paralegal from the law firm of Ulmer Berne LLP.¹⁹⁶ In 2013, BSLS engaged an intellectual property lawyer from Akron, Ohio-based law firm Emerson Thomson Bennett to work on a part-time basis (three days a week) for BSLS. That lawyer, Ms. Mallory Smith, has continued to work for BSLS on the same basis since then.¹⁹⁷

158. BSLS also retains the services of another law firm in New York, Pillsbury Winthrop Shaw Pittman LLP, which provides corporate legal services for BSLS, such as the filing of state reporting requirements and the preparation and filing of board resolutions.¹⁹⁸
159. BSLS pays for these legal expenses from its U.S. bank account with JP Morgan Chase, which is based in San Antonio, Texas.¹⁹⁹ These expenses include legal services and litigation fees (such as the fees expended in the Panama civil damages litigation and subsequent investor-state arbitration), intra-company loans, and corporate fees (*e.g.*, filings with the Delaware Franchise Tax Board and Annual Reports with the Tennessee Secretary of State).²⁰⁰ BSLS also operates out of the same office in Nashville as BSAM, where Mr. Akiyama and Mr. Crothers are based, and pays a “handling fee” to BSAM for shared services, such as accounting.²⁰¹
160. BSLS also pays U.S. federal, state, and local taxes from the same bank account.²⁰² These tax filings are managed internally within BSLS in Nashville, Tennessee by Mr. Crothers and Mr. Akiyama who serve as BSLS’s Assistant Treasurer and Treasurer, respectively. Between 2013 and 2015, BSLS paid US\$4,795,390 in federal taxes alone (specifically, US\$1,909,112 (2013), US\$1,714,792 (2014), and US\$1,171,486 (2015)).²⁰³ This is in addition to state and local taxes, which, according to BSLS’s financial statements, totaled US\$303,233 between 2014 to 2016.²⁰⁴
161. Lastly, profits generated by BSLS are reinvested by the company into the FIRESTONE intellectual property portfolio in the form of brand enhancement initiatives through collaborative initiatives with similar entities within the Bridgestone family of companies,

¹⁹⁵ *Id.* ¶¶ 11-13.

¹⁹⁶ *Id.* ¶ 10 (citing **Exhibit C-0087** – Ulmer Berne agreement).

¹⁹⁷ *Id.* ¶ 10 (citing **Exhibit C-0086** - Legal Representation agreements for Mallory Smith).

¹⁹⁸ *Id.* ¶ 7 (citing **Exhibit C-0085** - Invoices from Pillsbury Winthrop Shaw Pittman LLP).

¹⁹⁹ *Id.* ¶¶ 17-19 (citing **Exhibit C-0093** – JP Morgan Chase Bank Account Record).

²⁰⁰ *Id.* ¶ 19 (citing **Exhibit C-0092** - BSLS Financial Statements for 2014 to 2016).

²⁰¹ *Id.* Between 2014 and 2016, BSLS had a total of USD \$12,321,030 in expenses.

²⁰² *Id.* ¶ 18.

²⁰³ *Id.* (citing **Exhibit C-0094** – BSLS Corporate Tax Declaration (Form 8453-C))

²⁰⁴ *Id.* (citing **Exhibit C-0092** - BSLS Financial Statements for 2014 to 2016).

such as Bridgestone Brands LLC (the entity that manages the FIRESTONE trademark portfolio inside the United States).²⁰⁵

162. In summary, it is clear that BSLS has “*substantial business activities*” within the United States for the following reasons:

1. BSLS has a Board of Directors, who pass resolutions, are empowered to act on behalf of the company, and meet regularly by teleconference to discuss company issues and strategy. One member of the Board of Directors is located in the United States.²⁰⁶ This contrasts with the claimant in *Pac Rim v El Salvador*, which did not have a board of directors.²⁰⁷
2. BSLS owns intellectual property assets in foreign jurisdictions. It administers these assets on a coordinated basis from the United States – applying for registrations, monitoring the markets in the various jurisdictions, and protecting its trademarks by engaging in trademark opposition actions as necessary.²⁰⁸ This is similar to the claimant in **CLA-0013 – AMTO v Ukraine**, which did various activities in its home state relating to its investments.²⁰⁹
3. BSLS has officers based in the United States who are U.S. citizens who perform specific functions for BSLS. These include Mr. Kingsbury, who is Assistant Secretary of BSLS and who currently spends up to 10% of his time on BSLS matters.²¹⁰ This contrasts with the claimant in *Pac Rim v El Salvador*, which did not have any employees.²¹¹
4. BSLS does the necessary legal work itself, through Bridgestone personnel who, although not officially employed by BSLS, are required to spend a certain portion of their time on BSLS’s business.²¹² This is similar to the claimant in *AMTO v Ukraine*, which conducted activities from its premises and employed a “*small but permanent staff.*”²¹³
5. BSLS also currently engages external counsel, including, (i) Pillsbury Winthrop Shaw Pittman LLP in New York to deal with corporate matters; (ii) Ladas & Parry LLP in New York to deal with intellectual property matters; and (iii) Emerson Thomson Bennett in Ohio, which provides a lawyer who has been seconded to BSLS for four years to deal with intellectual property matters. Also, in the past, BSLS retained an

