

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**BRIDGESTONE LICENSING SERVICES, INC. AND BRIDGESTONE AMERICAS, INC.**  
Claimants

and

**REPUBLIC OF PANAMA**  
Respondent

**ICSID Case No. ARB/16/34**

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**DECISION ON EXPEDITED OBJECTIONS**

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*Members of the Tribunal*

Lord Nicholas Phillips Baron of Worth Matravers, President of the Tribunal  
Mr. Horacio A. Grigera Naón, Arbitrator  
Mr. J. Christopher Thomas, QC, Arbitrator

*Secretary of the Tribunal*

Ms. Luisa Fernanda Torres

*Date of dispatch to the Parties: 13 December 2017*

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Republic of Panama  
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**TABLE OF SELECTED ABBREVIATIONS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BSLS	Bridgestone Licensing Services, Inc.
BSAM	Bridgestone Americas, Inc.
BSJ	Bridgestone Corporation
Cl. Reg. Letter	Claimants' Letter during Registration of Request for Arbitration, dated 25 October 2016
Cl. Res. Exp. Obj.	Claimants' Response on Expedited Objections, dated 24 July 2017
Cl. Rej. Exp. Obj.	Claimants' Rejoinder on Expedited Objections, dated 14 August 2017
Cl. PHB Exp. Obj.	Claimants' Post-Hearing Brief on Expedited Objections, dated 11 October 2017
Cl. Costs Exp. Obj.	Claimants' Statement of Costs, dated 6 November 2017
C-[#]	Claimants' Exhibit
CLA-[#]	Claimants' Legal Authority
Calderon WS	Witness Statement of Mr. Erick Calderon, dated 22 July 2017
Hidalgo WS	Witness Statement of Mr. Roger Hidalgo, dated 22 July 2017
Kingsbury First WS	Witness Statement of Mr. Thomas Kingsbury, dated 21 July 2017
Kingsbury Second WS	Second Witness Statement of Mr. Thomas Kingsbury, dated 14 August 2017
Williams WS	Witness Statement of Ms. Audrey Williams, dated 13 August 2017
Hearing	Hearing on Expedited Objections, held on 3-6 September 2017

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Request for Arbitration	Claimants' Request for Arbitration, dated 7 October 2016
Resp. Exp. Obj.	Respondent's Expedited Objections, dated 30 May 2017
Resp. Reply Exp. Obj.	Respondent's Reply on Expedited Objections, dated 7 August 2017
Resp. PHB Exp. Obj.	Respondent's Post-Hearing Brief on Expedited Objections, dated 11 October 2017
Resp. Costs Exp. Obj.	Respondent's Statement of Costs, dated 6 November 2017
R-[#]	Respondent's Exhibit
RLA-[#]	Respondent's Legal Authority
Tr. Day [#][page:line] (Speaker(s))	Transcript of the Hearing on Expedited Objections held on 3-6 September 2017 (as revised by the Parties on 6 October 2017)
TPA	United States-Panama Trade Promotion Agreement signed on 28 June 2007, in force on 31 October 2012
Tribunal	Arbitral tribunal constituted on 27 April 2017
U.S. First Sub.	United States Written Submission, pursuant to Article 10.20.2 of the TPA, dated 28 August 2017
U.S. Second Sub.	United States Supplemental Written Submission, pursuant to Article 10.20.2 of the TPA, dated 25 September 2017

## I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the United States-Panama Trade Promotion Agreement signed on 28 June 2007, in force on 31 October 2012 (the “**TPA**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The Claimants are Bridgestone Licensing Services, Inc. (“**BSLS**”), a company incorporated in the State of Delaware, United States; and Bridgestone Americas, Inc. (“**BSAM**”), a company incorporated in the State of Nevada, United States (together, the “**Claimants**”).<sup>1</sup>
3. The Respondent is the Republic of Panama (“**Panama**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to in this ruling as the “**Parties**”, and the term “**Party**” is used to refer to either the Claimants or the Respondent.<sup>2</sup> The Parties’ representatives and their addresses are listed above on page (i).
5. This ruling concerns Panama’s Expedited Objections pursuant to Article 10.20.5 of the TPA.

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<sup>1</sup> Request for Arbitration, ¶ 4. Both are wholly-owned subsidiaries of Bridgestone Corporation (“**BSJ**”), a Japanese incorporated company. *Id.*, ¶ 1.

<sup>2</sup> The Tribunal is mindful that Chapter 10 also refers to the States signatories to the TPA as “*Party*.” For the clarity of this ruling, the State signatories of the TPA (Panama and the United States) will be referred to as the “*TPA Party*” or the “*TPA Parties*.” The Tribunal is also aware that Article 10.29 of the TPA refers to the Claimants and the Respondent together as the “*disputing parties*” and to either of them as a “*disputing party*.”

## II. PROCEDURAL HISTORY

### A. Registration and Constitution of the Tribunal

6. On 7 October 2016, ICSID received a request for arbitration dated 7 October 2016 from the Claimants against the Respondent (the “**Request for Arbitration**”). The Request for Arbitration was accompanied with Exhibits C-001 to C-043.
7. On 19 October 2016, the ICSID Secretariat requested the Claimants to provide certain additional information and clarifications concerning the Request for Arbitration.
8. On 25 October 2016, the Claimants filed a communication in response to the ICSID Secretariat’s request of 19 October 2016. This submission was accompanied by Exhibits C-044 to C-050.
9. On 28 October 2016, the Acting Secretary-General of ICSID registered the Request for Arbitration, as supplemented by letter of 25 October 2016, in accordance with Article 36(3) of the ICSID Convention, and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “**Institution Rules**”).
10. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed to constitute the Tribunal as follows: three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the two co-arbitrators.
11. The Tribunal is composed of Lord Nicholas Phillips Baron of Worth Matravers, a British national, President, appointed by the co-arbitrators; Mr. Horacio A. Grigera Naón, an Argentine national, appointed by the Claimants; and Mr. J. Christopher Thomas, QC, a Canadian national, appointed by the Respondent.
12. On 27 April 2017, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), the Secretary-General notified the



Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

**B. The First Session, the Parties' Written Submissions and Procedural Applications**

13. On 30 May 2017, the Respondent filed Expedited Objections pursuant to Article 10.20.5 of the TPA (the “**Expedited Objections**”). The objections were accompanied by Exhibits R-001 to R-014; and Legal Authorities RLA-001 to RLA-044. On 5 June 2017, the Respondent transmitted Annex A to its Expedited Objections and its supporting materials.
14. In accordance with ICSID Arbitration Rule 13(1), on 6 June 2017, the Tribunal held a first session with the Parties by video-conference.
15. Following the first session, the Tribunal and the Parties exchanged various communications concerning the procedural calendar for the expedited phase. The Tribunal received: communications from each Party, respectively, on 22 June 2017; communications from each Party, respectively, on 26 June 2017; a communication from the Claimants on 29 June 2017, and a communication from the Respondent on 30 June 2017. The Tribunal sent to the Parties communications dated 20, 23, 28 June 2017 and 2 July 2017. In this last communication of 2 July 2017, the Tribunal notified the Parties of its decision regarding the procedural calendar.
16. On 11 July 2017, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 1** embodying the agreement of the Parties on procedural matters and the decision of the Tribunal on the disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006 except to the extent modified by the TPA, that the procedural language would be English, and that the place of proceeding would be Washington, DC, United States. Procedural Order No. 1 also included the schedule for the Expedited Objections phase of the proceedings.

17. On 24 July 2017, the Claimants filed their Response to the Expedited Objections pursuant to Article 10.20.5 of the TPA (the “**Response on Expedited Objections**”), accompanied by: three witness statements, by Mr. Erick Calderón, Mr. Roger Hidalgo and Mr. Thomas R. Kingsbury, respectively; Exhibits C-051 to C-118;<sup>3</sup> and Legal Authorities CLA-001 to CLA-037. The Response on Expedited Objections included an application for stay of the expedited proceeding until the Respondent paid the first advance of funds requested in this case; but following a letter dated 25 July 2017 confirming that the Respondent’s payment had been received by ICSID on 21 July 2017, the Claimants’ application was withdrawn by letter dated 26 July 2017.
18. Having previously consulted with the Parties, on 4 August 2017, the Tribunal (i) informed the TPA “*non-disputing Party*”, *i.e.*, the United States of America (“**United States**” or “**U.S.**”)<sup>4</sup> of the scheduled date for the Hearing on Expedited Objections (the “**Hearing**”), and (ii) invited the United States to indicate whether it intended to make any written or oral submission pursuant to Article 10.20.2 of the TPA, setting a deadline for such submission.
19. On 7 August 2017, the Respondent filed its Reply on Expedited Objections pursuant to Article 10.20.5 of the TPA (the “**Reply on Expedited Objections**”), accompanied by: Exhibits R-015 to R-018; and Legal Authorities RLA-001 (REV) and RLA-002 (REV), and RLA-045 to RLA-068.
20. On 14 August 2017, the Claimants filed their Rejoinder on Expedited Objections pursuant to Article 10.20.5 of the TPA (the “**Rejoinder on Expedited Objections**”), accompanied by: two witness statements, by Ms. Audrey Williams, and Mr. Thomas R. Kingsbury, respectively; Exhibits C-119 to C-126; and Legal Authority CLA-038.
21. On 14 August 2017, the Tribunal invited the Parties to make certain submissions in anticipation of the Pre-Hearing Call.

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<sup>3</sup> As submitted on 24 July 2017, the pleading was accompanied by Exhibits C-051 to C-097. On 28 July 2017, the Claimants submitted an amended version, observing that a subset of Exhibits, designated C-098 to C-118, had been inadvertently omitted in their 24 July 2017 filing. Following a query from the Tribunal, on 2 August 2017, the Respondent confirmed that it had no objections to these amendments.

<sup>4</sup> The United States is referred to as the “*non-disputing Party*” in the sense of Article 10.29 of the TPA.

22. On 17 August 2017, the Parties made joint and individual submissions in anticipation of the Pre-Hearing Call.
23. On 18 August 2017, pursuant to Section 20.1 of Procedural Order No. 1, a pre-Hearing organizational call between the Parties and the President of the Tribunal was held by telephone conference (the “**Pre-Hearing Call**”), in preparation for the Hearing. During the Pre-Hearing Call, a matter was raised by the President and discussed with the Parties concerning the timing for oral submissions regarding certain procedural evidentiary issues arising out of the Parties’ written submissions, and for a determination by the Tribunal regarding the impact of those issues on the conduct of the Hearing.
24. On 21 August 2017, following the Pre-Hearing Call, the Respondent submitted (i) an application under Section 5.2 of Procedural Order No. 1, for reconsideration by the full Tribunal of the Respondent’s procedural request made during the Pre-Hearing Call that the session between the Parties and the full Tribunal to resolve the procedural evidentiary issues and their impact on the conduct of the Hearing be held before the first day of the Hearing (the “**Request for Reconsideration**”); and (ii) a request for a formal order from the full Tribunal identifying the specific questions that the Tribunal wanted the Parties to address before opening arguments at the Hearing (the “**Request for Questions**”).
25. On 24 August 2017, the full Tribunal issued **Procedural Order No. 2**, addressing the Respondent’s Request for Questions. In the same order, the Claimants were invited to file observations on the Respondent’s Request for Reconsideration.
26. On 24 August 2017, the United States confirmed its intent to file a written submission, pursuant to Article 10.20.2 of the TPA; and it informed the Tribunal that it was still considering whether it would make an oral submission at the Hearing as well.
27. On 25 August 2017, the Claimants filed observations on the Respondent’s Request for Reconsideration of 21 August 2017.
28. On 28 August 2017, in accordance with the deadline established by the Tribunal, the United States filed a written submission, pursuant to Article 10.20.2 of the TPA (“**U.S. First Written Submission**”).

29. On 29 August 2017, the full Tribunal issued **Procedural Order No. 3**, concerning the Respondent’s Request for Reconsideration of 21 August 2017, and the organization of the Hearing.
30. On 29 August 2017, the Claimants asked the Tribunal to order the Respondent to provide a supplementary translation of Legal Authority RLA-013. The Claimants’ application attached a supplementary translation of RLA-013 already provided by the Respondent voluntarily, and requested an order for a further translation. The Respondent filed observations on this application also on 29 August 2017.
31. On 30 August 2017, the Tribunal ruled on the Claimants’ application of 29 August 2017. That same day, the Respondent sent a further communication in response to the Tribunal’s ruling.
32. On 1 September 2017, each Party filed observations on the tentative Agenda for the Hearing, and on a few logistical and procedural matters pertaining to the organization of the Hearing.
33. On 2 September 2017, the Tribunal approved the Parties’ agreements of 1 September 2017, and indicated that it would resolve the limited areas of disagreement at the start of the Hearing.

**C. The Oral Procedure**

34. A Hearing on Expedited Objections was held in Washington, DC from 3-6 September 2017 (the “**Hearing**”). The following persons were present:

Tribunal:

Lord Nicholas Phillips	President
Mr. Horacio A. Grigera Naón	Arbitrator
Mr. J. Christopher Thomas, QC	Arbitrator

ICSID Secretariat:

Ms. Luisa Fernanda Torres	Secretary of the Tribunal
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For the Claimants:

Mr. Justin Williams	Akin Gump Strauss Hauer & Feld
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Mr. Stephen Kho	Akin Gump Strauss Hauer & Feld
Ms. Katie Hyman	Akin Gump Strauss Hauer & Feld
Mr. Johann Strauss	Akin Gump Strauss Hauer & Feld
Ms. Katherine Afzal	Akin Gump Strauss Hauer & Feld
Mr. Kevin McClintock-Batista	Akin Gump Strauss Hauer & Feld
Mr. Thomas Kingsbury (*)	BSAM and BSLS, Witness
Ms. Audrey Williams ( <i>via video link</i> ) (*)	Benedetti & Benedetti, Witness

For the Respondent:

Mr. E. Whitney Debevoise	Arnold & Porter Kaye Scholer LLP
Ms. Gaela Gehring Flores	Arnold & Porter Kaye Scholer LLP
Ms. Mallory Silberman	Arnold & Porter Kaye Scholer LLP
Ms. Amy Endicott	Arnold & Porter Kaye Scholer LLP
Ms. Katelyn Horne	Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena	Arnold & Porter Kaye Scholer LLP
Ms. Bailey Roe	Arnold & Porter Kaye Scholer LLP
Ms. Sara Ureña	Arnold & Porter Kaye Scholer LLP
Ms. Karla González	Embassy of Panama in the U.S.
Ms. Geniva Escobar ( <i>via video link</i> )	Ministry of Economy and Finances
Mr. Norman Harris	Ministry of Commerce and Industry
Mr. Francisco Olivardia	Embassy of Panama in the U.S.
Ms. Marissa Lasso de la Vega Ferrari	Alfaro, Ferrer & Ramírez, non-testifying independent Panamanian Law Expert

For the United States:<sup>5</sup>

Ms. Nicole Thornton	U.S. Department of State
Mr. Matthew Olmsted	U.S. Department of State
Mr. John Blanck	U.S. Department of State
Ms. Amanda Blunt	Office of the U.S. Trade Representative

Court Reporter(s):

Mr. David Kasdan	B&B Reporters
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(\*) present during his/her examination

35. The following persons were examined during the Hearing:

On behalf of the Claimants:

Mr. Thomas Kingsbury	Witness
Ms. Audrey Williams ( <i>via video link</i> )	Witness

36. In accordance with Article 10.21.2 of the TPA, and Section 21.6 of Procedural Order No. 1, the Hearing was made public via real-time streaming on the ICSID Website.

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<sup>5</sup> Both Parties confirmed their agreement to the presence of representatives of the United States in the Hearing Room on 9 August 2017.

37. On 3 September 2017, having heard the Parties' oral arguments on the preliminary evidentiary issues, the full Tribunal issued **Procedural Order No. 4**.
38. On 5 September 2017, the Tribunal communicated in writing to the Parties certain questions to be addressed during closing arguments at the Hearing.
39. During the Hearing, the Parties introduced the following materials into the record:
  - **Claimants:** Demonstrative Exhibits CD-001 to CD-002; Exhibits C-127 to C-129; Legal Authorities CLA-039 to CLA-047.
  - **Respondent:** Demonstrative Exhibits RD-001 to RD-003.

#### **D. The Post-Hearing Procedure**

40. On 13 September 2017, following an invitation from the Tribunal during the Hearing, the United States confirmed its intent to file a supplementary written submission.
41. On 25 September 2017, within the deadline set forth by the Tribunal, the United States filed a supplementary written submission, pursuant to Article 10.20.2 of the TPA ("**U.S. Second Written Submission**").
42. On 28 September 2017, following communications from both Parties, the Tribunal amended the deadline for the Post-Hearing Briefs, and confirmed the due dates for other post-Hearing procedural steps. In that same communication, the Tribunal provided further guidance concerning the statements of costs.
43. On 6 October 2017, the Parties filed agreed corrections to the transcript of the Hearing.
44. On 11 October 2017, the Parties filed their respective Post-Hearing Briefs on the Expedited Objections.
45. On 6 November 2017, the Parties filed their respective Statements of Costs for the Expedited Objections phase.
46. On 20 November 2017, the Tribunal inquired whether the Parties would agree to application of the "*extraordinary cause*" provision of Article 10.20.5 of the TPA

authorizing extension of the 180-day deadline for issuance of the present ruling, for an additional brief period no longer than 30 days. Both Parties confirmed their agreement on the same day.

### **III. FACTS**

#### **A. The Background Facts**

47. The facts that follow are background facts that are not in dispute. There are disputes, however, about the implications of some of these facts. The Tribunal will look more closely at the facts when dealing with these disputes. The following facts merely set the scene for the more detailed analysis that follows.

48. This arbitration arises in the context of a world-wide battle between two groups of companies that manufacture and sell tires. One, the Chinese owned Luque Group, markets, or seeks to market, tires under the mark “RIVERSTONE.”<sup>6</sup> The other, the Japanese owned Bridgestone Group, markets tires under the marks “BRIDGESTONE” and “FIRESTONE.”

49. In 1900, the Firestone Tire & Rubber Company was founded in Akron, Ohio. In 1931, a rival company, the Bridgestone Tire Company Ltd. was founded in Japan. By the early 1950s this had become Japan’s largest tire manufacturer. In 1988 the Japanese company acquired the American company.<sup>7</sup> The resultant Bridgestone Group is the world’s largest manufacturer of tire and rubber products. Tires account for about 80% of Bridgestone’s sales worldwide.<sup>8</sup> The Bridgestone Group consists of well over 100 companies.<sup>9</sup>

50. The Japanese parent company, Bridgestone Corporation (“**BSJ**”) is the owner of the BRIDGESTONE trademark, which has been registered by BSJ in many countries around

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<sup>6</sup> Tr. Day 3, 403:12-405:15 (Mr. Debevoise; Mr. Kingsbury).

<sup>7</sup> Request for Arbitration, ¶ 10.

<sup>8</sup> Request for Arbitration, ¶ 5.

<sup>9</sup> Tr. Day 4, 509:4-9 (Mr. Williams).

the world, including Panama.<sup>10</sup> BSJ does not itself sell tires around the world under the BRIDGESTONE trademark. Such sales are typically made by subsidiary companies, indirectly wholly owned by BSJ, under licenses or sub-licenses granting the right to use the trademark. The trademark is only used in relation to tires by companies that are part of the group. Outside tire companies are not granted franchises to use the trademark.

51. As noted above, the First Claimant (“**BSLS**”) is a subsidiary in the Bridgestone Group, registered in the State of Delaware, United States. The Second Claimant (“**BSAM**”) is a subsidiary in the Bridgestone Group registered in the State of Nevada, United States.<sup>11</sup> Neither of these companies manufactures or sells tires. Each carries out activities on behalf of the group.
52. In 2001, a substantial reorganization of the group took place. The FIRESTONE trademarks that were registered outside of the United States were assigned to BSLS. Those registered in the United States were assigned to another U.S. subsidiary, Bridgestone Brands LLC.<sup>12</sup> In the same year a loan for US\$ 31 million was made to BSLS by BSJ.<sup>13</sup> Counsel for the Claimants informed the Tribunal that this sum was used by BSLS to pay for the trademarks.<sup>14</sup> BSLS then granted BSAM a license to use these trademarks in an agreement dated 1 December 2001 (the “**FIRESTONE Trademark License**”). This granted to BSAM a license to use trademarks registered in South American countries, including Panama, which were set out in a lengthy schedule that contained a total of approximately 1200 registered trademarks.<sup>15</sup> The license provided for BSAM to pay modest royalties to BSLS for the use of the trademarks.

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<sup>10</sup> Request for Arbitration, ¶¶ 1, 6, 12; Cl. Res. Exp. Obj., ¶ 110; **RD-002**, Respondent’s Opening Statement on Expedited Objections, p. 20.

<sup>11</sup> Request for Arbitration, ¶ 4; Resp. Exp. Obj., ¶¶ 3-4. The use of current names of companies on occasion embraces their predecessors.

<sup>12</sup> Tr. Day 3, 454:1-456:1 (Mr. Debevoise; Mr. Kingsbury); **C-097**, Firestone Global Brand Position Funding Proposal (2 February 2017).

<sup>13</sup> Tr. Day 3, 461:3-7 (Mr. Debevoise; Mr. Kingsbury).

<sup>14</sup> Tr. Day 4, 623: 1-5 (Mr. Williams).

<sup>15</sup> **C-048**, Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001) [hereinafter, “**FIRESTONE Trademark License**”]; Cl. Res. Exp. Obj., ¶ 114; Resp. Reply Exp. Obj., ¶ 36.



53. The FIRESTONE Trademark License includes a right to grant sub-licenses to companies in the group. BSAM has granted sub-licenses to a number of its own wholly-owned subsidiaries. It is these subsidiaries that manufacture and sell tires bearing the FIRESTONE mark in the countries where that mark is registered. One such subsidiary is Bridgestone Costa Rica (“**BSCR**”).<sup>16</sup> BSCR manufactures tires bearing the FIRESTONE mark and sells these in Panama. There is, however, on the record no sub-license from BSAM granting BSCR the right to sell tires bearing the FIRESTONE mark in Panama.
54. Turning to the use of the BRIDGESTONE trademark, on 1 December 2001, BSJ, as owner of the BRIDGESTONE trademark, granted to a wholly-owned subsidiary of BSAM called Bridgestone/Firestone North American Tire LCC, subsequently Bridgestone American Tire Operations, LLC (“**BATO**”), the right to use the BRIDGESTONE trademark in relation to all tire products within the United States and elsewhere (the “**BRIDGESTONE Trademark License**”).<sup>17</sup> The Claimants have placed on the record a trademark sublicense agreement between BATO and BSCR which licenses BSCR to use the Costa Rican trademarks owned by BSJ to manufacture tire products in Costa Rica bearing the BRIDGESTONE trademark and to sell these worldwide.<sup>18</sup> That is, however, a 2015 agreement. There is no earlier document on the record that evidences the grant by BATO to BSCR of the right to sell tires bearing the BRIDGESTONE mark in Panama.
55. It is the policy of the Bridgestone Group to oppose any application to register a trademark in relation to tires that bears the suffix “*stone*.”<sup>19</sup> In August 2002, a company incorporated in Florida called L.V. International Inc., a member of the Luque Group, applied to register the RIVERSTONE trademark in the United States. That application was opposed by BFS Brands LLC, a U.S. incorporated subsidiary of BSJ,<sup>20</sup> (who the

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<sup>16</sup> Request for Arbitration, ¶ 7; Cl. Res. Exp. Obj., ¶ 117; Resp. Exp. Obj., ¶ 4.

<sup>17</sup> **C-052**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001) [hereinafter, “**BRIDGESTONE Trademark License**”]; Cl. Res. Exp. Obj., ¶ 111-113; Resp. Reply Exp. Obj., ¶ 40.

<sup>18</sup> **C-049**, Trademark Sublicense Agreement between Bridgestone Americas Tire Operations LLC and Bridgestone Costa Rica, S.A. (1 January 2015); Resp. Reply Exp. Obj., ¶ 38.

<sup>19</sup> Request for Arbitration, ¶ 20; Cl. Res. Exp. Obj., ¶ 27; Resp. Exp. Obj., ¶ 5.

<sup>20</sup> Request for Arbitration, ¶ 21; Resp. Reply Exp. Obj., ¶ 20.

Tribunal assumes now owns the FIRESTONE and BRIDGESTONE trademarks in the United States), and L.V. International then withdrew its application.<sup>21</sup> On 3 November 2004, BFS Brands' lawyers wrote to L.V. International's lawyers warning them that L.V. International would be acting "*at its own peril*" if it used the RIVERSTONE mark in other countries.<sup>22</sup>

56. On 4 February 2005, the Panamanian Trademark and Patent Office published an application by a member of the Luque Group called Muresa Intertrade S.A. ("**Muresa**") for the registration in Panama of the RIVERSTONE trademark.<sup>23</sup> BSJ and BSLS, in their respective capacities as the owners of the BRIDGESTONE and FIRESTONE trademarks, initiated proceedings in the Panamanian courts opposing the registration of the RIVERSTONE trademark. L.V. International and Tire Group of Factories Ltd. ("**Tire Group**"), also part of the Luque Group, intervened in the proceedings.<sup>24</sup> On 21 July 2006, this opposition claim was denied.<sup>25</sup> BSJ and BSLS filed an appeal but subsequently withdrew this.<sup>26</sup>
57. Muresa and Tire Group then commenced proceedings in the Panamanian Courts against BSJ and BSLS alleging that their commencement of the opposition proceedings had been wrongful and had caused them to cease sales of RIVERSTONE tires out of fear that their inventory would be seized if they were to lose the proceedings.<sup>27</sup> They alleged that this resulted in their sustaining losses exceeding US\$ 5 million. L.V. International intervened in support of this claim, contending that Muresa's fears were justified having regard to the terms of the letter that BFS Brands had sent to them on 3 November 2004.<sup>28</sup>

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<sup>21</sup> Request for Arbitration, ¶ 22; Resp. Reply Exp. Obj., ¶ 20.

<sup>22</sup> **C-013**, Letter from Foley & Lardner LLP to Sanchelina & Associates, P.A. (3 November 2004); Request for Arbitration, ¶ 23; Resp. Reply Exp. Obj., ¶ 20.

<sup>23</sup> Request for Arbitration, ¶ 24; Cl. Res. Exp. Obj., ¶ 28; Resp. Exp. Obj., ¶ 5.

<sup>24</sup> Request for Arbitration, ¶ 25; Cl. Res. Exp. Obj., ¶ 29; Resp. Exp. Obj., ¶¶ 5-6.

<sup>25</sup> Request for Arbitration, ¶ 26; Cl. Res. Exp. Obj., ¶ 30; Resp. Exp. Obj., ¶ 6.

<sup>26</sup> Request for Arbitration, ¶ 27; Resp. Reply Exp. Obj., ¶ 22.

<sup>27</sup> Request for Arbitration, ¶¶ 28-29; Cl. Res. Exp. Obj., ¶ 31; Resp. Exp. Obj., ¶ 6.

<sup>28</sup> Request for Arbitration, ¶ 29; Resp. Reply Exp. Obj., ¶ 23.

58. Muresa's claim was rejected at first instance,<sup>29</sup> and by the Panamanian Court of Appeal.<sup>30</sup> But, on a subsequent appeal, the First Civil Chamber of the Panamanian Supreme Court gave a judgment dated 28 May 2014, which reversed the Court of Appeal's judgment by a majority of 2 to 1, and BSJ and BSLS were held jointly and severally liable to Muresa and Tire Group in the sum of US\$ 5 million, together with attorney's fees of US\$ 431,000.<sup>31</sup> It is that judgment that forms the basis of the claims in the present arbitration.

## **B. The Substantive Claims**

59. It is the Claimants' case that they owned or controlled investments in Panama that were protected under the TPA, that the judgment of the Panamanian Supreme Court violated that protection and that they are entitled in this arbitration to look to Panama for compensation for the damage done to those investments. Panama's five Expedited Objections will require the Tribunal to look closely at much of the Claimants' case. Once again, the Tribunal at this stage seeks to do no more than set the scene for what is to follow.

60. The investments in relation to which the Claimants seek relief consist of intellectual property, or rights derived from intellectual property. So far as BSLS is concerned, the right relied on is the FIRESTONE trademark registered in Panama that BSLS owned. BSLS contends that this intellectual property constituted an investment for the purposes of the ICSID Convention and the TPA. In these expedited proceedings, Panama has not challenged that contention.

61. The investments in relation to which BSAM seeks relief are (i) the license that it had been granted by BSLS to use the FIRESTONE trademark registered in Panama; and (ii) the license that its wholly owned subsidiary, BATO, had been granted by BSJ to use the BRIDGESTONE trademark registered in Panama. BSAM contends that these licenses

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<sup>29</sup> Request for Arbitration, ¶¶ 31-33; Cl. Res. Exp. Obj., ¶ 32; Resp. Reply Exp. Obj., ¶ 24.

<sup>30</sup> Request for Arbitration, ¶¶ 36-37; Resp. Exp. Obj., ¶ 7; Resp. Reply Exp. Obj., ¶ 24.

<sup>31</sup> **C-027**, Judgment, First Civil Chamber of the Supreme Court of Justice of the Republic of Panama (28 May 2014); Request for Arbitration, ¶¶ 40-43; Cl. Res. Exp. Obj., ¶ 34; Resp. Reply Exp. Obj., ¶ 24. There were two unsuccessful motions against this judgment before the Panama Supreme Court: a motion for clarification and modification filed in 16 June 2014, and dismissed on 28 November 2014; and a *Recurso de Revisión* filed on 30 September 2014, and dismissed on 16 March 2016. See, Request for Arbitration, ¶¶ 44-47.

were “*intellectual property rights*” which constituted investments owned or controlled by BSAM that fell within the protection of the TPA. Panama challenges that contention.

62. The Claimants contend that the judgment of the Panamanian Supreme Court was unjust and arbitrary, and that it violated Panama’s obligations under the TPA (i) to accord fair and equitable treatment to BSLS’s and BSAM’s investments; (ii) to accord to BSLS and BSAM treatment no less favorable than that accorded to its own investors and their investments; and (iii) not to expropriate BSLS’s and BSAM’s investments without prompt, adequate and effective compensation, and in accordance with the other requirements in the TPA.<sup>32</sup> No challenge is made in this expedited proceeding to the attack made by the Claimants on the judgment of the Panama Supreme Court, but it can be expected to be hotly contested if this case proceeds to a hearing on the merits.
63. BSLS paid the amount of US\$5,431,000 to discharge the judgment that had been given against BSJ and BSLS jointly, with monies borrowed from BSAM, and claims these sums as a head of compensation due.<sup>33</sup> Panama alleges that this payment constituted an abuse of process that prevents BSLS from invoking the jurisdiction of the Tribunal.<sup>34</sup>
64. The essence of the remaining claims for compensation advanced by the Claimants is that the judgment of the Supreme Court has devalued their investments by weakening the protection given to registered trademarks in Panama and elsewhere in Latin America.<sup>35</sup> The total compensation claimed is a sum in excess of US\$16 million.<sup>36</sup> The Tribunal will explore in more detail the nature of these claims when dealing with the Expedited Objections made by Panama in respect of them.

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<sup>32</sup> Request for Arbitration, ¶¶ 3, 61-67.

<sup>33</sup> Request for Arbitration, ¶¶ 53-54; Cl. Res. Exp. Obj., ¶ 37; Cl. Rej. Exp. Obj., ¶ 66(a); Cl. PHB Exp. Obj., ¶ 57.

<sup>34</sup> See, e.g., Resp. Exp. Obj., ¶¶ 38-43; Resp. PHB Exp. Obj., ¶¶ 31-40.

<sup>35</sup> See, e.g., Request for Arbitration, ¶¶ 55-58.

<sup>36</sup> Request for Arbitration, ¶¶ 54, 90.

#### **IV. SUMMARY OF THE PARTIES' REQUESTS FOR RELIEF IN THE EXPEDITED PHASE**

65. The Respondent has requested:

“a. that, in accordance with Article 10.20.5 of the TPA, the Tribunal evaluate the objections articulated herein on an expedited basis, [...]; and

b. that, at the end of the expedited proceeding, the Tribunal issue an award dismissing the case in its entirety for lack of jurisdiction, ordering Claimants jointly and severally to bear all costs of the arbitration, and awarding Panama full recovery of all of its costs and expenses (including attorneys' fees and expenses), with interest thereon at the rate of six-month LIBOR plus 2% per annum from the date of the award to the date of payment.”<sup>37</sup>

66. The Claimants, in turn, have requested that “*the Objections [...] be dismissed in their entirety*”, and that the Tribunal issue “*an order requiring the Respondent to pay the costs of its Objections immediately*.”<sup>38</sup>

67. The Parties' respective positions regarding the objections at issue in this expedited phase are summarized in the sections that follow. The Tribunal emphasizes that it has considered the Parties' arguments in their written and oral submissions in their entirety, irrespective of whether an argument is referred to expressly in the summary of the Parties' positions in this ruling.

#### **V. BURDEN OF PROOF AND THE EVIDENTIARY STANDARD**

##### **A. The Parties' Positions**

###### **(1) The Claimants' Position**

68. The Claimants contend that “*it is not for [them] to prove that the Tribunal does have jurisdiction*” but “*rather it is the Respondent that has the burden of proving that it does*

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<sup>37</sup> Resp. Exp. Obj., ¶ 55. *See also*, Resp. Reply Exp. Obj., ¶ 99; Resp. PHB Exp. Obj., ¶ 48 (adding the words “*from either Claimant*” after “*full recovery*”).

<sup>38</sup> Cl. Res. Exp. Obj., ¶ 180. *See also*, Cl. Rej. Exp. Obj., ¶ 74; Cl. PHB Exp. Obj., ¶ 62 (not including the word “*immediately*”).

not.”<sup>39</sup> And, it is “[t]he Respondent [who] has the burden of proving its Objections because it invoked this preliminary and expedited process.”<sup>40</sup> This conclusion, the Claimants argue, also “accords with practical sense” given that in an expedited process a claim may be disposed of at the outset, without a full process and a full hearing.<sup>41</sup> The Claimants submit they are not aware of authority supporting the view that in a *preliminary expedited proceeding* the burden of proof is the same applicable to any jurisdictional objection, *i.e.*, that the Claimants bear the burden proof, that no factual allegations are accepted *pro-tem*, and that both Parties are entitled to adduce evidence.<sup>42</sup>

69. The Claimants observe that Article 10.20.5 of the TPA includes no express reference to the applicable evidentiary standard in an expedited procedure,<sup>43</sup> and contend that the standard set forth in Article 10.20.4(c) of the TPA applies to the objections in this expedited phase.<sup>44</sup> Pursuant to that standard, “*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 “[t]he tribunal may also consider any relevant facts not in dispute.”<sup>45</sup>
70. According to the Claimants, as matter of proper construction of the TPA and in application of Article 10.20.4(c): (i) the factual allegations in the Request for Arbitration and in the Claimants’ 25 October 2016 letter are to be assumed as true, and factual disputes raised by the Respondent are to be ignored;<sup>46</sup> and (ii) any dispute over the Respondent’s stand-alone allegations of fact that do not directly contradict allegations in the Claimants’ pleadings, should be resolved in favour of the Claimants.<sup>47</sup> The Rejoinder on Expedited Objections states, more broadly, that the Claimants’ position is “*that their*

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<sup>39</sup> Cl. Res. Exp. Obj., ¶ 51.

<sup>40</sup> Cl. Rej. Exp. Obj., ¶ 4. *See also, id.*, ¶ 28; Cl. PHB Exp. Obj., n. 16.

<sup>41</sup> Cl. Rej. Exp. Obj., ¶ 29.

<sup>42</sup> Cl. Rej. Exp. Obj., ¶¶ 27-28.

<sup>43</sup> Cl. Res. Exp. Obj., ¶ 52.

<sup>44</sup> *See* Cl. Res. Exp. Obj., ¶¶ 53, 60.

<sup>45</sup> **C-003/C-117**, United States-Panama Trade Promotion Agreement signed on 28 June 2007, in force on 31 October 2012 [hereinafter, “TPA”], Chapter 10, Art. 10.20.4(c).

<sup>46</sup> Cl. Res. Exp. Obj., ¶¶ 84, 87.

<sup>47</sup> Cl. Res. Exp. Obj., ¶ 88.

*pleaded allegations of fact are to be subject to the deemed truthfulness provision at Article 10.20.4(c) either as a matter of construction or pursuant to the Tribunal’s discretion under Rule 34 of the ICSID Arbitration Rules.*”<sup>48</sup>

71. The Claimants observe that Article 10.20.5 of the TPA has two limbs of expedited objections, namely, “(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”,<sup>49</sup> and take the view that “Article 10.20.5 is to be construed such that any objection raised thereunder is to be subject to the deemed truthfulness provision at Article 10.20.4(c).”<sup>50</sup> The Claimants argue that:

- “[T]he 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.”<sup>51</sup>
- It would be “incompatible with the spirit, purpose and context of the clause” and “manifestly absurd and unreasonable” to conclude that Article 10.20.5 permits “mini-trials” while Article 10.20.4 does not.<sup>52</sup>
- “[I]t would make no sense for an objection under the first limb of Article 10.20.5 to be subject to such deemed truthfulness and an objection under the second limb not to be so.”<sup>53</sup>
- “[I]t 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.”<sup>54</sup>

72. In the alternative, the Claimants argue, even if the Tribunal concludes that the objections are brought under the competence limb in Article 10.20.5 of the TPA and that the regime

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<sup>48</sup> Cl. Res. Exp. Obj., ¶ 4 (emphasis added).

<sup>49</sup> Cl. Res. Exp. Obj., ¶ 59. *See also, id.*, ¶ 72; Cl. Res. Exp. Obj., ¶ 20(a).

<sup>50</sup> Cl. Res. Exp. Obj., ¶ 22.

<sup>51</sup> Cl. Res. Exp. Obj., ¶ 74.

<sup>52</sup> Cl. Res. Exp. Obj., ¶ 73.

<sup>53</sup> Cl. Res. Exp. Obj., ¶ 22.

<sup>54</sup> Cl. Res. Exp. Obj., ¶ 60. In the Response on Expedited Objections, the Claimants initially observed also that since “issues of the Tribunal’s competence [were] likely to be questions of law”, in practice there would be no difference between the standard applicable between the two limbs of Article 10.20.5 given that “they are both questions of law.” Cl. Res. Exp. Obj., ¶ 60.

in Article 10.20.4(c) does not apply, as a matter of discretion pursuant to ICSID Arbitration Rule 34, the Tribunal should assume as true the Claimants' factual allegations in their Request for Arbitration and their 25 October 2016 letter, and resolve factual disputes in favour of the Claimants.<sup>55</sup> The Rejoinder on Expedited Objections refers more broadly to the Claimants' "*pleaded allegations of fact.*"<sup>56</sup>

73. For the Claimants, even if the Respondent's construction of Article 10.20.5 of the TPA were adopted,<sup>57</sup> Rule 34 of the ICSID Arbitration Rules gives the Tribunal discretion "*to determine what approach to take to evidence and factual disputes for these purposes, including whether it is appropriate, in expedited summary proceedings such as these, to make final determinations on disputed facts.*"<sup>58</sup> In the Claimants' view, at a minimum, "*where there is a dispute of fact (whether or not pleaded) that can only satisfactorily be resolved at a full trial or where by reason of the expedited nature of the current process there may not have been a proper opportunity for the Claimant to obtain and present all of the evidence that may be relevant, then the Tribunal should exercise its discretion for these purposes to take the Claimants' allegations to be true.*"<sup>59</sup>
74. Notwithstanding the foregoing, and without prejudice to their primary position that factual disputes must be deemed resolved in their favour in this expedited phase, the Claimants say that, in the circumstances, they "*had little option but to do [their] best in the limited time available to put together and exhibit responsive evidence.*"<sup>60</sup>
75. The Claimants do not accept that the Respondent's present objections fall under the second limb of Article 10.20.5 of the TPA (*i.e.* objections to the Tribunal's competence).<sup>61</sup> In the Rejoinder on Expedited Objections, the Claimants maintained that the extent of the disputed issues of fact "*strongly suggests*" that the objections go beyond competence and go into the merits of the case, referring "*for example*" to the second and

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<sup>55</sup> Cl. Res. Exp. Obj., ¶ 60. *See also, id.*, ¶¶ 77-82, 84, 87-88; Cl. Rej. Exp. Obj., ¶ 22.

<sup>56</sup> Cl. Rej. Exp. Obj., ¶ 4.

<sup>57</sup> *Infra*, § V.A(2).

<sup>58</sup> Cl. Rej. Exp. Obj., ¶ 22.

<sup>59</sup> Cl. Rej. Exp. Obj., ¶ 4. *See also, id.*, ¶ 23.

<sup>60</sup> Cl. Res. Exp. Obj., ¶ 5.

<sup>61</sup> Cl. Rej. Exp. Obj., ¶ 20(d)(iii). *See also, id.*, ¶ 20(c).



fifth objections, which the Claimants described as matters of causation.<sup>62</sup> At the Hearing, the Claimants submitted the chart replicated below, reflecting *inter alia*, their position on whether the objections were a matter of competence, and on whether they were intertwined with the merits:<sup>63</sup>

<b>Objection</b>	<b>Is this properly brought under the competence limb?</b>	<b>Are facts in dispute?</b>	<b>Is a decision on assumed truth needed?</b>	<b>Does the objection mix competence and the merits?</b>
<b>Objection 1</b> Whether BSAM has a covered investment.	<b>Yes</b>	<b>No</b>	<b>No</b>	<b>No</b>
<b>Objection 2</b> Whether BSAM's dispute arises directly out of an investment.	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>
<b>Objection 3</b> Whether Panama may deny the benefits of the TPA to BSLS.				
<b>Objection 4</b> Whether BSLS engaged in an abuse of process.	<b>No</b>	<b>Unclear</b>	<b>No</b>	<b>No</b>
<b>Objection 5</b> Whether Claimants can pursue claims in excess of \$5.4 million.	<b>No</b>	<b>Yes</b>	<b>No</b>	<b>Yes</b>

In the course of oral argument, however, the Claimants amended their positions in this chart:

- As to the first objection, the Claimants ultimately submitted that indeed it *does* also involve merit issues.<sup>64</sup>
- As to the second objection, the Claimants ultimately contended that “*as it is now, as the position has now emerged, is not one of competence.*”<sup>65</sup>

76. In their Post-Hearing Brief, the Claimants recognize that following the session on 3 September 2017, the Tribunal issued Procedural Order No. 4, ruling that “*the evidentiary rule in Article 10.20.4 (c) of the U.S.-Panama TPA has no application in the present*

<sup>62</sup> Cl. Rej. Exp. Obj., ¶ 24.

<sup>63</sup> CD-001, Claimants’ Chart on the Nature of the Respondent’s Objections (3 September 2017).

<sup>64</sup> Tr. Day 1, 137:18-21 (Mr. Williams). Initially, the Claimants had contended that the issue was *not* one going to both jurisdiction and the merits. Tr. Day 1, 24:8-11 (Mr. Williams).

<sup>65</sup> Tr. Day 1, 36:18-20 (Mr. Williams). Regarding the second objection, in answering questions from the Tribunal, the Claimants also indicated that to the extent that the objection was limited to the nexus (and assumed that the loss had occurred), in that case, the issue would not involve a question of fact, but rather solely one of law, that could be brought under Article 10.20.5. Tr. Day 1, 37:5-38:1 (Mr. Williams).

*proceeding, and the Tribunal will address the issues on the basis of the evidence.”*<sup>66</sup> The Claimants argue, however, that this ruling still left open two of the questions presented by the Tribunal in Procedural Order No. 2, namely, (i) whether the Tribunal is required to make final and definitive factual findings in relation to Article 10.20.5 objections; and (ii) whether the Tribunal is required to decide all objections to competence including those that are intertwined with the merits.<sup>67</sup>

77. The Claimants argue that although the Tribunal is required to decide the objections, “*where the evidence is clearly incomplete [...] [the Tribunal] is not obliged to make final and definitive findings of fact and law or to decide those Objections that are intertwined with the merits*”, but rather, it is open to the Tribunal to dismiss the objection(s) “*on the basis that the Respondent has failed to discharge its burden of proof.*”<sup>68</sup> The Claimants insist that as the Hearing took place at a very early stage, under a highly compressed timetable, and as the Respondent’s positions have evolved, “*the Claimants have simply not had a proper opportunity to submit all of their evidence on all of the issues.*”<sup>69</sup> For example, the Claimants submit, the nature of the objections has changed in the course of the proceeding, and the Respondent and the Tribunal have raised new points at the Hearing that the Claimants have not had an opportunity to deal with in evidence, even though they would like to.<sup>70</sup>
78. The Claimants further contend that if the objections are not properly brought under the competence limb of Article 10.20.5, they must fail on that basis. According to the Claimants’ Post-Hearing Brief, only the first objection is one of “*competence*” (albeit

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<sup>66</sup> Procedural Order No. 4, ¶ 3.

<sup>67</sup> Cl. PHB Exp. Obj., ¶¶ 4-5.

<sup>68</sup> Cl. PHB Exp. Obj., ¶ 8. At the Hearing, the Claimants argued that the Tribunal “*should make final findings of fact only to the extent it feels able safely to do so on the basis of, Number 1, undisputed allegations of fact; Number 2, the Claimants’ allegations of fact that the Tribunal is willing to assume to be true; and, Number 3, to the extent that the Tribunal wishes to look at the evidence, the evidence.*” Tr. Day 1, 19:6-13 (Mr. Williams). They went on to argue that it “*ultimately it falls to the Tribunal to decide is it safe to make final findings of fact or not, on the basis of the material before it*” and that “[t]o the extent that it is not, or that the material before the Tribunal does not support such a finding, then the Respondent’s application must fail.” Tr. Day 1, 20:20-21:3 (Mr. Williams).

<sup>69</sup> Cl. PHB Exp. Obj., ¶ 7.