²⁰⁵ *Id.* 20 (citing **Exhibit C-0097** - Firestone Global Brand Position Funding Proposal).

²⁰⁶ *Id.* ¶ 4.

²⁰⁷ **CLA-0018 – Pac Rim v. El Salvador**, Jurisdictional Objections ¶ 4.69.

²⁰⁸ Thomas R. Kingsbury Witness Statement ¶ 8.

²⁰⁹ **CLA-0013 – Amto v. Ukraine** ¶ 69.

²¹⁰ Thomas R. Kingsbury Witness Statement ¶ 9.

²¹¹ **CLA-0018 – Pac Rim v. El Salvador**, Jurisdictional Objections ¶ 4.69.

²¹² Thomas R. Kingsbury Witness Statement ¶ 10.

²¹³ **CLA-0013 – Amto v. Ukraine** ¶ 69.

- attorney and a paralegal from the intellectual property law firm Ulmer Berne. All of these activities are similar to, if not more substantial than, the activities engaged in by the claimant in *AMTO v Ukraine*, which conducted activities from its premises and employed a “*small but permanent staff*”.²¹⁴
6. BSLS enters into contracts with U.S. and foreign companies which are governed by U.S. law. It earns royalties on some of these contracts. This is similar to the claimant in *AMTO v Ukraine*, which had various agreements related to its investments,²¹⁵ and contrasts with the claimant in *Pac Rim v El Salvador* which only held assets and did nothing with them.²¹⁶
 7. BSLS has a U.S. bank account with JP Morgan Chase into which royalties are paid, and out of which expenses including legal fees are paid.²¹⁷ This is similar to the claimant in *AMTO v Ukraine*,²¹⁸ and contrasts with the claimant in *Pac Rim v El Salvador*, which did not have a U.S. bank account.²¹⁹
 8. BSLS pays taxes in the United States. Between 2013 and 2016, BSLS paid US\$4,795,390 in federal taxes, and approximately US\$303,233 in state and local taxes between 2014 and 2016.²²⁰ This is similar to the claimant in *AMTO v Ukraine*, which paid taxes in its home state.²²¹
 9. BSLS has its office at 535 Marriott Drive, Nashville, Tennessee, USA and pays a handling fee to BSAM for its shared services. This is similar to the claimant in *AMTO v Ukraine*, which leased office space in its home state,²²² and contrasts with the claimant in *Pac Rim v El Salvador*, which did not lease any office space.²²³
 10. BSLS has been located in the United States since its formation, performing the same function. This contrasts with the claimant in *Pac Rim v El Salvador*, which had previously been registered in the Cayman Islands, and there had been no change in its activities when it moved to the United States.²²⁴

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ **CLA-0018** – *Pac Rim v. El Salvador*, Jurisdictional Objections ¶ 4.69.

²¹⁷ Witness Statement of Thomas R. Kingsbury ¶¶ 17-19 (citing **Exhibit C-93** – JP Morgan Chase Bank Account Record).

²¹⁸ **CLA-0013** – *Amto v. Ukraine* ¶ 69.

²¹⁹ **CLA-0018** – *Pac Rim v. El Salvador*, Jurisdictional Objections ¶ 4.69.

²²⁰ Witness Statement of Thomas R. Kingsbury ¶ 18 (citing **Exhibit C-94** - BSLS Corporate Tax Declaration (Form 8453-C)).

²²¹ **CLA-0013** – *Amto v. Ukraine* ¶ 69.

²²² *Id.*

²²³ **CLA-0018** – *Pac Rim v. El Salvador*, Jurisdictional Objections ¶ 4.69.

²²⁴ *Id.* ¶ 4.73.