<sup>70</sup> Cl. PHB Exp. Obj., ¶ 7. The Claimants refer to the issues of the tax treatment of BSLs’s income, the purpose of a loan from BSAM to BSLs, how profits pass from BSCR to BSAM, the existence of an agreement between BSLs and BSJ with respect to payment of the damages ordered by the Supreme Court decision. *Id. See also, id.*, ¶ 25.

intertwined with the merits), and the remaining objections (second, third, fourth and fifth) are not.<sup>71</sup> But, in light of the procedural agreement reached in connection with objection third, the Claimants only ask that the second, fourth and fifth objections be dismissed on the ground that they are not a matter of competence.<sup>72</sup>

79. At the Hearing, the Claimants ultimately submitted that, given the requirement in the TPA that the proceedings on the merits be suspended during the expedited objections phase, “*in circumstances where a decision would necessarily involve aspects of the merits, then that would not conform with what the regime of the TPA requires.*”<sup>73</sup> The Claimants reiterate that conclusion in the Post-Hearing Brief, arguing that the Tribunal should dismiss any objection where the issue of competence is intertwined with the merits, and where due to the expedited nature of the proceeding “*all the necessary evidence is not before the Tribunal, and so the Respondent has failed to discharge its burden of proof.*”<sup>74</sup> The Claimants argue that objections one, two and fifth (if not already dismissed) should be dismissed on this basis.<sup>75</sup>

## **(2) The Respondent’s Position**

80. The Respondent maintains that the Claimants misstate the evidentiary standard applicable in the present expedited proceeding,<sup>76</sup> and argues that the assertions underlying the Claimants’ theory are incorrect, inapposite or both.<sup>77</sup>

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<sup>71</sup> Cl. PHB Exp. Obj., ¶¶ 9-12.

<sup>72</sup> Cl. PHB Exp. Obj., ¶ 3(a). With respect to the third objection, the Claimants acknowledge that “*it was agreed that the Tribunal would decide the denial of benefits objection*”, although they add that “*in any event, it is worth noting that this is strictly not a competence issue.*” *Id.*, ¶ 11. See also, Tr. Day 1, 38:18-21 (Mr. Williams).

<sup>73</sup> Tr. Day 1, 139:3-13 (Mr. Williams). See also, Tr. Day 1, 25:11-18 (Mr. Williams). At an earlier point in the Hearing, the Claimants had taken a different position, submitting that objections to competence intertwined with the merits “*should still be decided; but, in order for the objection to succeed, the Tribunal would need finally to decide in the Respondent’s favor both the objection and the issue on the merits, and any such decision would have to be made on the basis of undisputed allegations of fact and, to the extent the Tribunal considers it appropriate, the evidence. And where the objection and the merits’ issues cannot safely be finally decided on that basis, then the objection fails.*” Tr. Day 1, 23:13-24:3 (Mr. Williams).

<sup>74</sup> Cl. PHB Exp. Obj., ¶ 3(b).

<sup>75</sup> Cl. PHB Exp. Obj., ¶ 3(b).

<sup>76</sup> Resp. Reply Exp. Obj., § II.

<sup>77</sup> Resp. Reply Exp. Obj., ¶ 5.

81. Panama explains that Article 10.20.5 of the TPA refers to three different types of objections, the second type being objections to the Tribunal's competence; and contends that the Respondent has only advanced objections to competence in this expedited phase.<sup>78</sup> The Respondent further disputes that the evidentiary standard is the same no matter the type of objection under Article 10.20.5 of the TPA.<sup>79</sup>
82. The Respondent takes issue with the allegation that it would not be "*sensible*" for the TPA to provide that expedited objections to competence have a broader scope than expedited objections under Article 10.20.4.<sup>80</sup> It argues that the role of a tribunal is treaty interpretation, and not to opine on whether a treaty policy was sensible or not.<sup>81</sup> And in any event, Panama submits, it is indeed sensible for expedited objections to competence to have broader scope than objections under Article 10.20.4, because they are different: one set relates to the tribunal's authority to hear the claim, while the other set refers to objections that as a matter of law there is no genuine claim to be heard.<sup>82</sup> Panama further submits that there is nothing absurd in the contention that objections to jurisdiction and objections that a claim fails as a matter of law have different evidentiary standards, because that is the rule under international law.<sup>83</sup>
83. Panama points out that when Article 10.20.5 of the TPA refers to objections to competence and to objections under Article 10.20.4 it separates them with the word "*and*", indicating that they are different. The reference to both would be "*redundant*" if the scope were the same, and treaty language should be deemed meaningful.<sup>84</sup>
84. The Respondent also disputes that there is no difference in practice between objections under Article 10.20.4 and objections to competence because they are both questions of law. The Respondent disagrees that objections to the Tribunal's competence are solely a

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<sup>78</sup> Resp. Reply Exp. Obj., ¶ 4. At the Hearing, the Respondent indicated that it did not accept all the arguments and characterizations made by the Claimants in the table at **CD-001**. Tr. Day 1, 147:18-148:1 (Ms. Silverman).

<sup>79</sup> Resp. Reply Exp. Obj., ¶ 5.

<sup>80</sup> Resp. Reply Exp. Obj., ¶ 6.

<sup>81</sup> Resp. Reply Exp. Obj., ¶ 6.

<sup>82</sup> Resp. Reply Exp. Obj., ¶ 7.

<sup>83</sup> Tr. Day 1, 114:19-115:15 (Ms. Silverman).

<sup>84</sup> Resp. Reply Exp. Obj., ¶ 8.

matter of law.<sup>85</sup> As only objections under Article 10.20.4 are described in the TPA by using the words “*as a matter of law*”, Panama submits, it would be improper to imply that description into the other category (*i.e.*, objections to competence).<sup>86</sup>

85. Panama also denies that Article 10.20.5 of the TPA indicates that the evidentiary standard applicable to Article 10.20.4 objections always applies in the context of an expedited Article 10.20.5 proceeding, regardless of the type of objection.<sup>87</sup> According to Panama, Article 10.20.4(c) only applies to Article 10.20.4 objections, and it does not address or govern the other two types covered by Article 10.20. It says nothing about the treatment of factual allegations relating to competence.<sup>88</sup>

86. In the Respondent’s submission, “*the applicable standard is the same one that always applies in the context of jurisdictional objections, under which the **claimant** bears the burden of proof, there is no presumption of the veracity or acceptance pro tem of its factual allegations, and both parties are entitled to adduce evidence.*”<sup>89</sup> There is no reason why disputed facts cannot be decided with expedition in this case, given that: (i) most of the “*factual*” issues simply involve evaluation of the Claimants’ own evidence; and (ii) the Respondent has only introduced evidence for one issue (whether BSLS has substantial business activities), which the Claimants should have been able to establish with relative dispatch.<sup>90</sup> For Panama, accepting the Claimants’ jurisdiction-related factual allegations *pro-tem* would entail multiple assessments of the same issues, defeating the very purpose of the expedited review mechanism in the TPA.<sup>91</sup> And “[s]uch a result would constitute the type of unforeseen event Panama mentioned when it reserved its right to seek bifurcation of jurisdictional objections following this expedited proceeding.”<sup>92</sup>

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<sup>85</sup> Resp. Reply Exp. Obj., ¶ 9.

<sup>86</sup> Resp. Reply Exp. Obj., ¶ 9.

<sup>87</sup> Resp. Reply Exp. Obj., ¶ 10.

<sup>88</sup> Resp. Reply Exp. Obj., ¶ 12.

<sup>89</sup> Resp. Reply Exp. Obj., ¶ 14 (footnotes omitted; emphasis in original).

<sup>90</sup> Resp. Reply Exp. Obj., ¶ 15.

<sup>91</sup> Resp. Reply Exp. Obj., ¶ 15.

<sup>92</sup> Resp. Reply Exp. Obj., n. 56.

87. The Respondent also takes issue with the notion that jurisdiction exists until the Respondent shows otherwise. It argues that the international law rule is exactly the opposite, namely, that a claimant is required to prove jurisdiction regardless of whether objections to jurisdiction are raised, and nothing in the TPA alters this rule.<sup>93</sup>
88. Further, in Panama’s view, “*there is no excuse for Claimants’ failure to meet their burden of proof.*”<sup>94</sup> *First*, referring to the Pre-Hearing Call, Panama observes that the Claimants have conceded that they had sufficient time to gather evidence concerning the denial of benefits objection, and argue that the Claimants had even more time to gather evidence on factual issues underlying the other objections:<sup>95</sup> the Bridgestone Group announced publicly that it was contemplating TPA claims two years prior to the Request for Arbitration, time during which the Claimants had every incentive to gather evidence on jurisdictional issues;<sup>96</sup> and the time following the Request for Arbitration could also have been used to gather evidence.<sup>97</sup> *Second*, Panama contends, even if the expedited phase had been the only opportunity to gather evidence, the Claimants cannot reasonably argue a denial of due process because: (i) they knew they had to “*protect themselves*” by submitting evidence on the factual matters at issue in the expedited objections, and had months to do so; (ii) any relevant evidence would have been within the Claimants’ reach or control; and (iii) the Claimants consented to arbitration in accordance with the TPA, and therefore consented to expedited resolution of objections under Article 10.20.5.<sup>98</sup>
89. Lastly, in response to the Tribunal’s questions in Procedural Order No. 2, the Respondent stated at the Hearing:

“[...] ‘Should the Tribunal rule on Panama’s objections under Article 10.20.5 of the TPA as a matter of law on assumed facts, applying (either as a matter of law or as a matter of discretion) the approach laid down in Article 10.20.4(c), or instead, should the

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<sup>93</sup> Resp. PHB Exp. Obj., ¶ 3.

<sup>94</sup> Resp. PHB Exp. Obj., ¶ 4.

<sup>95</sup> Resp. PHB Exp. Obj., ¶¶ 4-5.

<sup>96</sup> Resp. PHB Exp. Obj., ¶ 5.

<sup>97</sup> Resp. PHB Exp. Obj., ¶ 6.

<sup>98</sup> Resp. PHB Exp. Obj., ¶ 6.

Tribunal make final and definitive findings of fact and law in relation to those objections’?

[...] because Panama’s objections under Article 10.20.5 are objections to jurisdiction, there is no basis for applying the approach laid down in 10.20.4(c). And, consistent with the general rule under international law, the Tribunal must make final and definitive findings of fact and law in relation to those objections.

[...] ‘Does the obligation under Article 10.20.5 to decide on an expedited basis any objection that the dispute is not within the Tribunal’s competence apply to any objection, or all objections to competence or only those that do not require the Tribunal to determine the merits of the Claimants’ substantive claim?’

[...] the answer is: first, as indicated by the words ‘any objection (to competence),’ the obligation applies to all objections to competence; and in any event, none of the objections here requires the Tribunal to determine the merits of the Claimants’ substantive claims [...].”<sup>99</sup>

## **B. The U.S. Submissions**

90. In its Article 10.20.2 submission, the United States observes that Articles 10.20.4 and 10.20.5 of the TPA draw “*a clear distinction*” between three categories of procedures for preliminary objections, namely “*claims that cannot prevail as a matter of law*”, “*objections to the tribunal’s competence*” and “*other objections.*”<sup>100</sup>

91. Referring to Article 10.20.4, the United States submits that:

“Subparagraph (c) states that, for any objection under paragraph 4, a tribunal ‘shall assume to be true’ the factual allegations supporting a claimant’s claims. The tribunal ‘may also consider any relevant facts not in dispute.’ This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to

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<sup>99</sup> Tr. Day 1, 127:4-128:14 (Ms. Silverman). *See also*, Tr. Day 1, 119:4-120:14 (Ms. Silverman) (arguing by reference to the U.S. First Submission, that Article 10.20.5 supersedes the provision in ICSID Arbitration Rule 41 that grants the Tribunal the power to join to the merits jurisdictional objections intertwined with the merits).

<sup>100</sup> U.S. First Sub., ¶¶ 5, 10.

competence, which the tribunal may already have authority to consider.”<sup>101</sup>

92. For the United States, the distinction drawn in Article 10.20.5 between an “*objection under paragraph 4*” and an objection to the tribunal’s competence demonstrates that the requirements in Article 10.20.4 “*are not incorporated into the paragraph 5 mechanism when it is being used to address the latter.*”<sup>102</sup>

93. The United States further submits that Article 10.20.5:

“[M]odifies the applicable arbitration rules by *requiring* a tribunal to decide on an expedited basis any paragraph 4 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal’s constitution.”<sup>103</sup>

94. Finally, the United States argues that the “*normal rules of burden of proof*” are not altered by Article 10.20.5 of the TPA; and thus with respect to objections to competence, the claimant has the burden to prove the necessary and relevant facts to establish the tribunal’s competence.<sup>104</sup> Therefore, “[a] *tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.*”<sup>105</sup>

### **C. The Tribunal’s Analysis**

95. The provisions of Article 10.20.4 and 10.20.5 of the TPA appear in similar, though not always identical, form in a number of BITs and Free Trade Agreements to which the United States is party. In this case, pursuant to Article 10.20.5, Panama has requested the Tribunal to decide on an expedited basis five objections that the dispute is not within the Tribunal’s competence. The Tribunal has not been referred to, and is not aware of, any previous decision in which the effect of such a request under Article 10.20.5 of the TPA has been considered.

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<sup>101</sup> U.S. First Sub., ¶ 8. *See also, id.*, ¶ 11.

<sup>102</sup> U.S. First Sub., ¶ 11.

<sup>103</sup> U.S. First Sub., ¶ 9 (emphasis in original).

<sup>104</sup> U.S. First Sub., ¶ 12.

<sup>105</sup> U.S. First Sub., ¶ 12.



96. In oral argument counsel for the Claimants urged the Tribunal to adopt “a *practical, common sense approach*” to the procedure.<sup>106</sup> The Tribunal is in sympathy with that submission. Procedural rules should, so far as possible, be applied in such a manner as will facilitate, not inhibit, the fair and economic resolution of disputes.
97. The meaning of a term of a treaty must be determined in the light, *inter alia*, of its object and purpose.<sup>107</sup> The object and purpose of the provisions of Article 10.20.4 are not in dispute. They, or very similar provisions, were first introduced by the United States into its investment treaty-making practice in or about 2002 in reaction to the NAFTA case *Methanex*.<sup>108</sup> In that case, the United States argued at an early stage that the claims were inadmissible because they were without legal merit, but the tribunal ruled that it could not address this issue in a preliminary stage. Only after years of costly proceedings did the tribunal finally dismiss the claims, on the grounds that they fell outside its jurisdiction and, in any event, were devoid of merit.<sup>109</sup> Thus Article 10.20.4 is designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure, thereby saving time and costs.
98. The desirability of saving time and costs equally underlies procedural provisions that can lead to bifurcation of a proceeding, under which some issues are resolved in advance of a hearing “on the merits.” Resolution of such issues against the claimant can result in a final award against it that obviates the need for the hearing on the merits.
99. Article 41 of the ICSID Convention is such a procedural provision:

“(1) The Tribunal shall be the judge of its own competence.

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<sup>106</sup> Tr. Day 1, 19:5 and 20:19 (Mr. Williams).

<sup>107</sup> **C-115**, Vienna Convention on the Law of Treaties (“**VCLT**”), Art. 31(1). The United States is not a party to the Vienna Convention; however, it accepts that the Convention’s rules on treaty interpretation are declaratory of customary international law. See, the United States Counter-Memorial on Competence and Liability filed in *Mondev International Ltd. v. United States of America*, n.17: “Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the ‘authoritative guide’ to treaty law and practice.” See Letter from the Secretary of State Rodgers to President Nixon transmitting the Vienna Convention on the Law of Treaties, 18 October 1971, Ex. L. 92d Cong., 1st Sess. at 1. (available at <https://www.state.gov/documents/organization/14710.pdf>).

<sup>108</sup> **CLA-016**, *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Partial Award (7 August 2002) [hereinafter, “*Methanex*”].

<sup>109</sup> U.S First Sub., ¶ 2.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

100. Rule 41 of the ICSID Arbitration Rules in turn sets out the procedural aspects for dealing with such an objection:

“(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. [...]

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. [...]

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. [...]

101. Panama has, at all times, submitted that Article 10.20.5 entitles a respondent to require the Tribunal to make a final determination, based on evidence, of whether or not the dispute falls within the Tribunal’s competence. The Claimants have, at all times, submitted that any hearing pursuant to an expedited objection under Article 10.20.5 should be determined, either by application of the test in Article 10.20.4(c) or, as a matter of discretion, not by evaluation of evidence but on the premise that the facts pleaded by the Claimants are correct, leaving it open to Panama, should Panama’s expedited objections be dismissed, to make a further challenge to the competence of the Tribunal, based on the evidence.

102. Despite the stance described above, the Claimants placed on the record a substantial body of evidence in support of their claims. They did so in case the Tribunal should rule that the objections to competence would fall to be decided on the evidence. At the expedited Hearing, they accepted that if the Tribunal considered that it was in a position to make a

final determination on the evidence of the issues raised by the Respondent's Expedited Objections it would be free to do so.<sup>110</sup>

103. It was in these circumstances that the Tribunal invited the Parties to address the following questions in a preliminary session at Day 1 of the Hearing:

“(1) Should the Tribunal rule on Panama’s objections under Article 10.20(5) of the TPA as a matter of law on assumed facts, applying (either as a matter of law or as a matter of discretion) the approach laid down in Article 10.20(4)(c) or should the Tribunal make final and definitive findings of fact and law in relation to those objections[?]”

(2) Does the obligation under Article 10.20(5) to decide on an expedited basis ‘*any objection that the dispute is not within the Tribunal’s competence*’ apply to all objections to competence or only to those that do not require the Tribunal to determine the merits of the Claimants’ substantive claim?”<sup>111</sup>

104. After hearing argument, the Tribunal made a ruling in Procedural Order No. 4 that deliberately did no more than address those parts of the two questions that it was necessary to resolve in order to continue with the Hearing:

“[T]he evidentiary rule in Article 10.20.4(c) of the U.S.-Panama TPA has no application in the present proceeding, and the Tribunal will address the issues on the basis of the evidence.”<sup>112</sup>

The Tribunal will now explain the basis and the implications of this Order.

105. The starting point is Article 10.20.4. In *Pac Rim*<sup>113</sup> an identically worded Article in the Dominican Republic-Central America-United States Free Trade Agreement of 2004 (“CAFTA”) received consideration, together with Article 10.20.5. The tribunal made the following observations:

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<sup>110</sup> Tr. Day 1, 18:21-19:13 (Mr. Williams).

<sup>111</sup> Procedural Order No. 2, ¶ 5.

<sup>112</sup> Procedural Order No. 4, ¶ 3.

<sup>113</sup> **CLA-019**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) [hereinafter, “*Pac Rim*, Preliminary Objections”].

“105. [...] the Tribunal approaches the procedure under CAFTA Article 10.20.4 tempered by a lack of formalism, with an emphasis on substance and practical common-sense.

[...]

106. As regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 with an additional ground of objection as to competence [...]

110. [...] to grant a preliminary objection, a tribunal must have reached a position both as to all the relevant questions of law and all relevant alleged or undisputed facts that an award should be made finally dismissing the claimant’s claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection.

111. At all times during the exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.

112. Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5, it is clear that an expedited preliminary objection is not intended to lead to a ‘mini-trial.’ A contrary conclusion would attribute to the CAFTA Contracting Parties a perverse intention to render investor- state arbitration even more expensive and procedurally difficult for the disputing parties, when it would seem from these provisions (read as a whole) that the actual intention of the Contracting Parties was, manifestly, the exact opposite. The procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. [...]”

106. With the exception of the passing reference to “*an additional ground of objection as to competence*”, in paragraph 106 the *Pac Rim* tribunal’s remarks were addressed to an objection under CAFTA Article 10.20.4 that a claim “*is not a claim for which an award in favour of the claimant may be made*”, and to the expedition of such an objection pursuant to CAFTA Article 10.20.5. On that basis, this Tribunal endorses the reasoning of the tribunal in *Pac Rim*. It does not, however, necessarily follow that this reasoning

can be applied to an expedited objection to the competence of a tribunal under Article 10.20.5, for the two regimes are different, as the tribunal in *Renco*<sup>114</sup> identified.

107. *Renco* involved an arbitration under the United States-Peru Trade Promotion Agreement (the “**U.S-Peru TPA**”) and the UNCITRAL Arbitration Rules (2010). Article 10.20.4 of the U.S.-Peru TPA differed from that in the present case inasmuch as it commenced: “[w]ithout prejudice to the tribunal’s authority to address **other** objections as a preliminary question, **such as an objection that a dispute is not within the tribunal’s competence** [...]”<sup>115</sup> Peru had purported to make six preliminary objections pursuant to Article 10.20.4 of the U.S.-Peru TPA. *Renco* argued that four of these were objections as to the tribunal’s competence and that it was not open to a respondent to make such objections under Article 10.20.4. The tribunal’s 53-page decision, made without an oral hearing, was devoted to the single issue of whether or not objections as to the competence of a tribunal could be brought pursuant to Article 10.20.4 of the U.S.-Peru TPA.
108. On the basis, primarily, of textual analysis the tribunal accepted *Renco*’s argument. It found that Article 10.20.4 of the U.S.-Peru TPA drew a distinction between a “competence objection[] **brought under the applicable arbitration rules**”,<sup>116</sup> and an objection authorized by Article 10.20.4 itself that as a matter of law a claim was not one for which an award in favour of the claimant might be made. Only the latter type of objection could be brought under Article 10.20.4 of the U.S.-Peru TPA. So far as *Renco* was concerned, the applicable arbitration rule that authorized dealing with objections as to competence as a preliminary issue was Article 23(3) of the 2010 UNCITRAL Rules.<sup>117</sup>
109. The Tribunal finds this reasoning of the tribunal in *Renco* compelling and applicable in the present case, notwithstanding the difference in the wording of Article 10.20.4 of the U.S.-Peru TPA. In the present case, the relevant arbitration rules that authorise the Tribunal to deal with preliminary objections as to the competence of the Tribunal are to

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<sup>114</sup> **RLA-046**, *The Renco Group, Inc v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Decision on the Scope of the Respondent’s Preliminary Objections under Article 10.20.4 (18 December 2014) [hereinafter, “*Renco*”].

<sup>115</sup> **RLA-046**, *Renco*, ¶ 40 (quoting Article 10.20.4 of the U.S.-Peru TPA) (emphasis added).

<sup>116</sup> **RLA-046**, *Renco*, ¶ 200 (emphasis added).

<sup>117</sup> **RLA-046**, *Renco*, ¶ 188.

be found in Article 41 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules set out at paragraphs 99 and 100 *supra*.