D. Conclusion

163. Accordingly, Panama has failed to show that the requirements for denial of the benefit of the TPA to BSLS are satisfied. Specifically, (i) the Respondent did not provide advance notice “to the maximum extent possible” to the United States of its intention to deny the benefits of the TPA to BSLS, and (ii) the Respondent has failed to show that BSLS lacks “substantial business activities” in the United States. Therefore, the Tribunal should dismiss the Respondent’s objection, and should find that the Respondent is not permitted to deny the benefits of the TPA to BSLS.

XII. PANAMA’S FOURTH OBJECTION: BSLS’S ALLEGED ABUSE OF PROCESS

164. The Respondent argues that BSLS’s claims amount to an abuse of process. This section of the Objections is vague and confused, but as far as the Claimants can make out, the alleged abuse of process arises because BSLS is said to have manipulated its own nationality, the nationality of the investment and/or the nationality of the claim.²²⁵ BSLS is said to have done this by choosing to pay the Supreme Court damages award, in order to incur loss to allow it to make a claim, but due to Panama’s denial of benefits, it is not entitled to bring such claim. As set out below, these arguments are illogical and meritless: in particular, the Respondent conveniently ignores that the Supreme Court held BSLS jointly and severally liable for the damages award, and therefore BSLS did not force itself to incur loss – Panama did that with its Supreme Court decision.
165. This objection seems to be tacked on as an afterthought, and is predicated on the success of the Respondent’s denial of benefits argument, which, as explained above, cannot succeed. Consistent with the approach taken in the rest of its Objections, the Respondent does not set out the legal basis for its abuse of process objection, or explain what the applicable standard of review should be.
166. An allegation of abuse of process should not be made lightly, and the Respondent has a high bar to meet. The tribunal in *Phillip Morris v. Australia* recently reviewed case law on abuse of process at length, and stated:

*[I]t is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high. It is equally accepted that the notion of abuse of process does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.*²²⁶

167. It is true that some tribunals have declined jurisdiction over a claimant who has engaged in “abuse of process,” which is a legal device intended to address the issue of “nationality planning” or “treaty shopping.” These actions may not be illegal or

²²⁵ Objections ¶ 38.

²²⁶ CLA-0022 – *Philip Morris v. Australia* ¶ 539.

unethical, but certain tribunals have held that a “state may regard corporate structuring for the purposes of obtaining advantages from treaties as undesirable and take appropriate measures against it.”²²⁷ The tribunal in *Philip Morris v. Australia* formulated the test for abuse of process as follows:

*[T]he initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable. The Tribunal is of the opinion that a dispute is foreseeable when there is a reasonable prospect, as stated by the Tidewater tribunal, that a measure which may give rise to a treaty claim will materialise.*²²⁸

168. The Respondent does not attempt to set out any test for abuse of process, much less apply it to the facts, and simply states vaguely:

[I]f a jurisdictional defect exists at the time a dispute arises, a claimant cannot simply take matters into its own hand and “fix” the effect unilaterally by manipulating its own nationality, the nationality of the investment, or the nationality of the claim. It is widely considered an abuse of process for a claimant to proceed in that manner. Yet, that is precisely what Bridgestone Licensing has done.”²²⁹

The Respondent fails clearly to specify why there is said to be a jurisdictional defect, or which of the abuses BSLs is said to have committed. It cannot be said that BSLs “manipulated” its own nationality, because BSLs is and always has been a US-incorporated company, and its corporate nationality long predates this dispute.²³⁰ It cannot be said that BSLs manipulated the “nationality of the investment” because the investment is and always was Panamanian. As best the Claimants can discern, the Respondents appear to argue for the third item, that the nationality of the claim has been manipulated, arguing that: (i) BSLs could not submit a claim under the TPA in 2015 and “much of 2016” because the damages assessed by the Supreme Court had not been paid; (ii) it would have been “logical” for BSJ to have made the payment because BSLs “is a shell company with no discernible assets of its own”, but if BSJ paid then it would not have been able to bring an investment treaty claim as it is not covered by any treaty; (iii) therefore BSLs made the payment in order to put it “in a better position to claim “loss or damage””; and (iv) in so doing, BSLs “attempted to manipulate the nationality of the claim after the dispute had already materialized, in an attempt to create a basis for jurisdiction where none otherwise existed.”²³¹ This argument is incoherent.

²²⁷ CLA-0035 – Dolzer & Schreuer, *Principles of International Investment Law* 52.

²²⁸ CLA-0022 – *Philip Morris v. Australia* ¶ 554.

²²⁹ Objections ¶ 38.