110. Thus far, the Tribunal’s conclusions accord with submissions made by Panama.<sup>118</sup> The critical question is, however, the effect in relation to each type of objection, of Article 10.20.5. The Claimants’ primary submission was that the provisions of Article 10.20.4(c) fell to be applied both to an expedited hearing of an objection brought under Article 10.20.4 and to an expedited hearing of an objection as to competence. By Procedural Order No. 4 the Tribunal rejected this submission. As a matter of textual analysis, Article 10.20.4(c) only applies to an objection under Article 10.20.4 and not to objections as to the competence of the Tribunal. Furthermore, there are some types of objection as to competence, such as Objection No. 3 asserting a denial of benefits, where Article 10.20.4(c) is incapable of application in practice.
111. If, as the Tribunal has ruled, Article 10.20.4(c) has no application to an expedited hearing of an objection as to competence, what, if any, rules do apply to such a hearing? Panama has made the following submission:

“[...] [T]he applicable standard is the same one that always applies in the context of jurisdictional objections, under which the *claimant* bears the burden of proof, there is no presumption of the veracity or acceptance *pro tem* of its factual allegations, and both parties are entitled to adduce evidence.”<sup>119</sup>

112. This submission appears to treat Article 10.20.5 as providing the Tribunal with free-standing authority, and indeed obligation, to make a final decision, based on evidence, in relation to any objection as to competence, regardless of the extent to which this will preempt findings that would normally be made on the merits hearing or conflicts with procedural rules that would otherwise apply to a preliminary hearing on jurisdiction. The Tribunal does not accept this scenario.

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<sup>118</sup> Resp. Reply Exp. Obj., ¶ 4.

<sup>119</sup> Resp. Reply Exp. Obj., ¶ 14.

113. Article 10.20.4 provides that it is “[w]ithout prejudice to a tribunal’s authority to address other objections as a preliminary question.”<sup>120</sup> Article 10.20.5 requires the Tribunal to decide on an expedited basis “any objection that the dispute is not within the tribunal’s competence.”<sup>121</sup> Such an objection must be one of those referred to in Article 10.20.4, namely one that falls within the authority of the Tribunal pursuant to an applicable procedural rule. This conclusion accords with the U.S. First Written Submission:

“Paragraph 5 provides an expedited procedure for deciding preliminary objections, whether permitted by paragraph 4 or the applicable arbitral rules.”<sup>122</sup>

114. The requirement to decide an objection on an expedited basis must be read together with the rule or rules under which such an objection is authorized. The U.S. First Written Submission comments:

“Paragraph 5 thus modifies the applicable arbitration rules by requiring a tribunal to decide on an expedited basis [...] any objection to competence [...]”<sup>123</sup>

115. Panama submitted that this meant that Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules were not merely *modified*, but wholly *superseded* by a request under Article 10.20.5.<sup>124</sup> The Tribunal does not accept this interpretation of the United States’ comment, and would not agree with it. The provisions of Article 41 and Rule 41 are designed to give the Tribunal the authority necessary to conduct proceedings in the most efficient and cost effective manner. It is a radical submission, which is not accepted by the Tribunal, that the right accorded to the Respondent by Article 10.20.5 to require an expedited decision in relation to competence deprives the Tribunal of this authority.

116. When Panama invoked the right to request that its objections as to jurisdiction should be decided on an expedited basis pursuant to Article 10.20.5, this request implicitly invoked the authority conferred on the Tribunal by Article 41 of the ICSID Convention and Rule

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<sup>120</sup> C-003/C-117, TPA, Art. 10.20.4.

<sup>121</sup> C-003/C-117, TPA, Art. 10.20.5.

<sup>122</sup> U.S. First Sub., ¶ 9 (emphasis added).

<sup>123</sup> U.S. First Sub., ¶ 9 (emphasis in original).

<sup>124</sup> Tr. Day 1, 119:4-120:14 (Mr. Thomas; Ms. Silverman).

41 of the Arbitration Rules. The Tribunal's authority to reach a decision on the objections on an expedited basis is subject to the regime laid down in Article 41 and Rule 41, subject to one modification. Rule 41(3) gives the Tribunal an option to suspend the proceedings on the merits. Article 10.20.5 requires the Tribunal to do so.

117. Article 41 and Rule 41 grant to the Tribunal a number of options as to how to proceed. There is considerable jurisprudence, some of it conflicting, as to the correct approach to the exercise of these options. Panama has placed in the record a large part of Douglas's book,<sup>125</sup> though not all that is relevant to this matter. The Tribunal is satisfied with his treatment of this subject. It is no longer of direct relevance and the Tribunal will summarise the position by reference to his work.
118. Where an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction.<sup>126</sup> This is the position as far as Objection No. 3 asserting a denial of benefits is concerned.<sup>127</sup>
119. Where an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing. In those circumstances, it is usual for the tribunal to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.<sup>128</sup> It will then be open to the respondent, if its preliminary objection fails, to have a second "*bite at the cherry*" at the merits hearing on the basis of the facts that will then be determined.
120. The Tribunal rejects Panama's submission that it has no authority on an expedited objection to competence under Article 10.20.5 to reach a decision on a *prima facie* basis and to join the issue of competence to the merits of the dispute. Such authority is essential if the Tribunal is to be in a position to prevent the hearing of the expedited

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<sup>125</sup> **RLA-001**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press, 2009) [hereinafter, "Douglas"].

<sup>126</sup> **RLA-001**, Douglas, Rule 19 and ¶¶ 313 and 315.

<sup>127</sup> *See, infra* § VII.A.

<sup>128</sup> **RLA-001**, Douglas, ¶ 314; *see also*, Douglas, Rules 27 and 28, ¶¶ 520-527.



objection turning into a mini, or even a maxi, trial. It is also consonant with the obligation under Article 10.20.5 to “*suspend any proceedings on the merits.*”<sup>129</sup> A decision to join the objection to the merits of the dispute will satisfy the Tribunal’s obligation under Article 10.20.5 to issue an expedited decision on the objection.

121. It is, however, open to the Tribunal to make a determinative finding of fact and to base a final award or decision upon this at the expedited phase if it considers this appropriate. In this case, Panama’s Expedited Objections, apart from Objection No. 3, do not raise any significant issues of fact. Far from disputing the facts alleged by the Claimants, Panama’s objections are essentially based upon these. The Claimants have adduced a body of evidence in support of their pleaded case, but again this evidence has not been significantly challenged. The issues are essentially issues of law, not fact.
122. It is none the less the case that the evidence adduced by the Claimants gives an incomplete picture, as the Claimants are aware. They contend that the expedition of the process has prevented them from placing before the Tribunal some of the evidence that they would have wished to adduce had a more leisured approach been permitted.<sup>130</sup> In the event the Tribunal is confronted with a jig-saw puzzle with some of the pieces missing. The fact remains that, apart from evidence adduced in relation to Objection No. 3 – denial of benefits – Panama has not advanced a positive case that conflicts with that advanced by the Claimants. In these circumstances, the Tribunal has concluded that it is in a position, on the basis of the evidence that is before it together with allegations made by the Claimants that Panama has accepted, to make final determinations of fact in relation to Panama’s Expedited Objections and, in accordance with Procedural Order No. 4, this is what it will proceed to do.
123. The Parties have made submissions in relation to burden of proof. The Tribunal indicated that, at the end of the day, burden of proof was unlikely to prove important. That remains the Tribunal’s view, but it will address the question of burden of proof in the context of the individual objections.

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<sup>129</sup> C-003/C-117, TPA, Art. 10.20.5.

<sup>130</sup> Cl. PHB Exp. Obj., ¶¶ 6-8.

## VI. OBJECTIONS RELATING TO BSAM

### A. First Objection: BSAM Does Not Have a Qualifying Investment

#### (1) The Parties' Positions

##### a. The Respondent's Position

124. Panama argues that it is “*imperative that each Claimant demonstrate that it has a qualifying investment – under both the ICSID Convention and the TPA*”,<sup>131</sup> and submits that BSAM has failed to do so.<sup>132</sup>
125. The Respondent disputes that “*tire sales (and profits from tire sales) in Panama, (2) ‘revenue sharing and license rights in Panama’ and (3) ‘intellectual property rights in Panama’*” may constitute BSAM’s “*investment*”,<sup>133</sup> arguing that: (i) ordinary commercial transactions do not qualify as an investment;<sup>134</sup> and (ii) merely having a license conferring revenue sharing and intellectual property rights is insufficient, because while those are among the forms that an investment may take pursuant to the TPA, under that treaty “*substance shall prevail over form.*”<sup>135</sup> Panama explains that BSAM is first required to demonstrate that such revenue sharing and intellectual property rights meet the *chapeau* of the TPA definition of “*investment*”, that is, that they constitute an “*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.*”<sup>136</sup> And, according to Panama’s initial submission, BSAM cannot make this showing, for the following reasons:<sup>137</sup>

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<sup>131</sup> Resp. Exp. Obj., ¶ 10.

<sup>132</sup> Resp. Exp. Obj., ¶ 21.

<sup>133</sup> Resp. Exp. Obj., ¶ 11.

<sup>134</sup> Resp. Exp. Obj., ¶ 12.

<sup>135</sup> Resp. Exp. Obj., ¶ 13.

<sup>136</sup> Resp. Exp. Obj., ¶ 14 (*quoting*, R-001, TPA, Art. 10.29).

<sup>137</sup> Resp. Exp. Obj., ¶¶ 14-20. *See also*, Tr. Day 4, 517:2-21; 520:18-22; 522:2-10 (Ms. Silverman).

- The “*revenue sharing rights*” in the sales by a subsidiary are not “*investments*”, because the TPA expressly provides that “*claims to payment that are immediately due and result from the sale of goods or services are not an investment.*”<sup>138</sup>
- Chapter 10 of the TPA applies only to investments located in Panama, and thus, the rights must “*exist under Panamanian domestic law*”, which is not the case with respect to the three licenses submitted with the Claimants’ 25 October 2016 letter (C-048 to C-050).<sup>139</sup>

126. In the Reply on Expedited Objections, Panama insists that the “*thrust*” of the Claimants’ case is that the sales in Panama by BSAM’s Costa Rican subsidiary (Bridgestone Costa Rica (“**BSCR**”)), the rights thereto and the activities associated therewith qualify as an “*investment.*”<sup>140</sup> This cannot be so, Panama argues, because: (i) sales are not investments; (ii) rights, activities, commitments, expectations and risks associated with, and the duration of, cross-border sales do not add up to an investment; (iii) “*marketing*” and “*sale*” activities are only relevant to the extent they relate to an “*investment*”, and expenditures alone do not amount to an “*investment*”; (iv) pointing to an item in the list of forms an investment may take in the definition in Article 10.29 of the TPA is not sufficient; (v) not all contractual rights are assets, and under the TPA only “*assets that an investor owns or controls directly or indirectly*” qualify as an “*investment*”, and only investments “*in the territory*” of the host-State are protected; (vi) the Claimants have not identified any asset in Panama, that BSAM owned or controlled at the time of the Supreme Court decision of 28 May 2014, at the center of their claims.<sup>141</sup>

127. Expanding on point (vi) *supra*, the Respondent explains that the alleged “*intellectual property*” and “*revenue sharing*” rights described in the five agreements mentioned in the Claimants’ Response on Expedited Objections (C-048 to C-050, C-052 and C-064) cannot be considered “*investments*”,<sup>142</sup> for the reasons that follow:

- The Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001) (C-048) (hereinafter, the “**FIRESTONE Trademark License**”) is not an “*investment*”

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<sup>138</sup> Resp. Exp. Obj., ¶ 15.

<sup>139</sup> Resp. Exp. Obj., ¶¶ 17-20.

<sup>140</sup> Resp. Reply Exp. Obj., ¶ 30.

<sup>141</sup> Resp. Reply Exp. Obj., ¶¶ 31-35. *See also, id.*, ¶ 27.

<sup>142</sup> Resp. Reply Exp. Obj., ¶ 35.

because (a) it is not an “*asset*” in Panama, but rather a limited and non-exclusive right to “*use*” a Panamanian trademark, conferred by a contract between two U.S. entities, created, governed and performed under U.S. law; and (b) and even if it were an “*asset*”, it is not owned or controlled by BSAM, as demonstrated by the fact that BSAM had to license it from a third party and by the terms of the agreement.<sup>143</sup>

- The Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001) (C-052) (hereinafter, the “**BRIDGESTONE Trademark License**”) confers a right that cannot be construed as an “*asset*” in Panama, and even if it did, it would not be owned or controlled by BSAM.<sup>144</sup>
- The Trademark Sublicense Agreement between Bridgestone Americas Tire Operations LLC and Bridgestone Costa Rica, S.A. (1 January 2015) (C-049) is not an “*investment*” in Panama, because (a) it only authorizes a Costa Rican subsidiary to use Costa Rican trademarks, it does not discuss Panamanian intellectual property, and it is governed by U.S. law; and (b) is irrelevant because it post-dates the Supreme Court decision of May 2014, and thus it does not demonstrate that BSAM had an investment at the time of the alleged violation.<sup>145</sup>
- The Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002) (C-050) is irrelevant because (a) it is governed by Japanese law; (b) it does not confer any right to conduct activities in Panama; (c) the right that it confers is not an “*asset*”; and (d) even if it were an “*asset*” the nature and the terms of the agreement establish that BSAM does not “*own or control*” it.<sup>146</sup>
- The Bandag System Franchise Agreement between Bandag Inc. and Rodelag, S.A. (27 September 1965) (C-064) (hereinafter, the “**Bandag Agreement**”) authorized a Panamanian entity to use a U.S. patented method in exchange for royalty, but (a) given that the underlying patent has expired is unclear what rights the agreement confers at present, and how those patents have any relevance; (b) not every contract wherein royalty payments are made falls under the category listed in Article 10.29(e) of the TPA; and (c) it does not qualify as the type of licenses referred to in Article 10.29(g) of the TPA because it is a private contract, governed by U.S. law that confers the right to use U.S. intellectual property.<sup>147</sup>

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<sup>143</sup> Resp. Reply Exp. Obj., ¶ 37.

<sup>144</sup> Resp. Reply Exp. Obj., ¶ 40.

<sup>145</sup> Resp. Reply Exp. Obj., ¶ 38.

<sup>146</sup> Resp. Reply Exp. Obj., ¶ 39.

<sup>147</sup> Resp. Reply Exp. Obj., ¶¶ 41-42. At the Hearing, the Respondent indicated that the Claimants’ position on the Bandag Agreement amounts to the contention that if there is an intellectual property right in the United States, and someone uses it in another country, somehow that becomes an investment in that other country, which does not work in this case. Tr. Day 4, 528:17-529:10 (Ms. Silverman).

128. At the Hearing, the Respondent insisted that the issue is not whether the FIRESTONE and BRIDGESTONE Trademark Licenses qualify as an “*intellectual property right*”, because that “*does not matter.*” BSAM first needs to comply with the chapeau of the definition of “*investment*” in Article 10.29 of the TPA, and it is not able to do so as it has no “*asset owned or controlled directly or indirectly.*”<sup>148</sup> In responding to the Tribunal’s questions, Panama further argued that while the Tribunal is entitled to look at Chapter 15 of the TPA in trying to interpret the meaning of “*intellectual property rights*”, in doing so, the Tribunal should bear in mind that (i) Chapter 15 cannot simply be fitted in into Article 10.29, because in many instances that does not make sense, for example, because Chapter 15 contemplates “*international law rights*”; and (ii) the question first and foremost is whether there is an “*investment*”, not whether there is an “*intellectual property right.*”<sup>149</sup>
129. In the Post-Hearing Brief, the Respondent takes issue again with the argument that BSAM’s investment consists of the “*intellectual property rights*” to use the Panamanian BRIDGESTONE and FIRESTONE trademarks resulting from the 2001 license agreements (C-048 and C-052).<sup>150</sup>
130. *First*, the Respondent disputes the connection the Claimants seek to draw between the above-mentioned rights with the sale activities of BSCR. Panama points out that the only document in the record that authorizes BSCR to manufacture or sell products using a trademark licensed by BSAM or one of its subsidiaries is a January 2015 sublicense agreement (C-049) that: (i) post-dates that date of the alleged TPA violations, and (ii) only relates to Costa Rican trademark registrations, applications and unregistered trademarks. Panama submits that there is no evidence in the record that BSCR has been using or has the right to use Panamanian trademarks, nor is there evidence that BSAM or other subsidiary is selling tires in Panama.<sup>151</sup>

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<sup>148</sup> Tr. Day 4, 531:17-532:6 (Ms. Silverman).

<sup>149</sup> Tr. Day 4, 532:21-535:4 (Ms. Silverman).

<sup>150</sup> Resp. PHB Exp. Obj., ¶¶ 9-19.

<sup>151</sup> Resp. PHB Exp. Obj., ¶ 10.

131. *Second*, Panama argues that beyond the right to use the Panamanian trademarks, the “few” connections BSAM has to Panama, cannot be characterized as an “investment” because:<sup>152</sup> (i) the patent underlying the Bandag Agreement has expired, and there is no evidence that the agreement is still in force or that royalty payments are being made; and (ii) BSCR’s sales of foreign-manufactured tires to third party dealers and distributors in Panama and activities in connection with those sales are ordinary commercial transactions that do not qualify as an “investment.”<sup>153</sup>
132. *Third*, the argument that the right to use Panamanian trademarks on tires (which neither BSAM or its subsidiaries appears to be exercising) amounts to an “investment” fails because: (i) if sales are not investments, the right to conduct sales is not one either; and (ii) the TPA requires more than the mere existence of an “intellectual property right”, and the rights contemplated in the contracts in C-048 and C-052 do not constitute an “asset” that BSAM owns or controls directly or indirectly.<sup>154</sup>
133. Finally, Panama explains that an asset is “an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies”, and argues that: (i) there is nothing in the record indicating that BSAM’s right qualifies as “property” under Panamanian law; (ii) the evidence shows that such right is not available to meet debts because absent approval from the licensor, the license cannot be assigned for any purpose.<sup>155</sup> And, in any event, Panama argues, even if this right was an “asset”, it is not owned or controlled by BSAM or its subsidiary.<sup>156</sup>

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<sup>152</sup> Resp. PHB Exp. Obj., ¶¶ 11-12. Panama notes that there is no evidence that BSAM has a subsidiary, factories, warehouses, offices, stores, or employees in Panama; nor that it pays taxes in Panama, has any tangible assets or owns any trademarks in Panama. *Id.*, ¶ 11.

<sup>153</sup> Resp. PHB Exp. Obj., ¶¶ 11-12.

<sup>154</sup> Resp. PHB Exp. Obj., ¶¶ 14-15.

<sup>155</sup> Resp. PHB Exp. Obj., ¶ 16. The Respondent argues that the evidence presented by the Claimants to support the assertion that these rights are an asset under Panamanian law was contradicted during cross-examination at the Hearing. *Id.*, ¶ 17.

<sup>156</sup> Resp. PHB Exp. Obj., ¶¶ 18-19.

## b. The Claimants' Position

134. The Claimants request that the Tribunal dismiss this objection.<sup>157</sup> According to their last submission, the objection should be dismissed for either of the following alternative reasons: (i) it is intertwined with the merits, and all the necessary evidence is not before the Tribunal such that the Respondent has not discharged its burden of proof; or (ii) if the Tribunal considers that it has sufficient evidence before it to decide the objection safely, then it should conclude that BSAM has a qualifying investment in Panama.<sup>158</sup>
135. The Claimants assert that “*BSAM’s core investment is its intellectual property rights [...] in the Panamanian BRIDGESTONE and FIRESTONE trademarks, which are owned by [...] BSJ [...] and BSLS, respectively, but which have been licensed to BSAM for use, manufacture, sale, and distribution*”, and argue that those meet the definition of “*investment*” in the TPA and the requirements of Article 25(1) of the ICSID Convention.<sup>159</sup>
136. There is no dispute that in an ICSID arbitration the activity in question must be both an “*investment*” under the relevant treaty, and meet the requirements in Article 25(1) of the ICSID Convention.<sup>160</sup> Referring to the so-called “*Salini test*”, the Claimants note that:

“[...] numerous tribunals have applied [it] 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.”<sup>161</sup>

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<sup>157</sup> Cl. Rej. Exp. Obj., ¶ 40.

<sup>158</sup> Cl. PHB Exp. Obj., ¶ 3(b), 3(c)(i).

<sup>159</sup> Cl. Res. Exp. Obj., ¶ 9. *See also*, Cl. Rej. Exp. Obj., ¶ 7; Cl. PHB Exp. Obj., ¶ 15.

<sup>160</sup> Cl. Res. Exp. Obj., ¶ 92.

<sup>161</sup> Cl. Res. Exp. Obj., ¶ 95.

137. For the Claimants, “*the definition of investment in the TPA and Article 25(1) of the ICSID Convention must be understood together*” and given that the TPA “*contains a comprehensive and expansive definition of ‘investment,’ [...], it would make little sense if Article 25(1) of ICSID operated to limit the scope of the TPA.*”<sup>162</sup>
138. The Claimants contend that an interpretation of Article 25(1) of the ICSID Convention in accordance with its ordinary meaning leads to the conclusion that “*rights to royalty payments*” and “*trademarks*” fall under Article 25.<sup>163</sup> Further, in their Response on Expedited Objections, the Claimants argued, by reference to their prior submission during registration of the Request for Arbitration, that “*BSAM’s [...] intellectual property rights in Panama [...] fall within the definition of ‘investment’ at Article 10.29(f) of the [TPA]*” and that BSAM’s “*revenue-sharing and license rights in Panama [...] fall within the definition of ‘investment’ at Article 10.29(e) and Article 10.29(g) of the [TPA].*”<sup>164</sup>
139. The Claimants add that in their Request for Arbitration and letter of 25 October 2016 they “[...] *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. [...]*”, and also explained that BSAM has held these investments for over 16 years.<sup>165</sup> For the Claimants, these are “*clear factual allegations about the nature of the investments held by BSAM*” that the Tribunal must assume as true in accordance with the mechanism in Article 10.20.5 of the TPA, the only remaining issue for the Tribunal being “*whether these assets can properly be considered to be covered investments.*”<sup>166</sup>
140. However, and without prejudice to their primary position on the applicable evidentiary standard, the Claimants say that they have provided further details about BSAM’s

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<sup>162</sup> Cl. Res. Exp. Obj., ¶ 101.

<sup>163</sup> Cl. Res. Exp. Obj., ¶ 101.

<sup>164</sup> Cl. Res. Exp. Obj., ¶ 103 (quoting Cl. Reg. Letter).

<sup>165</sup> Cl. Res. Exp. Obj., ¶ 104.

<sup>166</sup> Cl. Res. Exp. Obj., ¶ 104. *See also, id.*, ¶¶ 9, 130.



investment and answers to Respondent’s allegations relating to facts pertaining to this objection.<sup>167</sup>

141. *First*, the Claimants note that BSAM itself and through its wholly-owned direct and indirect subsidiaries is involved in various activities in Panama; and explain that “*it is the totality of these activities that together amount to BSAM’s investment*”, with the “*intellectual property rights*” being the “*core investment around which these other activities revolve.*”<sup>168</sup>

142. *Second*, the Claimants assert that the licenses appended to their 25 October 2016 letter were only an “*illustration*” of BSAM’s intellectual property rights. While arguing that no further evidence is required at this stage, the Claimants’ Response on Expedited Objections provides further information about BSAM’s intellectual property investment in Panama,<sup>169</sup> and submits that:

- BSAM has “*intellectual property rights*” comprised of the two 2001 licenses, namely, the BRIDGESTONE Trademark License (C-052) and the FIRESTONE Trademark License (C-048).<sup>170</sup> The BRIDGESTONE Trademark License was granted by BSJ to a predecessor of Bridgestone American Tire Operations (“**BATO**”), a wholly-owned subsidiary of BSAM. It confers rights, *inter alia*, over BSJ’s Panamanian trademarks,<sup>171</sup> and it is under this trademark that “*BSAM undertakes all of its activities in Panama – the sale and distribution of tires bearing the BRIDGESTONE mark, and the marketing and training activities [...]*.”<sup>172</sup> The FIRESTONE Trademark License is granted by BSLS to a predecessor of BSAM, confers rights over BSLS’s FIRESTONE trademarks in Panama, and gives BSAM the right to “*use the Marks*” on the Western Hemisphere except the United States.<sup>173</sup>
- Contrary to the Respondent’s position, “*there is no requirement in the TPA that an intellectual property right create a right protected under domestic law*” because the provision referring to domestic law is in item (g) of the definition of “*investment*” in Article 10.29 on “*licenses*”, and not in item (f) on “*intellectual property rights.*”<sup>174</sup>

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<sup>167</sup> Cl. Res. Exp. Obj., ¶ 105. *See also, id.*, ¶¶ 9, 130.

<sup>168</sup> Cl. Res. Exp. Obj., ¶ 107. *See also, id.*, ¶ 117.

<sup>169</sup> Cl. Res. Exp. Obj., ¶ 109.

<sup>170</sup> Cl. Res. Exp. Obj., ¶¶ 111, 114.

<sup>171</sup> Cl. Res. Exp. Obj., ¶ 112.

<sup>172</sup> Cl. Res. Exp. Obj., ¶ 113.

<sup>173</sup> Cl. Res. Exp. Obj., ¶ 114.

<sup>174</sup> Cl. Res. Exp. Obj., ¶ 115.

- In any event, the Claimants contend, the FIRESTONE Trademark License does create a right protected under Panamanian law.<sup>175</sup> Although the license is governed by U.S. law, BSLS’s FIRESTONE trademark in Panama is protected under Panamanian law, and the FIRESTONE Trademark License licenses that Panamanian law right to BSAM.<sup>176</sup> Similarly, the BRIDGESTONE Trademark License licenses to BSAM’s subsidiary (BATO) the BRIDGESTONE Panamanian law right, and both BATO and BSAM’s rights are recognized under Panamanian law.<sup>177</sup>
- “*BSAM and its wholly-owned subsidiaries*” carry out a wide range of activities in support of BSAM’s core investments (*i.e.* the intellectual property rights contained in the FIRESTONE and BRIDGESTONE Trademark Licenses). The Claimants explain that “*BSAM sub-licenses its intellectual property rights to its wholly-owned subsidiary, [...] BSCR [...], which manufactures, sells, markets and distributes BRIDGESTONE and FIRESTONE tires throughout the region, including in Panama.*”<sup>178</sup> According to the Claimants, BSAM sets the marketing activities at the regional level, and those are implemented locally by BSCR (pre-October 2015) and now by another entity called Bridgestone Latin American North (“**BS-LAN**”).<sup>179</sup> BSAM (through BSCR and BS-LAN) has spent an estimated US\$469,417 in marketing activities in Panama.<sup>180</sup>
- BSAM also has “*revenue sharing rights*” and “*licenses in Panama*” through its wholly-owned indirect subsidiary, Bridgestone Bandag LLC (formerly Bandag Inc.). This refers to the franchise agreement between Bridgestone Bandag LLC and Bandag de Panama S.A., a Panamanian entity, that allows such local entity to use a patented method, trademarked apparatus and supplies to offer retreading services in Panama. Bridgestone Bandag LLC receives royalties, and the Panamanian entity is required to make minimum supply purchases.<sup>181</sup> Sales and marketing is carried out by BSCR.<sup>182</sup>

143. The Claimants also argue that BSAM’s assets in Panama have the “*characteristics of an investment.*”<sup>183</sup>

- *Commitment of Capital and Other Resources.* According to the Claimants, BSAM has committed substantial amounts of capital to its investments in Panama as well as

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<sup>175</sup> Cl. Res. Exp. Obj., ¶¶ 115-116.

<sup>176</sup> Cl. Res. Exp. Obj., ¶ 116.

<sup>177</sup> Cl. Res. Exp. Obj., ¶ 116 (referring to Article 121 of Law No. 35 of 1996, now at **C-127**).

<sup>178</sup> Cl. Res. Exp. Obj., ¶ 117. *See also, id.*, ¶¶ 118-120.

<sup>179</sup> Cl. Res. Exp. Obj., ¶ 120.

<sup>180</sup> Cl. Res. Exp. Obj., ¶ 121.

<sup>181</sup> Cl. Res. Exp. Obj., ¶ 122.

<sup>182</sup> Cl. Res. Exp. Obj., ¶ 123. BANDAG is a brand associated with tire retreading business, part of BSAM’s subsidiary BATO. *Id.*, ¶ 122.

<sup>183</sup> Cl. Res. Exp. Obj., ¶ 124. *See also*, Cl. Rej. Exp. Obj., ¶ 7; Cl. PHB Exp. Obj., ¶¶ 21-25.

non-monetary resources, in relation to marketing and sale activities.<sup>184</sup> Both type of contributions are to be considered, and as there is no monetary threshold in the TPA, no large expenses are needed, and the only requirement is that the investor's commitment has "*some economic value.*"<sup>185</sup> Further, BSCR has contributed non-monetary resources, by employing personnel tasked specifically with Panama's sales and marketing, who travel to Panama to perform their duties including provision of know-how to local distributors and customers.<sup>186</sup> Lastly, "*capital is being committed to obtaining the intellectual property rights, i.e. the assets, through royalty payments*";<sup>187</sup> which is different from the capital committed to sale and distribution of the tires, and "*it is the brands that BSAM is spending capital to use and market.*"<sup>188</sup>

- *Expectation of Gain and Profit.* The Claimants argue that BSAM's investments were made with the expectation of gain and profit because: (i) the licenses were granted to BSAM and its subsidiaries "*so that BSAM could make money in Panama by selling tires*", and (ii) BSAM's subsidiary entered into the franchise agreement with Bandag de Panama S.A. with the expectation that it would earn money.<sup>189</sup>
- *Assumption of Risk.* For the Claimants, the existence of an investment dispute is an indication of risk. Further, the Supreme Court decision of May 2014 created a significant risk for BSAM, namely, that the "*dilution of the value [of the] trademark*" will result in trademark infringements and competing registrations, and reduce sales and decrease profits in Panama. In addition, the Claimants contend, BSAM faces risk in "*its activities including payment risk*" from customers and distributors for the tires shipped to Panama.<sup>190</sup>
- *Duration.* The Claimants argue that BSAM meets this criterion as: (i) it has held its investments based on the BRIDGESTONE and FIRESTONE Trademark Licenses since 2001; (ii) it "*has sold into Panama for decades*"; (iii) its wholly-owned subsidiary BSCR has been in charge of the Panama market since 1997, and has a distribution agreement to sell tires in Panama that dates back to 1979; and (iv) the franchise agreement with Bandag de Panama S.A. dates back to 1965.<sup>191</sup>

144. Referring to the issue whether BSAM could take credit from the activities of its subsidiaries to show that it has an asset with the characteristics of an investment, the Claimants observe that: (i) the licensee (BSAM or BATO, depending on the license) is

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<sup>184</sup> Cl. Res. Exp. Obj., ¶¶ 125-126.

<sup>185</sup> Cl. Res. Exp. Obj., ¶ 125.

<sup>186</sup> Cl. Res. Exp. Obj., ¶ 126.

<sup>187</sup> Cl. PHB Exp. Obj., ¶ 22.

<sup>188</sup> Cl. PHB Exp. Obj., ¶ 22.

<sup>189</sup> Cl. Res. Exp. Obj., ¶ 127. *See also*, Cl. PHB Exp. Obj., ¶ 21.

<sup>190</sup> Cl. Res. Exp. Obj., ¶ 128.

<sup>191</sup> Cl. Res. Exp. Obj., ¶ 129.

the ultimate party responsible under the license regardless of sub-licenses; and (ii) BSAM itself commits capital and other resources to its asset, as it sets and funds the marketing strategy, and employs Mr. Kingsbury.<sup>192</sup>

145. The Claimants further address the Respondent’s contention that BSAM’s alleged investment is simply cross-border sales in Panama that do not qualify as an investment. The Claimants accept that cross-border sales on their own could not be an investment, but argue that “*cross border sales are part of the activities in Panama in which BSAM is engaged on the basis of its intellectual property investment.*”<sup>193</sup> Thus, while cross-border sales are not themselves an investment, the Claimants argue, they “*can be part of the activities of an investor.*”<sup>194</sup> These sales “*are only made possible*” and are “*legally protected*” by “*the Claimants’ investment in Panamanian-registered trademark rights.*”<sup>195</sup>
146. The Claimants also deny that the “*thrust*” of their argument is that BSCR’s sales of tires into Panama, rights thereto and activities therewith is the qualifying investment.<sup>196</sup> They contend that they have provided information on sales and marketing activity “*to explain the commitment of capital, risks and activities associated with BSAM’s investments [...].*”<sup>197</sup> Their position is, the Claimants insist, that “*BSAM’s investment in Panama is its registered intellectual property rights, which are rights to sell and market tires under the Panamanian-registered BRIDGESTONE and FIRESTONE trademarks, and the right to pursue remedies against infringers of such marks under Panamanian law.*”<sup>198</sup> These Panamanian-granted intellectual property rights are “*assets*”, they argue.<sup>199</sup>

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<sup>192</sup> Cl. PHB Exp. Obj., ¶ 25. The Claimants note there is no evidence on the record regarding BATO’s activities, a point they consider a “*new point raised by the Tribunal*” in response to which they would wish to adduce evidence. *Id.*

<sup>193</sup> Cl. Rej. Exp. Obj., ¶ 8.

<sup>194</sup> Cl. Rej. Exp. Obj., ¶ 36(b).

<sup>195</sup> Cl. Rej. Exp. Obj., ¶ 36(a).

<sup>196</sup> Cl. Rej. Exp. Obj., ¶¶ 34-35.

<sup>197</sup> Cl. Rej. Exp. Obj., ¶ 35.

<sup>198</sup> Cl. Rej. Exp. Obj., ¶ 34. *See also*, Cl. PHB Exp. Obj., ¶ 15.

<sup>199</sup> Cl. Rej. Exp. Obj., ¶ 35. *See also, id.*, ¶ 36(d).

147. The Claimants do no dispute that to establish there is a covered investment, they must “*identify [...] an ‘asset,’ in the territory of the host State, ‘that an investor owns or controls, directly or indirectly,’ at the time of the alleged treaty violation, ‘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’*”, and insist that this is what they have shown.<sup>200</sup> They go on to explain that “*such investment may take the form of one of those listed in Article 10.29*” and note that, with respect to BSAM, such investment is its “*intellectual property rights.*”<sup>201</sup> The Claimants further accept that the investment must be “*an investment in Panama.*”<sup>202</sup>

148. In connection with the above points, the Claimants further explain that:

- They have identified an “*asset*” that BSAM’s “*owned or controlled*” at the time of the 28 May 2014 Supreme Court decision, namely, the 1 December 2001 BRIDGESTONE Trademark License (C-052) and FIRESTONE Trademark License (C-048).<sup>203</sup> They note that “[*s*]pecifically, BSAM is the named rights holder in the FIRESTONE Trademark License [...], while BSAM’s wholly-owned subsidiary, [...] BATO [...], is the named rights holder in the BRIDGESTONE Trademark License [...]”<sup>204</sup>
- The Respondent has misunderstood the nature of the “*asset*” when arguing that the lack of ownership is demonstrated by the fact that BSAM needed to license it from third parties. The BRIDGESTONE and FIRESTONE Trademark Licenses are themselves the “*assets that are owned by BSAM [...] which constitute Panamanian intellectual property rights*”, and “*the asset is the license, because it is the license that confers on the licensee Panamanian intellectual property rights.*”<sup>205</sup>
- The issue whether BSAM’s intellectual property rights under a Panamanian trademark registration conferred by the FIRESTONE Trademark License constitute “*assets in Panama owned by BSAM*” is a question of Panamanian law.<sup>206</sup>
- As supported by Article 121 of Law 35 of 1996, and the statement of Ms. Audrey Williams,<sup>207</sup> “*under Panamanian law (i) the right to use a trademark granted by a*

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<sup>200</sup> Cl. Rej. Exp. Obj., ¶ 36(d). *See also*, Cl. PHB Exp. Obj., ¶ 15; Tr. Day 4, 590:5-22 (Mr. Williams).

<sup>201</sup> Cl. PHB Exp. Obj., ¶ 15.

<sup>202</sup> Cl. PHB Exp. Obj., ¶¶ 15. *See also, id.*, ¶ 38.

<sup>203</sup> Cl. Rej. Exp. Obj., ¶ 36(f).

<sup>204</sup> Cl. PHB Exp. Obj., ¶ 18.

<sup>205</sup> Cl. Rej. Exp. Obj., ¶ 39.

<sup>206</sup> Cl. Rej. Exp. Obj., ¶ 37.

*license is an intellectual property right in that trademark; (ii) the license granting such intellectual property right need not be granted under Panamanian law in order to be effective; and (iii) such intellectual property right is an asset owned by the holder of that right”;*<sup>208</sup> and “*a trademark license holder may sue under its agreement in the Panamanian courts and enforce its rights against third parties.*”<sup>209</sup>

- The Tribunal should be guided by the substance and not the nomenclature of Panamanian law.<sup>210</sup> And “*in substance*” the intellectual property rights conferred by the FIRESTONE and BRIDGESTONE Trademark Licenses are owned directly and indirectly by BSAM.<sup>211</sup> The Claimants explain that, while Ms. Williams indicated at the Hearing that “*ownership of IP rights is always considered to remain with the original trademark owner, in substance it is plain that the licensee of intellectual property rights owns those rights subject to the terms of the license.*”<sup>212</sup> Indeed, “*the licensee is the one who may use and benefit from those rights*” and therefore, it is the licensee who by virtue of the license “*owns or controls the right to use and commercially exploit the mark in the territory.*”<sup>213</sup>
- The terms of the two license agreements also support the conclusion that BSAM directly and indirectly controls the intellectual property rights conferred by the agreements, even though control is not unfettered.<sup>214</sup> The Claimants note, for example, that BSAM has control over how to commercially exploit the license, how to use the license, how to market and promote tires, who to sub-license, and it must exercise quality control over the products.<sup>215</sup>
- BSAM’s rights are transferrable, and while this requires the consent of the trademark holder, that does not take away from BSAM’s ownership and control.<sup>216</sup>
- BSAM’s intellectual property rights “*are in Panama*” because they are “*deriving from trademarks registered in Panama.*”<sup>217</sup>

149. The Claimants dispute the Respondent’s contention that they are reading the definition of Article 10.29 “*from the bottom up*”, and deny that the issue whether BSAM has

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<sup>207</sup> As explained by the Claimants, Ms. Williams is “*BLSL’s Panamanian counsel*” who was “*instructed in the Panamanian law proceedings that underlie this arbitration.*” Cl. Rej. Exp. Obj., ¶ 37.

<sup>208</sup> Cl. Rej. Exp. Obj., ¶ 37.

<sup>209</sup> Cl. Rej. Exp. Obj., ¶ 38.

<sup>210</sup> Cl. PHB Exp. Obj., ¶ 19.

<sup>211</sup> Cl. PHB Exp. Obj., ¶ 19.

<sup>212</sup> Cl. PHB Exp. Obj., ¶ 18.

<sup>213</sup> Cl. PHB Exp. Obj., ¶ 18.

<sup>214</sup> Cl. PHB Exp. Obj., ¶ 20.

<sup>215</sup> Cl. PHB Exp. Obj., ¶ 20. *See also*, Cl. PHB Exp. Obj., ¶ 38 (arguing that BSAM controls directly or indirectly how the trademarks are used in marketing materials to advertise tires in Panama).

<sup>216</sup> Cl. PHB Exp. Obj., ¶ 30.

<sup>217</sup> Cl. PHB Exp. Obj., ¶ 38.

“*intellectual property rights*” does not arise because the Claimants have failed to demonstrate that BSAM has an “*asset*” that it owns or controls.<sup>218</sup> In their Post-Hearing Brief the Claimants reiterate, “[t]o be clear”, that their case is that “*the assets owned or controlled by BSAM are the intellectual property rights conferred by the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement*” and argue the question is then whether those license agreements and intellectual property rights are “*assets*.”<sup>219</sup> The Claimants accept that the term asset refers to “*items of value and available to meet debts*”, and argue that both licenses are of value because they allow BSAM to use the marks to generate revenue. The Claimants dispute, however, that the test to determine whether something is an “*asset*” depends on whether it can be sold. In any event, the Claimants argue, contrary to the Respondent’s allegation that these licenses cannot be sold, the licenses can indeed be converted to cash as they can be assigned to another for consideration. That the licensor must agree to the assignment does not deprive the license rights of value.<sup>220</sup>

150. Finally, with regard to the issue whether the term “*intellectual property rights*” in the TPA refers only to the trademarks themselves or also encompasses the right to use the trademarks,<sup>221</sup> the Claimants:

- Remark that Article 10.29 refers to “*intellectual property rights*” as distinguished from “*intellectual property*.”<sup>222</sup>
- Note that the term “*intellectual property rights*” is not defined in Chapter 10 or Chapter 15 of the TPA, but argue relying on the applicable law provision in Article 10.22.1 of the TPA, that there is useful context in the TPA that can assist the Tribunal. The Claimants refer to Article 15.2.10, Article 15.11.6 and footnote 20, as support for the distinction between “*intellectual property (i.e. the trademark)*” and “*intellectual property rights*.”<sup>223</sup>
- Argue that the Respondent has analyzed BSAM’s intellectual property rights under the criteria of Article 10.29(g) of the TPA referring to “*licenses*” overlooking

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<sup>218</sup> Cl. PHB Exp. Obj., ¶ 16.

<sup>219</sup> Cl. PHB Exp. Obj., ¶ 17.

<sup>220</sup> Cl. PHB Exp. Obj., ¶ 17.

<sup>221</sup> Cl. PHB Exp. Obj., ¶¶ 26-37.

<sup>222</sup> Cl. PHB Exp. Obj., ¶¶ 26-27.

<sup>223</sup> Cl. PHB Exp. Obj., ¶ 28. See also, Tr. Day 4, 585:1-589:1 (Mr. Williams).

whether they were “*intellectual property rights*” falling under Article 10.29(f). Further, Panama has also implied that the only intellectual property right that could be an asset is the trademark, thereby conflating intellectual property with intellectual property rights.<sup>224</sup>

- Dispute the allegation that the purpose of a trademark license is to allow the licensee to use the “*good will*” of the brand, and that BSAM not having rights to that “*good will*” it does not have any “*intellectual property rights*.” The purpose of the trademark license is to allow use of the trademark, a right which the licensee owns and controls, pays for, and receives benefits from, though manufacturing and selling branded products.<sup>225</sup>
- Argue that the present situation has parallels to oil exploration and production licenses, in which the licensee does not own the concession area, but it does own the right to explore and produce in that area in accordance with the license.<sup>226</sup>

## (2) The U.S. Submissions

151. In its Article 10.20.2 submission, the United States refers to the definition of “*investment*” in Article 10.29 of the TPA. It observes that such definition encompasses “*every asset*” owned or controlled, directly or indirectly, by an investor that has the characteristics of an investment; and notes that the categories listed in the sub-paragraphs of the definition “*are illustrative and non-exhaustive*.”<sup>227</sup> The United States further adds that:

“In determining whether an asset falls within the definition, the analysis should be guided by whether it 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.”<sup>228</sup>

152. It also points out that “[o]rdinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e)”, and that “[t]he definition of

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<sup>224</sup> Cl. PHB Exp. Obj., ¶ 29.

<sup>225</sup> Cl. PHB Exp. Obj., ¶ 34.

<sup>226</sup> Cl. PHB Exp. Obj., ¶ 36.

<sup>227</sup> U.S. First Sub., ¶ 14.

<sup>228</sup> U.S. First Sub., ¶ 14.



*‘investment’ explicitly excludes claims to payment that arise from commercial contracts for the sale of goods or services and that are not immediately due.”*<sup>229</sup>

### (3) The Tribunal’s Analysis

#### a. Introduction

153. Because the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on BSAM to demonstrate that it owns or controls a qualifying investment.<sup>230</sup> That is a burden that BSAM must discharge according to the normal standard of proof, namely on balance of probabilities.
154. Article 25 of the ICSID Convention provides: “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...]” It follows that the jurisdiction of the Tribunal requires first that each Claimant should have an “investment” and secondly that any dispute raised by a Claimant should “arise directly” out of that investment.
155. The Claimants’ claims have been brought under the ICSID Convention pursuant to Section B of Chapter 10 of the TPA. Chapter 10 of the TPA applies to “covered investments.” These are defined in 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, stocks, and other forms of equity participation in an enterprise;

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<sup>229</sup> U.S. First Sub., ¶¶ 15-16.

<sup>230</sup> The Tribunal endorses the statements of principle at **RLA-048**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) [hereinafter, “*Tulip*”], ¶ 48; and **RLA-049**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014) [hereinafter, “*National Gas*”], ¶ 118.

- (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, moveable or immovable property, and related property rights, such as leases, mortgages, liens and pledges.”<sup>231</sup>

156. A footnote to (g) provides:

“Whether a particular type of license, authorization, permit or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. 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. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit or similar instrument has the characteristic of an investment.”<sup>232</sup>

157. It is common ground that the Tribunal will only have jurisdiction in relation to a claim brought by BSAM if (i) there is an “*investment*” out of which the dispute directly arises within the meaning of Article 25 of the ICSID Convention; and (ii) that “*investment*” also falls within the definition in Article 10.29 of the TPA.

158. The ICSID Convention contains no definition of “*investment*.” There is much jurisprudence and academic discussion as to whether the meaning of “*investment*” in the ICSID Convention can be more restrictive than the definition of “*investment*” in a BIT or other agreement under which the jurisdiction of the Centre is invoked. In this case, however, the Parties have directed their arguments in relation to Panama’s Objection No.

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<sup>231</sup> C-003/C-117, TPA, Art. 10.29.

<sup>232</sup> C-003/C-117, TPA, Art. 10.29, n. 9.

1 to the question of whether BSAM's claim relates to an investment that falls within the definition in Article 10.29 of the TPA. This is understandable. The Tribunal finds it hard to envisage an investment within the definition in Article 10.29 of the TPA that would not qualify as an investment under Article 25 of the ICSID Convention.