²³⁰ Witness Statement of Thomas R. Kingsbury ¶ 3 (“BSLS was duly incorporated under the laws of the State of Delaware on September 10, 2001.” (citing Exhibit C-0078 – Articles of Incorporation for BSLs)).

²³¹ Objections ¶¶ 40-42.

169. *First*, the Respondent argues that “in order to submit a claim under the TPA, Bridgestone Licensing would have to be able to show that it had “incurred loss or damage.””²³² Since the Supreme Court ordered BSLS to pay the damages in its judgment of 28 May 2014, that is the date on which BSLS incurred the loss to BSLS. It does not matter when BSLS paid the damages, because the “unlawful taking” by Panama took place when its “measure” was implemented, *i.e.*, the date of the judgment.²³³
170. *Second*, the Respondent states that it would have been “logical” for BSJ to have paid the damages award, but ignores the fact that BSJ and BSLS were held jointly and severally liable for the whole of the sum by the Supreme Court of Panama. While the Respondent may argue that BSJ rather than BSLS *could have* paid the damages, it can hardly argue that BSLS somehow abused the process of investor-state arbitration by paying a sum it had been ordered by a court to pay. The Respondent further asserts that it would have been illogical for BSLS to pay because BSLS “is a shell company with no discernible assets of its own,” and by footnote refers back to the section of its Objections dealing with denial of benefits. This is both circular and disingenuous—the Respondent merely asserts, without proper basis, that BSLS is a “shell company with no discernible assets of its own.” and this directly contradicts the facts that the Claimants put forward in their Request and the letter to ICSID dated 25 October 2016, which are set out at paragraph 144 above. In an Article 10.20.5 expedited objections process, the Tribunal must deem the facts asserted by the Claimants to be true, and cannot take into account disputed facts asserted by the Respondent. This argument is also entirely reliant on the success of the Respondent’s denial of benefits argument, which as explained above, cannot succeed. If, as is the case, BSLS did have substantial business activities in the United States, then there is nothing illogical about BSLS paying a sum for which it is liable and suffering loss accordingly. Indeed, even if the Tribunal found that BSLS does not have substantial business activities in the United States, the fact remains (and has not been disputed by the Respondent) that BSLS was liable for that sum.
171. *Third*, the Respondent absurdly claims that BSLS made the damages payment in order to put itself into a better position, so that it could claim loss under the TPA. But, as explained above, the Supreme Court held BSLS jointly and severally liable. The Court therefore imposed on BSLS a liability, and had BSLS not discharged that liability it would have been exposed to enforcement action against its assets in Panama.

XIII. PANAMA’S FIFTH OBJECTION: JURISDICTIONAL BASIS FOR CLAIMS IN EXCESS OF US\$5.4 MILLION

172. The Respondent’s final objection is that neither BSAM nor BSLS can claim for loss and damage in excess of US\$5.4 million because any loss incurred as a result of actions taken by other states cannot be attributed to Panama. This objection is misconceived, as the loss claimed by BSAM and BSLS in excess of US\$5.4 million arises directly out of the Panamanian Supreme Court decision, and there is no reason why such loss must only be

²³² Objections ¶ 40.

²³³ CLA-0001 – *See, e.g., Ascom v. Kazakhstan* ¶ 1497.

felt in Panama. The relevant test as to whether loss has been suffered in any other country is the usual test for causation.

173. The Respondent has devoted only eight short paragraphs to this objection, and it is couched in terms of state responsibility and Panama's inability to be held liable for the actions of other states. But in reality this objection relates to matters of causation, foreseeability, and loss. As such, these are all matters that cannot be properly considered under Article 10.20.5: this is not an objection that can be resolved as a matter of law and the claims are not claims for which an award in favor of the Claimants cannot be made under Article 10.26 of the TPA.
174. With respect to both BSLS and BSAM, the Respondent objects to the Claimants' claims for loss and damage in excess of US\$5.4 million. This loss is detailed at paragraphs 55 to 58 of the Request, and is summarized as follows: (i) payment of the damages has had a direct impact on the ability of the U.S. Bridgestone entities to reinvest in their business; (ii) the Supreme Court decision may be followed in other neighboring countries as a matter of government policy, leading to a reduction in trademark protections and ultimately a reduction in sales and market share; (iii) the Supreme Court decision may establish a precedent that is likely to be followed within and outside of Panama; and (iv) it is likely that there will be more trademark applications that are similar and confusingly similar to the BRIDGESTONE and FIRESTONE marks, by Muresa's group of companies and by unrelated competitors.
175. In its Objection, the Respondent only disputes two of these points, those at (ii) and (iii) above.²³⁴ Accordingly, even if the Respondent succeeded in persuading the Tribunal that these two factors could not result in loss to the Claimants, the Claimants' claim for damages in excess of US\$5.4 million still stands on the basis of the other factors raised in the Request.
176. In relation to the two points rejected by the Respondent, the Objections state, "*The only claims that the Tribunal has jurisdiction to entertain are claims that Panama allegedly has breached the TPA, through 'measures' that Panama has 'adopted or maintained.'*"²³⁵ This is correct: the "*measure*" in question is the Supreme Court decision.²³⁶ In respect of damages incurred outside of Panama, the Claimants do not contend that the Respondent is responsible for measures (such as court decisions or government policies) adopted by any neighboring countries. Instead, the Claimants allege that losses in neighboring countries may result from the measures that Panama adopted in Panama, and the Claimant is entitled to do so, since there is no provision in the TPA that loss must only be sustained in Panama. This point is further supported by prior arbitral awards. In *S.D. Myers v Canada*, for example, the tribunal held, "[t]o be recoverable, a loss must be linked causally to interference with an investment located in a host state. There is no