159. This area of dispute between the Parties has fallen into a narrow compass. BSLS is the owner of the FIRESTONE trademark that is registered in Panama. At least for the purposes of the present expedited proceedings, Panama accepts that this registered trademark qualifies as an "*investment*" under Article 10.29 of the TPA. BSLS has granted BSAM a license to use that FIRESTONE trademark in Panama. BSAM contends that this license constitutes an "*investment*" as defined by Article 10.29; Panama contends that it does not. BATO, a wholly-owned subsidiary of BSAM has, under the BRIDGESTONE Trademark License, the license to use the BRIDGESTONE trademark registered in Panama. BSAM contends that this is an "*investment*" within the definition of Article 10.29 of the TPA that BSAM controls. Panama contends that it is not.
160. Thus, the argument has largely focused on the differences between the *ownership* of the relevant trademarks and the *licenses to use* these, and whether or not the latter satisfies the definition of an "*investment*" in Article 10.29 of the TPA. Panama's submissions did not focus on the question of how or in what circumstances a registered trademark qualifies as an investment.<sup>233</sup> That is, however, a seminal question that must be addressed before it is possible to analyse the significance of the difference between *ownership* of and a *license to use* a registered trademark.
161. The analysis of the issues arising in respect of this Objection is complicated by the manner in which BSJ has delegated different aspects of its world-wide business to subsidiary companies in the Group, all of which are wholly-owned, directly or indirectly, by BSJ. Under international investment treaty law, subject always to the precise wording of the applicable treaty, in principle, when considering whether an investment is owned or controlled by a claimant in a chain of companies the corporate veil is withdrawn when looking down the chain from the claimant, but the fact that all the benefits of the

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<sup>233</sup> Tr. Day 4, 518:14-519:15; 524:9-526:6 (Ms. Silverman).

investment may ultimately pass up the chain to the parent is ignored. It is perfectly legitimate for a group of companies so to structure their inter-relationship as to gain the benefit of international investment treaties, subject always to the terms of the treaty whose protection the relevant member of the group seeks to enjoy, such as the denial of benefits provision that forms the subject of Objection No. 3, and any other provision that bears on the standing of a particular claimant to gain access to international jurisdiction.

162. The Tribunal intends to approach Panama's Objection No. 1 by considering a series of questions:

- (1) In what circumstances does a trademark qualify as an investment?
- (2) In what circumstances, if any, are the FIRESTONE Trademark License and the BRIDGESTONE Trademark License capable of qualifying as an investment?
- (3) In the light of the answers to 1 and 2, was the FIRESTONE Trademark License an investment in Panama owned or controlled by BSAM?
- (4) In the light of the answers to 1 and 2 was the BRIDGESTONE Trademark License an investment in Panama owned or controlled by BSAM?

**b. In What Circumstances Does a Trademark Qualify as an Investment?**

163. In this arbitration, BSLS claims in respect of the FIRESTONE trademark, which it owns. For the purposes of these expedited proceedings, Panama has accepted that the FIRESTONE trademark constitutes an investment in Panama that is owned by BSLS. Panama has, however, been understandably reluctant to explain the basis on which this concession has been made in order not to prejudice any subsequent challenge to BSLS's claim.<sup>234</sup>

164. What are the elements of an investment under the definition in Article 10.29 of the TPA? First, the investment must be an "*asset*" that is capable of being owned or controlled. The TPA lists a series of forms that an investment may take, including "*intellectual property rights*" but there is an overriding requirement that the asset claimed to be an

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<sup>234</sup> Tr. Day 4, 524:16-525:12 (Ms. Silverman).

investment must have the “*characteristics*” of an investment. The TPA gives some examples of these:

- commitment of capital or other resources;
- expectation of gain or profit;
- assumption of risk.

These are characteristics of an investment that have been identified in the abundant investment treaty jurisprudence on the topic over the years and reduced to the text of the TPA. The Claimants have accepted them as typical characteristics of an investment and Panama has not demurred from this.

165. There are other characteristics to be found in many investments, as identified in *Salini*,<sup>235</sup> such as a reasonable duration of the investment and a contribution made by the investment to the host State’s development. The Tribunal is of the view, in agreement with most previous decisions, that there is no inflexible requirement for the presence of *all* these characteristics, but that an investment will normally evidence most of them.
166. A trademark is a type of intellectual property. BITs and modern FTAs commonly list intellectual property within the definition of the assets that are, or are capable of being, an investment. Sometimes trademarks are specifically included in the list, see for instance *Arif*<sup>236</sup> and the *Philip Morris* case.<sup>237</sup> In the latter case the investments asserted by the claimants specifically included trademarks.<sup>238</sup> The tribunal dismissed Uruguay’s objection that the claimants did not have investments in Uruguay that satisfied the meaning of “*investment*” in the ICSID Convention. It did not, however, deal specifically with trademarks. Nor has this Tribunal been referred to any other decision that considers the circumstances in which a trademark can constitute an investment when it is

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<sup>235</sup> **CLA-030**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) [hereinafter, “*Salini*”].

<sup>236</sup> **RLA-063**, *Mr. Frank Charles Arif v. Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) [hereinafter, “*Arif*”], ¶¶ 326, 361.

<sup>237</sup> **RLA-008**, *Philip Morris Brand Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) [hereinafter, “*Philip Morris, Uruguay*”], ¶ 24.

<sup>238</sup> **RLA-008**, *Philip Morris*, Uruguay, ¶ 183.

unaccompanied by other forms of investment such as the acquisition of shares in a company incorporated under the law of the host State, the acquisition of real property, or the acquisition of other assets commonly associated with the establishment of an investment.

167. A trademark identifies the features that a consumer will expect to find in a product that bears the mark. Where consumers consider those features to be desirable, the trademark enables the seller to profit from the goodwill that attaches to products that bear the trademark. That goodwill can be generated in two ways. The first is by designing, manufacturing and selling products that contain the desirable features. Consumers who have appreciated these will wish to purchase further products that contain those features. The trademark enables them to identify these.
168. The other way of generating goodwill is by promoting the brand by advertising and other means so that the purchaser is led to anticipate that an article bearing the trademark will contain those desirable features.
169. Whichever way the trademark is promoted, the promotion involves the commitment of resources over a significant period, the expectation of profit and the assumption of the risk that the particular features of the product may not prove sufficiently attractive to enable it to win or maintain market share in the face of competition.
170. Douglas states<sup>239</sup> that there is no conceptual problem in recognizing intellectual property rights as investments, but he does not explain why that is. He goes on to comment:<sup>240</sup>

“[...] An intellectual property right is therefore negative in character: it is a right to exclude others and corresponds to an obligation *in rem* by which all subjects of the legal system have a negative duty to refrain from exploiting an invention or representing one’s business or its products by a certain name or symbol and so on.”

171. It seems to the Tribunal that the mere registration of a trademark in a country manifestly does not amount to, or have the characteristics of, an investment in that country. The

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<sup>239</sup> RLA-001, Douglas, ¶ 395.

<sup>240</sup> RLA-001, Douglas, ¶ 396.

effect of registration of a trademark is negative. It prevents competitors from using that trademark on their products. It confers no benefit on the country where the registration takes place, nor, of itself, does it create any expectation of profit for the owner of the trademark. No doubt for these reasons the laws of most countries, including Panama, do not permit a trademark to remain on the register indefinitely if it is not being used.

172. The picture is, however, transformed if the trademark is exploited. A trademark is exploited by the manufacture, promotion and sale of goods that bear the mark. The exploitation accords to the trademark, by the activities to which the trademark is central, the characteristics of an investment. It will involve devotion of resources, both to the production of the articles sold bearing the trademark, and to the promotion and support of those sales. It is likely also to involve after-sales servicing and guarantees. This exploitation will also be beneficial to the development of the home State. The activities involved in promoting and supporting sales will benefit the host economy, as will taxation levied on sales. Furthermore, it will normally be beneficial for products that incorporate the features that consumers find desirable to be available to consumers in the host country. That was not the case in the *Philip Morris* case where the products in question were cigarettes, but the tribunal nevertheless found that the activities that included marketing the cigarettes under the trademark constituted a qualifying investment.
173. There is another way in which the owner of a registered trademark may exploit it. The owner may license the use of the trademark under a franchise agreement that grants to the licensee the right to exploit the trademark for its own benefit.
174. The Tribunal concludes that a registered trademark will be a qualifying investment on the part of the owner, provided that the owner carried out the activities that are normally involved in the exploitation of the investment, as described above. In many investment cases the tribunal has found the existence of a qualifying investment on the basis of a

number of interrelated transactions. The *Philip Morris* case is one. Another is *CSOB*<sup>241</sup> cited by the Claimants.<sup>242</sup>

175. In the case of a trademark, the interrelated activities are likely to relate to selling products bearing the mark. A simple sale is often taken as a paradigm example of a commercial investment that cannot constitute an investment.<sup>243</sup> Panama argues from this that:

“[...] Rights, activities, commitments of capital and resources, expectations of gain and profit, assumption of risk, and duration do not add up an ‘investment’ when they are simply the rights, activities, commitments, expectations, and risks associated with, and the duration of, cross-border sales.”<sup>244</sup>

176. Panama cites no authority to support this proposition and the Tribunal does not accept it. The reason why a simple sale does not constitute an investment is that it lacks most of the characteristics of an investment. It does not follow that an interrelated series of activities, built round the asset of a registered trademark, that do have the characteristics of an investment does not qualify as such simply because the object of the exercise is the promotion and sale of marked goods. Contrary to Panama’s submission, the Tribunal considers that to rule that such transactions could not qualify as an investment would be, impermissibly, to prefer form to substance.

177. In summary, a registered trademark will constitute a qualifying investment provided that it is exploited by its owner by activities that, together with the trademark itself, have the normal characteristics of an investment.

**c. In What Circumstances, if Any, Are the FIRESTONE Trademark License and the BRIDGESTONE Trademark License Capable of Qualifying as an Investment?**

178. Under the footnote to Article 10.29 (g) of the TPA a license will not have the characteristics of an investment unless it creates rights protected under domestic law, that

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<sup>241</sup> **CLA-005**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) [hereinafter, “*CSOB*”].

<sup>242</sup> Cl. Res. Exp. Obj., ¶ 107.

<sup>243</sup> See the cases cited by Panama at Resp. Reply Exp. Obj., ¶ 30, n. 124.

<sup>244</sup> Resp. Reply Exp. Obj., ¶ 31.



is under the law of the host State. No similar provision applies to (f) “*intellectual property rights*”, but the Tribunal is in no doubt that they must be rights protected under the law of Panama, otherwise they can neither properly be described as “*intellectual property rights*”, nor as “*assets*.”

179. The respective Claimant must own or control, directly or indirectly, the rights granted by each License.
180. The License must be exploited by the licensee in the same way as a trademark must be exploited if it is to qualify as an investment, as above described.

**d. Was the FIRESTONE Trademark License an Investment in Panama Owned or Controlled by BSAM?**

181. BSAM’s material contentions can be summarised as follows:
  - (i) the FIRESTONE Trademark License fell within the definition both of “*intellectual property rights*” under Article 10.29(f) of the TPA, and of a “*license*” under Article 10.29(g);
  - (ii) the rights granted by the License were protected under the law of Panama;
  - (iii) the total of the activities carried on by BSAM in relation to those rights, coupled with the License itself as the core investment, had the characteristics of an investment.
182. Panama’s material contentions can be summarised as follows:
  - (i) the rights granted by the License were so restricted that (a) they could not properly be described as intellectual property rights, or a license, or an asset; and (b) BSAM could not properly be said to own or control the rights;
  - (ii) the rights were not recognized or protected by the law of Panama;
  - (iii) the rights were not in Panama;
  - (iv) there were insufficient activities carried on by BSAM in Panama under or in relation to the License to give the two together the characteristics of an investment.

183. Panama drew attention to the following provisions of the FIRESTONE Trademark License in support of the submissions summarised at (i) above.<sup>245</sup>

“5. [Bridgestone/Firestone Americas Holding, Inc.] may use Marks only on Licensed Products after receiving the written approval of [BSLS] and only after [BSLS] has seen, inspected and approved a sample of the use of each of the Marks as well as a sample of each of the Licensed Products provided by [Bridgestone/Firestone Americas Holding, Inc], at its expense, displaying the proposed usage of the Marks. Thereafter until expiration of this Agreement, the Marks must only be used in the style, font, color and manner as required by [BSLS].

[...]

11. [Bridgestone/Firestone Americas Holding, Inc.] agrees that [BSLS] owns of [sic] the Marks and all the goodwill associated therewith. [BSLS] shall retain all right, title and interest in and to the Marks, the goodwill associated therewith, and all registrations granted thereon. Any and all uses of the Marks by [Bridgestone/Firestone Americas Holdings, Inc.] shall inure to the benefit of [BSLS]. [...]

184. As a matter of form these provisions make the use of the license conditional upon the grant of written approval by BSLs, and grant BSLs powers to regulate the use of the license by BSAM. The Tribunal does not accept, however, that the effect of this was to render it impossible to describe the FIRESTONE Trademark License as intellectual property rights or as a license, or as an asset, or as being owned or controlled by BSAM. Once the necessary consents were given, and subject to the law of Panama which is considered below, the FIRESTONE Trademark License conferred on BSAM the valuable right to sell tires bearing the FIRESTONE mark in Panama. In practice, that right was granted to BSAM exclusively. The exercise of that right would inevitably result in BSAM benefitting from the goodwill that attached to the mark, notwithstanding that the FIRESTONE Trademark License provided that BSLs would retain the title to the goodwill.
185. The provision that the use of the marks should “*inure to the benefit*” of BSLs is puzzling and was not explored. The Tribunal would not accept, were it to be suggested, that this

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<sup>245</sup> Resp. Reply Exp. Obj., ¶ 37, n. 161 citing C-048, FIRESTONE Trademark License, Art. 5 and Art. 11.

required BSAM to account to BSLS for any profits earned from sales under the FIRESTONE Trademark License of tires bearing the FIRESTONE mark. Even if it had, this would not have detracted from the fact that the FIRESTONE Trademark License granted BSAM the right to use the FIRESTONE mark in Panama, when this would otherwise have been prevented by the registration of the mark. What happens to the fruits of an investment after they have been harvested does not impact on the value of those fruits.

186. While the FIRESTONE Trademark License made it clear that BSAM was not granted any interest in the FIRESTONE mark itself, BSAM was granted the contractual right to *use* the mark. If that right can properly be described as an “*asset*”, then the FIRESTONE Trademark License made BSAM the owner of that asset. That question depends, in the view of the Tribunal, on the *effect* under the law of Panama of the FIRESTONE Trademark License.
187. Evidence of Panamanian law was given by Ms. Audrey Williams. Panama objected to her giving evidence *as an independent expert*, because she had previously been part of the Claimants’ legal team. Her evidence was given, without objection, for what it might be worth. In the event, Panama did not suggest that her evidence was influenced by bias and, indeed has sought to rely on it.
188. Ms. Williams set out the relevant Panamanian law in her witness statement. She translated the following extract from Law No. 35 of 1996:

“**Article 121:** 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.”<sup>246</sup>

189. Ms. Williams in her statement commented:

“9. [...] Through operation of Article 121 a trademark registration holder may therefore transfer their intellectual property rights with

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<sup>246</sup> Williams WS, ¶ 8. *See also*, C-127, Law No. 35 (10 May 1996), Art. 121.

respect to the *use* of the trademark to a licensee. It follows that the person to whom the trademark rights have been licensed possesses those trademark rights of use. While it is clear that the trademark owner must grant such license by contract, it is not required that such contract be governed by Panamanian law.

[...]

13. In addition, the right to use the mark granted to the licensee will also allow the licensee to participate in opposition and annulment actions against identical and/or confusingly similar trademarks as either a co-plaintiff or as a collaborating party of the plaintiff. [...].”<sup>247</sup>

190. Ms. Williams’s witness statement also deals with the nature and effect of the use of a trademark by a licensee, citing Article 101 of Law No. 35 of 1996, which, as translated by Ms. Williams, provides, in relation to a trademark on goods:

“Use of a trademark is understood as the placement of products bearing the mark in the national marketplace, whether they have been produced, manufactured, made or finished in the Republic of Panama or abroad. [...] The use of a mark by a licensee or by another person authorized to do so shall be deemed as effected by the owner of the registration, for all purpose related to the use of the mark.”<sup>248</sup>

191. Ms. Williams commented at paragraph 12 of her statement:

“As the use of the trademark by the licensee will be considered the same as use by the trademark owner, for all purposes for which the use of the mark is relevant, the role of the licensee will be of paramount importance. This is particularly the case when the trademark owner is not using the mark itself or has no other licensee in the territory. For instance, the use of the mark by the licensee will make it possible to maintain the exclusivity of the rights awarded under the registration certificate, as otherwise it can be cancelled if the mark is not used for five consecutive years. Therefore, the use made by the licensee can be enforced before a court of law by the trademark owner to prevent the cancellation of a trademark registration.”<sup>249</sup>

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<sup>247</sup> Williams WS, ¶¶ 9, 13 (emphasis in original).

<sup>248</sup> Williams WS, ¶ 10, n. 1. *See also*, C-127, Law No. 35 (10 May 1996) and Law No. 61 (5 October 2012), Art. 101.

<sup>249</sup> Williams WS, ¶ 12.

192. Ms. Williams concluded her statement:

“In summary, the right to use a trademark granted to a licensee by the owner of a trademark registered in Panama is a valuable asset, and constitutes an intellectual property right under Panamanian law.”<sup>250</sup>

193. The cross-examination of Ms. Williams was very short. The relevant passage was as follows:<sup>251</sup>

“Q. [...] I understand that one of the things that you’re saying is that, under Panamanian law, the right to use a trademark granted to a licensee is an ‘intellectual property’ right; is that correct?”

A. Yes, it is

Q. [...] it also seems that you’re saying that Panamanian law establishes that the right to use a trademark granted to a licensee is a ‘valuable asset.’ Are you saying that with that sentence? Are you saying that Panamanian law states that trademark rights granted to a licensee are valuable assets?”

A. No, I am not saying that.”

194. Ms. Williams was asked about her meaning of “*asset*” and, in particular, whether the intellectual property rights in a trademark license agreement were property that could be converted to cash. She replied that this would depend on what the contract stated. In the present case, the consent of the licensor was required.

195. On the basis of this evidence, the Tribunal concludes that under the law of Panama a registered trademark constitutes intellectual property. If the owner licenses the use of the trademark, the license constitutes an intellectual property right. The owner of the trademark has to use the trademark to keep it alive, but use by the licensee counts as use by the owner. The licensee cannot take proceedings to enforce the trademark without the participation of the owner, but can join with the owner in enforcement proceedings. The

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<sup>250</sup> Williams WS, ¶ 15.

<sup>251</sup> Tr. Day 3, 392:19-393:10 (Ms. Gehring Flores, Ms. Williams).

right is a right to use the Panamanian registered trademark in Panama. It follows that the location of the right is Panama.

196. Panama advanced a further point in support of its argument that the right to use the FIRESTONE trademark registered in Panama was not an asset and, therefore, could not constitute an investment. This was that BSAM's right was not "*available to meet debts, commitments or legacies*"<sup>252</sup> because the FIRESTONE Trademark License prohibited BSAM from assigning its license for any purpose absent the express approval of BSLS. The Tribunal is not persuaded by this submission. In the first place, the Tribunal does not accept that a contractual right cannot constitute an asset unless it is capable of assignment. In the second place, the requirement to obtain consent to the assignment of an asset does not mean that the asset is not assignable. In the circumstances of this case it is not realistic to envisage BSAM seeking consent to assign its license to use the FIRESTONE trademark, but in theory there was no reason why it should not have sought, and obtained, such consent.
197. Panama argued that BSAM did not "*own or control*" the rights: "*The mere fact that Bridgestone Americas needed to license it from a third party demonstrates a lack of ownership, and the terms of the agreement demonstrate a lack of control.*"<sup>253</sup> The Tribunal does not follow the first part of this submission. It is axiomatic that a license must be obtained from the licensor, but that does not mean that the licensee does not own the license. BSAM owned the license granted by BSLS. As to the second part of the submission, the requirement is that the claimant should own *or* control the license. In any event, although the terms of the license purported to impose quite strict control over the use of the license, BSLS did not, in practice control the manner in which the license was exploited.
198. For these reasons the Tribunal finds that the FIRESTONE Trademark License creates *rights* that are protected under the law of Panama and is thus capable of constituting an investment under Article 10.29 of the TPA. However, just as a registered trademark will

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<sup>252</sup> Resp. PHB Exp. Obj., ¶ 16, citing **RLA-054**, *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) [hereinafter, "*Emmis*"].

<sup>253</sup> Resp. Reply. Exp. Obj., ¶ 37.

not, without more, constitute an investment, so a license to use a registered trademark will not, without more, constitute an investment. In each case, exploitation of the trademark is necessary in order to turn the relevant right into an investment.

199. The Tribunal turns to the question of whether, in demonstrating the exploitation of the FIRESTONE trademark registered in Panama necessary to constitute an investment, BSAM is entitled to claim credit for the various activities of BSCR in Panama in relation to this.
200. Before looking at details of the evidence, the Tribunal will summarise its effect. BSAM itself played a limited part in the activities that exploited the FIRESTONE trademark in Panama. This consisted of involvement in the promotion of the mark. But the major activities of promotion, the manufacture of the tires (which took place outside Panama) and the sales of these tires bearing the FIRESTONE mark in Panama, were carried out by BSCR.
201. In its Post-Hearing Brief, Panama has submitted: “[t]here is no evidence that BSCR has been using (or even had the right to use) Panamanian trademarks on tires. Nor is there evidence that any other BSAM subsidiary (or BSAM itself) is selling tires into Panama.”<sup>254</sup>
202. There is a degree of conflict between this and Panama’s subsequent averment that BSCR “sells foreign-manufactured tires to third party dealers and distributors in Panama, and conducts certain activities in connection with these sales.”<sup>255</sup> The Tribunal assumes that the former submission was directed at the absence of documentary evidence conferring on BSCR the right to use the trademarks in Panama, for the witness statements of Mr. Calderon and Mr. Hidalgo clearly establish that BSCR had been selling tires bearing the FIRESTONE and BRIDGESTONE marks in Panama.
203. Mr. Calderon’s statement, from which the facts hereafter set out are taken, covers the position before and after the reorganization of BSAM’s Latin America operations, which

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<sup>254</sup> Resp. PHB Exp. Obj., ¶ 10.

<sup>255</sup> Resp. PHB Exp. Obj., ¶ 12.

occurred in October 2015. The relevant period is before that reorganization, when Mr. Calderon served as Marketing Manager for BSCR.<sup>256</sup> At that time BSAM had a marketing team in Nashville that included Mr. Pineda, the Director of Latin American Sales and Marketing. This team developed marketing initiatives for the BRIDGESTONE and FIRESTONE brands in the entire Latin American region. These initiatives included promotion and marketing campaigns. The team also set the regional strategy for the brands that included event sponsorships, advertising campaigns, and market research.<sup>257</sup> BSAM established the regional marketing budgets to fund these activities.