²³⁴ Objections ¶ 45.

²³⁵ Objections ¶ 48.

²³⁶ The decision of a Supreme Court is a "*measure*" adopted by a state. **CLA-0035** – See Dolzer and Schreuer, *Principles of International Investment Law* 216-17; **CLA-0028** – *Saipem v. Bangladesh* ¶¶ 188-90; **CLA-0027** – *Azinian and others v. Mexico* ¶¶ 97-203.

provision that requires that all of the investor's losses must be sustained within the host state in order to be recoverable."²³⁷ Therefore, the test for whether loss can claimed is the usual test for causation: "*the test is that the loss to the (foreign) investor must be suffered as a result of the interference with its investment in the host state.*"²³⁸

177. The damages must be the consequence of the wrongful act. The tribunal in *S.D. Myers v Canada* held, "*a debate as to whether damages are direct or indirect is not appropriate. If they were caused by the event, engage Chapter 11 and are not too remote, there is nothing in the language of [NAFTA] Article 1139 that limits their recoverability.*"²³⁹ Damages must also be reasonably foreseeable: "*offenders must be deemed to have foreseen the natural consequences of their wrongful acts.*"²⁴⁰ It is foreseeable that a Panamanian Supreme Court decision will be followed by courts of other countries, as the Claimants explained in their Request: "*it is also an established practice of Latin American courts to reference rulings of peer courts and supranational tribunals in the area of intellectual property, and indeed Latin America legal systems are changing rapidly through a process of reflection and imitation at the regional level.*"²⁴¹
178. It appears that this objection is not directed to the facts of causation and loss, and accordingly the Claimants have not put in any evidence of fact on this matter. Of course, while the Respondent may wish to argue that the Claimants cannot show causation, that is not an argument it is entitled to make under Article 10.20.5. As a matter for preliminary objections under Article 10.20.5, the Respondent can only argue that the Claimants' claim is legally impossible or outside of the competence of the Tribunal. Such argument cannot possibly discharge Panama's burden of proof for its Article 10.20.5 Objections: first, the Respondent has not objected at all to two of the factors causing loss in excess of US\$5.4 million; and second, questions of causation and loss can only satisfactorily be dealt with at trial. It is submitted that the Tribunal does not have the factual and expert evidence that it would need in order to reach any conclusion as to whether the Supreme Court decision may influence courts elsewhere in Latin America. Certainly, Panama does not even begin to discharge its burden of proof for the purposes of its present Objections that there is no such causation or loss.
179. Accordingly, the Respondent's final objection should also be dismissed.

XIV. CONCLUSION

180. For the reasons explained above, the Claimants submit (i) that the Respondent's application to dismiss the Claimants' claims be stayed pending payment of its share of the costs ordered by ICSID; and (ii) if and when such payment is made, that the Objections should be dismissed in their entirety. As explained at paragraph 15 above, the Claimants

²³⁷ CLA-0031 – *S.D. Myers v. Canada* ¶ 118.

²³⁸ CLA-0031 – *S.D. Myers v. Canada* ¶ 118.

²³⁹ CLA-0031 – *S.D. Myers v. Canada* ¶ 160.

²⁴⁰ CLA-0010 – *Joseph Lemire v. Ukraine* ¶ 170.

²⁴¹ Request ¶ 57 (citing Exhibit C-0041 and Exhibit C-0042).

respectfully submit that the Tribunal should make an order requiring the Respondent to pay the costs of its Objections immediately.