204. It fell to BSCR to implement the marketing strategies for the FIRESTONE and the BRIDGESTONE brands in Panama. Implementation included advertisements in publications, on radio and television and on the web, seasonal promotions, marketing campaigns, and merchandising co-sponsorship.<sup>258</sup> It is clear from Mr. Calderon's statement that all of these activities were designed to promote the sales by BSCR of, *inter alia*, tires bearing the FIRESTONE and BRIDGESTONE marks in Panama.
205. Mr. Hidalgo's witness statement adds to the picture. He was BSCR's Consumer Sales Manager for Central America and the Caribbean between March 2011 and April 2014, at which point he was promoted to become Commercial Director for Central America and the Caribbean.<sup>259</sup> This states that since about 2000 BSCR has manufactured tires in Costa Rica and sold these under the FIRESTONE and BRIDGESTONE marks in Panama.<sup>260</sup> The largest dealer in Panama to whom BSCR sells tires is Tambor S.A. ("**Tambor**").<sup>261</sup> In 2013 and 2014 sales to Tambor exceeded US\$5 million in value, in 2015 this dropped to about US\$3.9 million and in 2016 to about US\$2.7 million.<sup>262</sup>
206. Mr. Hidalgo states that the last written agreement with Tambor was concluded in 1979 and expired in 1996, after which the relationship continued on the same basis with the

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<sup>256</sup> Calderon WS, ¶ 2.

<sup>257</sup> Calderon WS, ¶ 7.

<sup>258</sup> Calderon WS, ¶¶ 8-18.

<sup>259</sup> Hidalgo WS, ¶¶ 3-4.

<sup>260</sup> Hidalgo WS, ¶¶ 6-7.

<sup>261</sup> Hidalgo WS, ¶ 16.

<sup>262</sup> Hidalgo WS, ¶ 18.



“*relevant Bridgestone entity*” which, in recent times has been BSAM and its subsidiaries.<sup>263</sup>

207. Although there is at least one piece missing from the jig-saw, the overall picture is clear. In 2001 BSJ reorganized the manner in which the American Firestone business that it had acquired was organized. Ownership of the many registered trademarks were transferred to BSLS. That company’s role, as its name suggests, was not itself to exploit those trademarks but to protect them and to delegate the exploitation of the marks by license to BSAM. BSAM’s role in its turn was to oversee marketing activities under which the marks were exploited and promoted in the various countries, but to delegate to its subsidiaries the actual exploitation of the marks by the sale of tires bearing them. In respect of Panama, BSCR was the company to which this function was delegated.
208. The missing piece of the jig-saw is the absence of any document evidencing the delegation to BSCR of the exploitation of the right to use the FIRESTONE mark that had been conferred on BSAM by the FIRESTONE Trademark License. One might have expected a sub-license granted by BSAM to BSCR to have been produced. As Panama has pointed out, the Claimants have placed on the record a number of licenses or sub-licenses that have no direct relevance.
209. What is the proper conclusion to be drawn by the Tribunal from the absence of a document of any kind from BSAM authorizing BSCR to market tires bearing the FIRESTONE mark in Panama? There are two possibilities. The first is that such a document exists or existed but the Claimants or their lawyers have been unable to find it. The second is that no such document has ever existed. Either explanation suggests a degree of disarray on the part of the Bridgestone Group. There is other evidence of such disarray. Counsel for the Claimants told the Tribunal that it would probably take several days to produce a chart showing the interrelationship of all the companies in the Bridgestone Group.<sup>264</sup> Perhaps more significant is the fact that for the last 20 years

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<sup>263</sup> Hidalgo WS, ¶ 16.

<sup>264</sup> Tr. Day 4, 509:4-9 (Mr. Williams).

Bridgestone companies have been selling to Tambor large quantities of tires without such sales being covered by any written agreement.

210. The Tribunal has concluded that it does not matter whether the document under which BSAM granted authority to BSCR to sell tires bearing the FIRESTONE trademark in Panama has been lost or whether it has never existed. BSLS entered into the FIRESTONE Trademark License with BSAM in order to confer on BSAM the right, either directly or through its subsidiaries, to sell tires bearing the FIRESTONE mark in countries where the mark was registered. In reliance on that right, BSAM has procured BSCR to sell tires bearing the FIRESTONE mark in Panama and has itself assisted with the marketing of those tires. Whether or not BSCR acted under a formal sub-license granted by BSAM, it was plainly authorized by BSAM to act as it did. The Tribunal notes the recognition in Article 101 of Law No. 35 that the use of a trademark by a person *authorized* to use it is deemed to be effected by the owner. The Tribunal is satisfied that BSAM can properly be treated as having, itself and through BSCR, been exploiting its right to sell tires bearing the FIRESTONE trademark in Panama, and has thereby invested directly and through its subsidiary in Panama. The FIRESTONE Trademark License was thus an investment in Panama owned by BSAM.

**e. Was the BRIDGESTONE Trademark License an Investment in Panama Owned or Controlled by BSAM?**

211. To a large extent, the issues raised by this question mirror those already discussed in relation to the FIRESTONE Trademark License. The difference is that the BRIDGESTONE Trademark License granted a license to use the BRIDGESTONE trademark not to BSAM but to BATO, a wholly owned subsidiary of BSAM, and unlike the FIRESTONE trademark, which is owned by BSLS outside of the United States, the BRIDGESTONE trademark is owned by BSJ, a Japanese entity that holds no rights under the TPA.
212. BSJ adopted a similar approach to the exploitation of BRIDGESTONE registered trademarks as was adopted in relation to the FIRESTONE registered trademarks. By Article 2.1 of the BRIDGESTONE Trademark License dated 1 December 2001, BSJ

granted a license to the predecessor of BATO, a wholly owned subsidiary of BSAM, to use “*BSJ Trademarks in relation to all Tire Products within the United States of America and elsewhere as provided for in Article 2-2 [...]*.”<sup>265</sup> Article 2.2 provided that the BSJ Trademarks could only be sub-licensed to the parties listed in Exhibit A. The parties so listed included Bridgestone/Firestone de Costa Rica S.A.

213. Article 4.1 of the Agreement required that the licensee “*shall actually use*” the trademarks “*for the purpose of giving adequate trademark notice in the jurisdiction of intended use.*”<sup>266</sup>
214. The BRIDGESTONE Trademark License contained similar restrictions in respect of the use of the trademark as the FIRESTONE Trademark License. Despite this, and for the reasons given when considering the FIRESTONE Trademark License, the Tribunal finds that the right to use the trademarks was indirectly owned and controlled by BSAM as the owner of 100% of BATO.
215. The use that was actually made of the BRIDGESTONE trademark registered in Panama was by BSCR. There is no document on the record that evidences the grant of authority by BATO to BSCR to use that trademark. Mr Williams suggested that it was a comment from the Tribunal that drew attention to the lack of evidence about the activities of BATO. The Tribunal considers that the fact that this was an important part of the story should have been apparent from the outset. What inferences are properly to be drawn from the absence of such evidence? The natural inference that flows from the grant of the sublicense by BATO to BSCR in 2015 is that no such sublicense existed before that date. Yet BSCR was busy promoting and selling in Panama tires bearing the BRIDGESTONE trademark.
216. The comments that the Tribunal has made in respect of the lack of documentation in respect of the use made by BSCR of the FIRESTONE mark apply equally here. As BATO and BSCR were both wholly owned by BSAM and BSAM assisted in the promotion of the sales made by BSCR, the obvious inference is that BATO authorised

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<sup>265</sup> C-052, BRIDGESTONE Trademark License, Art. 2.1.

<sup>266</sup> C-052, BRIDGESTONE Trademark License, Art. 4.1.

BSCR to use the right that BATO enjoyed under the BRIDGESTONE Trademark License to market tires under the BRIDGESTONE mark. The activities carried on in respect of the use of this right, coupled with the right itself, constituted an investment that BSAM, as BATO's parent, indirectly owned and controlled. It follows that the BRIDGESTONE Trademark License was an investment in Panama owned or controlled by BSAM.

217. The Tribunal has reached these conclusions on the balance of probability on the basis of the evidence before it and those parts of the Claimants' pleadings that Panama itself relied on. The Tribunal is satisfied that the result accords with reality. Had BSJ and BSLS, as owners respectively of the BRIDGESTONE and FIRESTONE trademarks registered in Panama, themselves carried out all the activities relating to the use of those trademarks on tires sold in Panama, each would have established an investment in Panama, albeit that BSJ would not have enjoyed the benefit of protection under the TPA. Each, however, passed to BSAM, under the BRIDGESTONE and FIRESTONE Trademark Licenses, the rights that they enjoyed as owners of the trademarks, in order that the exploitation of the trademarks should be made pursuant to these rights. BSAM, itself and through its wholly owned subsidiaries, carried out the various activities involved in exploiting those rights. Those activities, together with the rights under which they were permitted to take place, had the characteristics of investments. The rights to use the trademarks were at the heart of those investments. They were rights in respect of intellectual property, granted under licenses, and they fell within the list of forms that an investment may take, as tabled in Article 10.29 of the TPA. The conclusion that they were investments in Panama owned by BSAM follows naturally.
218. The Claimants adduced a body of evidence in relation to the grant by Bridgestone Bandag LLC (formerly Bandag Inc.), a wholly owned subsidiary of BATO, to an unrelated Panamanian company of a franchise to use a patented method, and a Bandag trademark, in respect of the provision of tire retreading services in Panama.<sup>267</sup> It was not clear to the Tribunal how this evidence was supposed to bear on the issue of whether the

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<sup>267</sup> C-064, Bandag System Franchise Agreement between Bandag Inc. and Rodelag, S.A. (27 September 1965) [hereinafter, "Bandag Agreement"].

FIRESTONE and BRIDGESTONE Trademark Licenses qualified as investments. The Tribunal found it of no assistance in resolving that issue.

**f. Summary**

219. Where the owner of a trademark licenses its use to a licensee, it is necessary to distinguish carefully between the interest of the owner and the interest of the licensee, each of which may be capable of constituting an investment. If the owner does no more than grant a license of the trademark, in consideration of the payment of royalties by the licensee, the value of the trademark to the owner will reflect the amount of royalties received, while the value of the license to the licensee will reflect the fruits of the exploitation of the trademark, out of which the royalties are paid.
220. Thus, in the present case, the claim of BSLS, as the owner of the FIRESTONE trademark, must be distinguished from the claim of BSAM, as licensee of that trademark.
221. So far as the BRIDGESTONE trademark is concerned, BSJ, as owner, has no claim because, being a Japanese company, it falls outside the protection of the TPA. BSAM's claim as indirect owner and controller of the license enjoyed by BATO, mirrors its claim as licensee of the FIRESTONE trademark.
222. So far as the Tribunal is aware, this is the first case in which it has been necessary to analyse the different types of investments that can arise in relation to trademarks.

**B. Second Objection: BSAM Does Not Have a Dispute “Arising Directly Out” of An Investment**

**(1) The Parties' Positions**

**a. The Respondent's Position**

223. The Respondent contends that even if BSAM had an investment, the present dispute does not arise directly out of that investment as required by Article 25(1) of the ICSID

Convention, because there is no “*immediate ‘cause and effect’*” or “*causal link*” between the host-State actions at issue and the effects of such actions on the alleged investment.<sup>268</sup>

224. The Respondent notes that this arbitration arises out of a Panama Supreme Court’s decision imposing a US\$ 5,431,000 penalty on BSJ and BSLS, later paid by BSLS, in the context of a domestic proceeding initiated by a Panamanian and a Chinese entity for injuries resulting from efforts by BSJ and BSLS to police the BRIDGESTONE and FIRESTONE trademarks.<sup>269</sup> The alleged US\$16 million loss claimed here is said to result from the penalty imposed by the Panama Supreme Court in that proceeding plus the “*diminution of value of the FIRESTONE and BRIDGESTONE trademarks.*”<sup>270</sup>
225. But there is no direct link between BSAM’s purported investment and the injury the Claimants allege, Panama argues, because: BSAM was not a party to the Panamanian court proceeding, it did not pay (nor did it have an obligation to pay) the penalty imposed by the Supreme Court, it does not own the BRIDGESTONE or FIRESTONE trademarks, and it did not have the authority to police them.<sup>271</sup> At most, Respondent contends, BSAM had a right to sell, market and distribute products under those trademarks in Panama and the Americas, but the Claimants have not explained how this right was harmed by the Supreme Court decision.<sup>272</sup> That decision did not prevent the sale, marketing or distribution of such products.<sup>273</sup>
226. The Respondent dismisses the theories put forward by the Claimants to show a connection, arguing that they do not establish an “*immediate*” cause and effect between Panama’s actions and the effects on the investment.<sup>274</sup> According to Panama, for BSAM’s alleged “*investment*” to have been affected directly by the Supreme Court decision, that decision would need to have dealt with BSAM’s right to put the Panamanian FIRESTONE and BRIDGESTONE trademarks on tires, which the decision

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<sup>268</sup> Resp. Exp. Obj., ¶ 24. *See also*, Resp. PHB Exp. Obj., ¶ 20.

<sup>269</sup> Resp. Exp. Obj., ¶¶ 25-26.

<sup>270</sup> Resp. Exp. Obj., ¶ 26.

<sup>271</sup> Resp. Exp. Obj., ¶ 27. *See also*, Resp. Reply Exp. Obj., ¶ 44.

<sup>272</sup> Resp. Exp. Obj., ¶ 27.

<sup>273</sup> Resp. Reply Exp. Obj., ¶ 44.

<sup>274</sup> Resp. Reply Exp. Obj., ¶¶ 45-49.

does not do.<sup>275</sup> The question, Panama contends, is not a causation issue, but rather, whether the rights subject of the Supreme Court decision are the same rights alleged to constitute BSAM’s investment, and it is clear that they are not the same.<sup>276</sup>

227. For Panama, the connection that the Claimants seek to draw – characterized as an allegation that the Supreme Court decision affected some third-party rights, and that BSAM and its subsidiaries derived other rights from those third parties – is plainly “*indirect*” and therefore outside the scope of ICSID jurisdiction.<sup>277</sup>

#### **b. The Claimants’ Position**

228. The Claimants ask the Tribunal to dismiss this objection.<sup>278</sup> According to their last submission, the objection should be dismissed for either of the following alternative reasons: (i) it is not a matter of competence; (ii) it is intertwined with the merits, and all the necessary evidence is not before the Tribunal such that the Respondent has not discharged its burden of proof; or (iii) if the objection is a matter of competence and the Tribunal has sufficient evidence before it to decide it safely, then it should conclude that BSAM’s dispute arises directly out of its investment, *i.e.* its trademark rights.<sup>279</sup>

229. The Claimants contend that the Respondent’s objection is misconceived,<sup>280</sup> explaining that BSAM does not claim for the penalty that the Supreme Court ordered BSJ and BSLs to pay, and BSLs paid. Rather, the Claimants argue, BSAM claims because its intellectual property rights under the FIRESTONE and BRIDGESTONE Trademark Licenses have been “*diluted*” as a consequence of the Supreme Court decision,<sup>281</sup> and the decision “*has made it much more costly for BSAM to maintain its investment in Panama and other countries in the region.*”<sup>282</sup>

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<sup>275</sup> Resp. PHB Exp. Obj., ¶ 21.

<sup>276</sup> Tr. Day 4, 536:4-13 (Ms. Silverman).

<sup>277</sup> Resp. PHB Exp. Obj., ¶ 22.

<sup>278</sup> Cl. Rej. Exp. Obj., ¶ 45.

<sup>279</sup> Cl. PHB Exp. Obj., ¶ 3(a), 3(b), 3(c)(ii).

<sup>280</sup> Cl. Res. Exp. Obj., ¶ 136.

<sup>281</sup> Cl. Res. Exp. Obj., ¶ 134.

<sup>282</sup> Cl. Res. Exp. Obj., ¶ 11. *See also, id.*, ¶¶ 134, 136; Cl. PHB Exp. Obj., ¶ 39.

230. In this connection, the Claimants explain that the Supreme Court decision (i) may be followed in other countries, leading to reduction of trademark protections, sales and market share; (ii) may “*establish a precedent*” that it is “*likely*” to be followed within and outside of Panama; and (iii) made more similar and confusingly similar trademark applications “*likely*.”<sup>283</sup>
231. The Claimants explain that (i) because it is BSAM and its subsidiaries who license the FIRESTONE and BRIDGESTONE trademarks, they are who “*ultimately stand to substantially lose if the trademarks that are at the center of their investment are devalued*”;<sup>284</sup> and (ii) the amount of supplies that Bandag of Panama S.A. acquires from Bridgestone has decreased because the sales of retreads have decreased “*due in part*” to the weaker intellectual property protection in Panama resulting from the Supreme Court decision.<sup>285</sup>
232. Recalling that BSAM’s investment is the intellectual property rights in the FIRESTONE and BRIDGESTONE Trademark Licenses, and that “*only BSAM*” uses the trademarks in Panama, the Claimants submit that the majority of the loss is incurred by BSAM “*because the value of its assets is directly contingent on the value of the trademarks to which those assets relate*.”<sup>286</sup> If it is accepted that BSLs (and BSJ) suffered loss in royalties resulting from the Supreme Court decision, the Claimants argue, “*it is obvious*” that BSAM also suffered loss because those royalties depend on sales, manufacturing and use of the trademark.<sup>287</sup>
233. The Claimants submit that they have shown an “*immediate ‘cause and effect’*” between the Panama’s actions and the effect on BSAM’s investment,<sup>288</sup> even though in this preliminary expedited phase they “*cannot be expected to provide detailed evidence of the*

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<sup>283</sup> Cl. Res. Exp. Obj., ¶ 134 (referring to Request for Arbitration, ¶¶ 55-58). Initially, the Claimants also argued that there was a connecting factor in that payment of the damages imposed by the Supreme Court decision directly affected the ability of the “*U.S. Bridgestone entities*” to reinvest in their business. *Id.* The Rejoinder on Expedited Objections later clarified that the reference to “*U.S. Bridgestone entities*” was to BSLs. Cl. Res. Exp. Obj., ¶ 44.

<sup>284</sup> Cl. Res. Exp. Obj., ¶ 135.

<sup>285</sup> Cl. Res. Exp. Obj., ¶ 135.

<sup>286</sup> Cl. Res. Exp. Obj., ¶ 42.

<sup>287</sup> Cl. Res. Exp. Obj., ¶ 42.

<sup>288</sup> Cl. Res. Exp. Obj., ¶¶ 10, 42.



*loss that BSAM has suffered as a result.*”<sup>289</sup> In connection with their position on the evidentiary standard, the Claimants submit that their factual allegations are sufficient for purposes of this objection, given that the “*factual inquiry as to causation*” necessary to determine if those allegations are proven is not appropriate in this expedited phase.<sup>290</sup> They add that, in this phase the Claimants are not required to provide evidence of the loss suffered,<sup>291</sup> and that the Tribunal’s approach should be to “*assume that the Claimants have suffered such loss as set out in paragraphs 54 to 58 of the Request, and consider the Respondent’s objection in that light.*”<sup>292</sup>

234. The Claimants further contend that the Respondent conceded during the Hearing that for purposes of this objection it would assume that the causation arguments are correct. Accordingly, the Claimants argue, it is to be assumed also that BSAM has a dispute and the only remaining question is “*whether the dispute arises directly out of the investment.*”<sup>293</sup> Because BSAM’s investment is “*contingent on BSLS’s and BJS’s trademarks, it is also affected by the Supreme Court decision, and consequently its loss does arise directly out of its investment.*”<sup>294</sup>
235. The Claimants reject the contention that the dispute is necessarily indirect as BSAM’s investment is contingent on BSLS’s and BSJ’s trademarks in Panama. In their view, this conflates two points: while BSAM’s *investment* can only exist because of those trademarks, BSAM’s *dispute* arises directly out of its own investment as BSAM’s assets suffered loss because of the Supreme Court decision.<sup>295</sup>
236. Finally, the Claimants observe that the requirements in Article 25(1) of the ICSID Convention are not to be interpreted narrowly, and the measure does not have to be directed specifically towards BSAM’s investment.<sup>296</sup> All the Claimants are required to

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<sup>289</sup> Cl. Rej. Exp. Obj., ¶ 10.

<sup>290</sup> Cl. Rej. Exp. Obj., ¶ 26.

<sup>291</sup> Cl. Rej. Exp. Obj., ¶ 43.

<sup>292</sup> Cl. Rej. Exp. Obj., ¶ 26.

<sup>293</sup> Cl. PHB Exp. Obj., ¶ 40.

<sup>294</sup> Cl. PHB Exp. Obj., ¶ 41.

<sup>295</sup> Cl. PHB Exp. Obj., ¶ 42.

<sup>296</sup> Cl. PHB Exp. Obj., ¶ 43.

do at this stage is to establish a *prima facie* case that BSAM's investment has been adversely affected by the Supreme Court decision, which they argue has been done.<sup>297</sup>

## (2) The Tribunal's Analysis

237. The first issue that the Tribunal has to resolve that arises under this Objection is whether it is one that goes to competence. The Claimants submit that it does not. The Tribunal is in no doubt that it does, and that the burden of proving that BSAM has a dispute arising directly out of an investment falls on BSAM. Article 25 of the ICSID Convention lays down two requirements in relation to the jurisdiction of the Centre. The first is that there must be an investment. That is a requirement of fact. Its ultimate resolution depends not on what the Claimants allege but on the factual position as determined by the Tribunal on the evidence. The second requirement is that the dispute must arise directly out of the investment. Once the Tribunal has identified the investment no further findings of fact are required in order to determine whether or not the dispute arises directly out of it. The Tribunal has to identify the relevant dispute but not resolve it. It then has to consider the nexus of that dispute with BSAM's investment.
238. There appears to have been little discussion in previous cases as to the test to be applied when deciding whether a dispute arises directly out of an investment. Panama has referred the Tribunal to an unofficial English translation of a single paragraph from the decision in *Metalpar*:<sup>298</sup>

“95. In the opinion of the Tribunal, for the legal dispute to arise ‘directly’ out of the investment there must be an immediate ‘cause-and-effect’ relationship between the actions of the host State and the effects of such actions on the protected investments; one must be able to establish firsthand a causal link between the investment and the actions of the host State that produce the harm. This does not mean, however, that the measures taken by the State must be aimed specifically against the investment. It is sufficient that an immediate (as opposed to a remote) link can be established between the harm to the investment and the actions that cause it.”

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<sup>297</sup> Cl. PHB Exp. Obj., ¶ 43.

<sup>298</sup> **RLA-013**, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction (27 April 2006) [hereinafter, “*Metalpar*”], ¶ 95.

This seems to the Tribunal a sound and sensible test and it is happy to adopt it.

239. Panama does not challenge BSLS's contention that it has a dispute with Panama that arises directly out of its investment in Panama. Its investment is the FIRESTONE trademark registered in Panama. The dispute in BSLS's case is as to whether the judgment of the Panama Supreme Court has wrongfully inflicted a penalty on BSLS for taking lawful and reasonable steps to protect that investment. The penalty is the damages and costs awarded by the Supreme Court against BSLS and BSJ in the total sum of US\$5,431,000. BSLS seeks to recover that sum. The nexus between the action that is alleged to have caused harm to the investment and the alleged harm could hardly be closer.
240. Panama contrasts the position of BSLS with that of BSAM. BSAM was not a party to the proceedings that resulted in the judgment of the Supreme Court and had no award of damages or costs made against it. BSAM had not been party to the prior challenge to the registration by Muresa of the RIVERSTONE trademark that was the subject matter of the proceedings in the Supreme Court.
241. That contrast would be valid if BSLS's only claim was in respect of the judgment debt, but that is not the case. BSAM has made it plain that it makes no claim in relation to the judgment debt. That debt, however, is only part of the total of at least US\$16 million that BSLS and BSAM claim jointly. So far as BSAM is concerned, the issue is whether the dispute in relation to its claim arises directly from its investment, and the same issue arises in respect of the balance of BSLS's claim, although no specific challenge has been made to that at this stage.
242. It seems to the Tribunal that the two claims must stand or fall together. Each claims in respect of its interest in the FIRESTONE trademark, BSLS as the owner and BSAM as the licensee. Each was benefitting from the exploitation of the trademark. BSLS's interest in the trademark was restricted to the royalties that it was to receive from BSAM for the use of the trademark. BSAM's interest was in the fruits of the exploitation of the trademark. BSAM had relied upon BSLS to protect the trademark and thus to protect BSAM's interest in the trademark. As Ms. Williams explained, BSAM as licensee could

have joined with BSLS in opposing the registration of the RIVERSTONE trademark. Had it done so, it would no doubt also have been joined as a defendant in the proceedings that resulted in the Supreme Court's judgment.

243. The same reasoning applies in relation to the shared interests in the BRIDGESTONE trademark of BSJ and BSAM, albeit that BSJ, being a Japanese company, was not in a position to join in the present proceedings. The joinder of BSJ in the proceedings against Muresa was, in large measure, for the purpose of protecting BSAM's investment in relation to the BRIDGESTONE Trademark License.
244. What is the nature of the damage alleged by BSLS and BSAM to have been caused to their respective investments? The Tribunal has not found it easy to formulate this from their pleadings. It falls into two parts; damage sustained in Panama and damage sustained outside Panama.
245. The Tribunal's understanding of that part of the Claimants' case that relates to damage sustained in Panama is as follows. Any owner of a trademark, or a license to use a trademark, in Panama will be concerned, as a result of the precedent set by the Supreme Court, that steps reasonably taken to enforce it may result in a heavy liability in damages. The chilling effect of this makes the protection afforded by or in respect of a trademark in Panama more expensive to enforce, and the trademark less attractive and less valuable in consequence. This in its turn is likely to encourage the registration and use in Panama of trademarks that are confusingly similar to, *inter alia*, the FIRESTONE and BRIDGESTONE trademarks, thereby further diminishing the goodwill attaching to those brands.
246. Putting the Claimants' case at its simplest it is that an aberrant decision of the Supreme Court to award damages against BSJ and BSLS, for taking action designed to protect their investments and those of BSAM, has caused damage to the value of those investments. Panama has not accepted that the judgment of the Supreme Court has had the alleged effect, but for the purposes of this Objection it is enough that this is the subject of the dispute. In the Tribunal's view that dispute arises directly out of the investments of BSLS and BSAM.

247. What of the damage alleged to have been caused outside Panama? Here Objection No. 2 covers the same territory as Objection No. 5, which is made in respect of both Claimants, but on different grounds. The Tribunal considers both grounds when dealing with Objection No. 5. For the reasons there given, it finds that there is no “*immediate cause-and-effect relationship*” between the judgment given by the Supreme Court and the alleged effects outside Panama. On the contrary, the relationship is speculative and remote. For this reason, the Tribunal finds that the claims made by BSAM in relation to losses caused outside Panama fall outside its jurisdiction.
248. For the reasons given, the Tribunal dismisses Objection No. 2 insofar as it relates to BSAM’s disputed claim to have suffered damage within Panama but allows the Objection in relation to BSAM’s disputed claim to have suffered damage outside Panama.

## **VII. OBJECTIONS RELATING TO BSLS**

### **A. Third Objection: BSLS Is Not Entitled to the Benefits of Chapter 10 of the TPA**

#### **(1) The Parties’ Positions**

##### **a. The Respondent’s Position**

249. Relying on Article 10.12.2 of the TPA (denial of benefits provision), the Respondent argues that BSLS is not entitled to bring any claim under Chapter 10 of the TPA, as Panama denies the benefits of Chapter 10 to it.<sup>299</sup>
250. For Panama, the exercise of the denial of benefits provision “*has the effect of depriving the Tribunal of jurisdiction.*”<sup>300</sup> The Respondent explains that Chapter 10 of the TPA allows a TPA Party to deny an investor and its investments the benefits of both the substantive and the dispute settlement provisions of Chapter 10 in certain circumstances,<sup>301</sup> which are met in this case.

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<sup>299</sup> Resp. Exp. Obj., ¶¶ 28-29.

<sup>300</sup> Resp. Exp. Obj., ¶ 29.

<sup>301</sup> See Resp. PHB Exp. Obj., ¶ 26.

(i) The Substantive Requirements

251. Panama contends that the three substantive requirements for the exercise of the denial of benefits provision in Article 10.12.2 of the TPA are met here, because BSLS: (i) is an “enterprise” of the other TPA Party (the United States); (ii) is wholly owned by BSJ (a Japanese corporation); and (iii) does not have any “discernible operations” or “business activities” at all in the territory of the United States, let alone “substantial business activities.”<sup>302</sup> The Respondent notes that points (i) and (ii) are uncontested.<sup>303</sup>
252. With regard to the third aspect, Panama argues that there is no “bright line” standard for determining “substantial business activities” in a country, and that any number of factors may be relevant to the analysis, with the goal being to determine whether BSLS has “physical presence” in the United States, or if it is “more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities.”<sup>304</sup> The Respondent has further explained that among the range of factors considered by previous tribunals are: (i) existence of a physical office; (ii) number of employees working at the place of business; (iii) whether address, phone and fax are offered to third parties; (iv) whether the parent company is the source of capital; (v) location of annual meetings of board or shareholders; and (vi) existence of records of annual meetings.<sup>305</sup>
253. Panama rejects the contention that the magnitude of the activities is not important, and instead argues that the conclusion in *Pac Rim* that the level of activities is important is consistent with the ordinary meaning of the word “substantial.”<sup>306</sup> The Respondent has further argued that “‘substantial’ means ‘sizeable,’ and ‘business’ involves offering goods or services to unrelated parties.”<sup>307</sup> And the analysis of whether the activities are

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<sup>302</sup> Resp. Exp. Obj., ¶¶ 28, 30-31, 37.

<sup>303</sup> See Resp. PHB Exp. Obj., ¶ 26.

<sup>304</sup> Resp. Exp. Obj., ¶ 32; Resp. Reply Exp. Obj., ¶ 63. See also, Resp. PHB Exp. Obj., ¶ 27.

<sup>305</sup> Resp. Reply Exp. Obj., ¶ 64.

<sup>306</sup> Resp. Reply Exp. Obj., ¶ 63 (citing **RLA-017**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012) [hereinafter “*Pac Rim*, Jurisdiction”]).

<sup>307</sup> Resp. PHB Exp. Obj., ¶ 27.

substantial is to be done “*in context*”, according to Panama.<sup>308</sup> Further, for Panama, revenue generating is an essential element of the notion of business activities.<sup>309</sup>

254. The Respondent further submits that only substantial business activities of BSLS *itself* will suffice;<sup>310</sup> the activities must take place in the territory of the United States, and therefore, activities with no geographical location will not satisfy the requirement;<sup>311</sup> passive ownership and income generation are not sufficient, as made clear from the word “*activities*”;<sup>312</sup> and the relevant date for this analysis is the date of the Request for Arbitration (7 October 2016).<sup>313</sup>

255. To support the argument that BSLS has no “*substantial business activities*” in the United States, Panama averred in its Expedited Objections that:

- There is no indication that BSLS has *any* business activities in the United States in multiple databases consulted (such as, corporate directories, domestic and international litigation reporters, business news sources, trade journals and trademark registration databases).<sup>314</sup>
- As far as Panama can discern, BSLS is “*precisely the type of ‘shell company’*” excluded from protection under the TPA as: (i) BSLS does not appear to own any assets in the United States; (ii) has issued 1,000 shares with a par value of zero; (iii) does not appear in public documents describing the Bridgestone family corporate structure; (iv) was not mentioned in BSJ’s 2015 Annual Reports; and (v) has virtually no presence in public databases.<sup>315</sup>
- The document provided to show that BSLS had taken all the necessary actions to authorize the Request for Arbitration in this case was apparently signed and notarized in Japan.<sup>316</sup>
- BSLS’s business address in the United States is the same used by BSAM and other Bridgestone entities, and it is not clear whether BSLS has any employees of its own that work at this address.<sup>317</sup>

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<sup>308</sup> Tr. Day 4, 551:1-4 (Mr. Debevoise).

<sup>309</sup> Tr. Day 4, 545:14-16; 546:18-21 (Mr. Debevoise).

<sup>310</sup> Resp. Exp. Obj., ¶ 32; Resp. Reply Exp. Obj., ¶ 65; Resp. PHB Exp. Obj., ¶ 27.

<sup>311</sup> Resp. PHB Exp. Obj., ¶ 27.

<sup>312</sup> Resp. PHB Exp. Obj., ¶ 27.

<sup>313</sup> Resp. Exp. Obj., ¶ 32; Resp. Reply Exp. Obj., ¶ 66.

<sup>314</sup> Resp. Exp. Obj., ¶ 33.

<sup>315</sup> Resp. Exp. Obj., ¶ 34. *See also*, Resp. PHB Exp. Obj., ¶ 23.

<sup>316</sup> Resp. Exp. Obj., ¶ 35.

256. The Respondent has further observed that the evidence provided by the Claimants to support business activities post-dates the Request for Arbitration, and that in any event, that evidence further supports Panama's case.<sup>318</sup> According to Panama:

- Incorporation alone does not demonstrate any business activities, especially when the Claimants have admitted that all work associated with maintaining BSLS's corporate status is conducted by external counsel and corporate service firms.<sup>319</sup>
- The business address in Nashville provided as BSLS's official address is the headquarters of BSAM, which conducts all management matters for BSLS; BSLS does not have separate phone or suite; and BSLS does not appear to lease separate office space.<sup>320</sup>
- BSLS does not have any full-time employees.<sup>321</sup>
- BSLS has no letterhead, no product and no public visibility.<sup>322</sup>
- BSLS's board is formed by three Japanese citizens; it does not meet in the United States; it apparently holds conference calls in lieu of meetings; it does not keep minutes; and its resolutions are prepared by outside counsel.<sup>323</sup> Further, only one member is allegedly based in Nashville, and he states in a social network profile that he is employed by BSAM; BSLS's officers likewise appear to be BSAM's employees to whom BSLS's has contracted out work; and one of those officers concedes that he only spends 7-10% of his time working on BSLS's matters.<sup>324</sup>
- The evidence provided by the Claimants regarding BSLS's financial activities is problematic because: it gives no insight about the state of affairs at the time of the Request for Arbitration; the financial statements appear as internal spreadsheets and do not indicate who prepared them and for what purpose; the tax documents provided with the Response on Expedited Objections only attest that a return was filed, but do not show an actual tax return, and in any event paying taxes in the State of incorporation does not reveal the existence of substantial business activities;<sup>325</sup>

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<sup>317</sup> Resp. Exp. Obj., ¶ 36.

<sup>318</sup> Resp. Reply Exp. Obj., ¶ 66.

<sup>319</sup> Resp. Reply Exp. Obj., ¶ 67.

<sup>320</sup> Resp. Reply Exp. Obj., ¶ 68. *See also*, Resp. PHB Exp. Obj., ¶ 25, n. 85.

<sup>321</sup> Resp. Reply Exp. Obj., ¶ 68. *See also*, Resp. PHB Exp. Obj., ¶ 25, n. 86.

<sup>322</sup> Resp. PHB Exp. Obj., ¶ 25, nn. 87-89.

<sup>323</sup> Resp. Reply Exp. Obj., ¶ 69. *See also*, Resp. PHB Exp. Obj., ¶ 25, n. 90.

<sup>324</sup> Resp. Reply Exp. Obj., ¶¶ 69-70.

<sup>325</sup> Resp. Reply Exp. Obj., ¶ 71.



and the Claimants have made certain statements about BSLS's financial activities that are misleading.<sup>326</sup>

- The evidence shows that *all* of the activities associated with management of the FIRESTONE trademark are conducted by external entities, not by BSLS itself; and BSLS is subject to BSJ's supervision in this aspect.<sup>327</sup> And it is BSAM (not BSLS) who manages the contractors performing the work.<sup>328</sup>
- The licensing agreements provided in the Response on Expedited Objections range from 2001 to 2017, and thus "*most*" do not assist in establishing business activities on the relevant date; many are not revenue generating; and in any event, the mere existence of license agreements between BSLS and third parties alone is no evidence of substantial business activities.<sup>329</sup>
- The "*activities*" that BSLS claims to conduct (*i.e.* "*licensing*" and "*management*" of non-US trademarks) "*essentially take place in the ether*", need not be done from a certain location and appear not to be done from any particular location.<sup>330</sup>
- What BSLS does is "*sign pre-negotiated contracts, collect royalty payments and enter into retainer agreements with outside counsel*", which to the extent it can be considered an "*activity*", is neither "*substantial*" nor "*business*" activity in the territory of the United States.<sup>331</sup>
- Passive income is not an "*activity*", and the passive nature of BSLS's income is highlighted by its heavy-dependence on intra-company loans.<sup>332</sup>
- The tax filings, bank statements, board resolutions, retainer agreements, and law firm invoices that BSLS has been able to "*scrounge up*" simply show that BSLS is doing the "*bare minimum*" required of a U.S. incorporated company.<sup>333</sup>
- "*Japanese nationals do everything from the hiring of counsel and initiation of this arbitration, to the handling of finances.*"<sup>334</sup>

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<sup>326</sup> Resp. Reply Exp. Obj., ¶ 72.

<sup>327</sup> Resp. Reply Exp. Obj., ¶¶ 73-75.

<sup>328</sup> Tr. Day 4, 553:5-9 (Mr. Debevoise).

<sup>329</sup> Resp. Reply Exp. Obj., ¶ 76. Panama contends that the Claimants contradict themselves in arguing that these licenses are evidence of business activity in the United States, while at the same time arguing in connection with other objections that agreements of this nature are so tied to Panama that they amount to investments therein. *Id.*, ¶ 78.

<sup>330</sup> Resp. PHB Exp. Obj., ¶ 28.

<sup>331</sup> Resp. PHB Exp. Obj., ¶ 29.

<sup>332</sup> Tr. Day 4, 556: 4-18 (Mr. Debevoise).

<sup>333</sup> Resp. PHB Exp. Obj., ¶ 30.

<sup>334</sup> Resp. PHB Exp. Obj., ¶ 30.

- BSLS is only a passive holder of the FIRESTONE trademark outside of the United States, used by the Japanese parent for trademark licensing outside of the United States. It exists on paper, but the Claimants cannot point to substantial business activities.<sup>335</sup>

(ii) The Procedural Requirements

257. The Respondent further contends that, under Article 10.12.2 of the TPA, read in conjunction with Article 18.3.1 of the TPA, the only procedural requirement for the exercise of the denial of benefits is for the denying TPA Party to provide notice to the other TPA Party “*to the maximum extent possible*”,<sup>336</sup> which was done by letter to the United States dated 22 May 2017.<sup>337</sup> The Respondent argues that under the TPA, the State is *not* required to give advance notice to the claimant, nor it is required to carry out the denial of benefits before the arbitration proceeding begins.<sup>338</sup>
258. Panama rejects the contention that it was required to give notice to the United States “*as promptly as it could have done*” or “*as soon as possible*.”<sup>339</sup> It argues that: (i) the expression “*to the maximum extent possible*” “*plainly means that notice should be made before invoking the denial of benefits clause, unless it is not possible to do so*”;<sup>340</sup> (ii) as the TPA establishes no deadline for invoking the denial of benefits clause, it is improper to impose the deadlines suggested by the Claimants – *i.e.*, notice of intent or registration of the request for arbitration; and (iii) the only time limit for invoking the denial of benefits provision is that in Arbitration Rule 41 pursuant to which objections to

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<sup>335</sup> Resp. Reply Exp. Obj., ¶ 79. *See also*, Resp. PHB Exp. Obj., ¶ 23 (referring to Mr. Kingsbury testimony at the Hearing).

<sup>336</sup> Resp. Exp. Obj., ¶ 30; Resp. Reply Exp. Obj., ¶ 55. Panama contends that the consultations contemplated in Article 20.4 of the TPA are discretionary. Resp. Exp. Obj., n. 92.

<sup>337</sup> Resp. Exp. Obj., ¶ 31 (*citing* **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 (16 May 2017); and **R-014**, Proof of Delivery to United States State Department (22 May 2017)); Resp. Reply Exp. Obj., ¶ 55. Panama points out that the notice was given 25 days after the arbitration commenced, observing that under Arbitration Rule 6(1) the arbitration begins on the date the Tribunal is constituted. *Id.*, n. 220.

<sup>338</sup> Resp. Exp. Obj., ¶ 30; Resp. Reply Exp. Obj., ¶ 55.

<sup>339</sup> Resp. Reply Exp. Obj., ¶¶ 56-57.

<sup>340</sup> Resp. Reply Exp. Obj., ¶ 57.

competence shall be made no later than the expiry of the time limit fixed for the counter-memorial.<sup>341</sup>

259. Panama further dismisses the Claimants’ allegation that timing of the notice deprived the United States from making a “*non-disputing Party*” submission or to engage in consultations under Article 20.4, alleging that: (i) this is not an argument for the Claimants to make, but rather for the United States; (ii) the Claimants have not been prejudiced, and do not explain how consultations would work in their favour; and (iii) in any event, the timetable has allowed for both consultations and “*non-disputing Party*” submissions.<sup>342</sup>

(iii) Burden and Standard of Proof

260. Panama argues that the burden of proving a fact rests with the party asserting that fact, and accepts that “[i]n general [...] Panama would bear the burden of proving its positive objections (such as this one).”<sup>343</sup> However, the Respondent argues, in this specific situation, as Panama is required to prove a negative (*i.e.* that BSLS has no substantial business activities), the burden shifted back to the Claimants once the Respondent submitted “*cogent evidence*” that the denial of benefits provision applies, as it did.<sup>344</sup>
261. The Respondent denies that the appropriate standard is for the Tribunal to accept the Claimants’ factual assertions in the Request for Arbitration, arguing that this is not appropriate for factual issues on which the Tribunal’s jurisdiction depends.<sup>345</sup> Relying on *Pac Rim*, Panama contends that it is impermissible for the Tribunal to base its jurisdiction on assumed facts.<sup>346</sup>

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<sup>341</sup> Resp. Reply Exp. Obj., ¶ 57.

<sup>342</sup> Resp. Reply Exp. Obj., ¶ 58. In the Reply on Expedited Objections, Panama stated that the United States had “*consulted with Panama*” and that Panama’s understanding was that the United States would be consulting with the Claimants too. *Id.*, n. 234.

<sup>343</sup> Resp. Reply Exp. Obj., ¶ 61.

<sup>344</sup> Resp. Reply Exp. Obj., ¶ 61.

<sup>345</sup> Resp. Reply Exp. Obj., ¶ 62.

<sup>346</sup> Resp. Reply Exp. Obj., ¶ 62 (citing **RLA-017**, *Pac Rim*, Jurisdiction, ¶ 2.8).

**b. The Claimants' Position**

262. The Claimants ask the Tribunal to dismiss this objection.<sup>347</sup> In their last submission, they argue that the objection should be dismissed because BSLS has amply shown that it has “*substantial business activities*” in the United States.<sup>348</sup>

(i) The Notice Requirement

263. The Claimants argue that, to exercise the provision in Article 10.12 of the TPA, Panama was required to provide adequate and timely notice to the United States of its intent to deny benefits to BSLS, as required by Article 18.3 of the TPA, and to engage in consultations with the United States as required by Article 20.4 of the TPA,<sup>349</sup> both of which it failed to do.<sup>350</sup>

264. According to the Claimants, although Panama was required to give its notice to the United States “*to the maximum extent possible*”, that is, “*to do everything in its power to provide advance notice*”, it failed to give notice to the United States, “*as promptly as it could have done.*”<sup>351</sup> The Claimants point out that the notice was given on 22 May 2017, even though the Respondent knew about BSLS’s involvement in this dispute at least since the notice of intent of arbitration of 30 September 2015, or even if it wanted to wait until there was a request for arbitration, it could have sent the notice once the Request for Arbitration was registered on 28 October 2016.<sup>352</sup>

265. This delay effectively deprived the United States of the opportunity to engage in consultations on this issue before it fell to be considered by the Tribunal, because the

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<sup>347</sup> Cl. Res. Exp. Obj., ¶ 163.

<sup>348</sup> Cl. PHB Exp. Obj., ¶ 3(c)(iii). As noted *supra*, with respect to this objection, the Claimants observe that, although “*it was agreed that the Tribunal would decide the denial of benefits objection*”, “*in any event, it is worth noting that this is strictly not a competence issue.*” *Id.*, ¶ 11. See also, Tr. Day 1, 38:18-21 (Mr. Williams).

<sup>349</sup> Cl. Res. Exp. Obj., ¶ 138 (a)

<sup>350</sup> Cl. Res. Exp. Obj., ¶¶ 13, 139. See also, *id.*, ¶ 163.

<sup>351</sup> Cl. Res. Exp. Obj., ¶ 141.

<sup>352</sup> Cl. Res. Exp. Obj., ¶ 141.

notice was given only one week before the filing of the Expedited Objections and the Respondent has elected to use an expedited procedure.<sup>353</sup>

(ii) The Evidentiary Standard

266. In their Response on Expedited Objections, the Claimants argued that (i) although limited by reason of the Claimants having learned of this objection only upon receipt of the Expedited Objections, “*there are sufficient facts*” in the Request for Arbitration and their supplementary 25 October 2016 letter to allow the Tribunal to dismiss this objection; (ii) the Tribunal is required to assume these facts as true, and the Respondent is not entitled to introduce new facts for determination by the Tribunal; (iii) as the Tribunal is not permitted to consider the facts in dispute asserted by the Respondent pursuant to the regime in Article 10.20.5 of the TPA, if the Tribunal does not consider that the facts put forward by the Claimants with the Request and October letter allow it to dispose of the objection, the Tribunal “*is not able*” to determine the objection at this stage, because to do so it would need to consider additional factual assertions made by the Respondent, which is not allowed. However, in light of the Respondent’s position on the issue of the evidentiary standard under Article 10.20.5, the Claimants provided further evidence showing that BSLS has substantial business activities in the United States,<sup>354</sup> discussed *infra*, at paragraph 279.

267. In the Rejoinder on Expedited Objections, the Claimants invited the Tribunal to dismiss the objection “*outright*” on the basis that the Respondent has not put forward “*cogent evidence*” that the denial of benefits provision applied.<sup>355</sup> They went on to argue, that if the Tribunal decided not to take that approach, it had three alternative courses to dismiss the objection:<sup>356</sup>

- *First*, to take as true the Claimants’ pleaded facts as to BSLS’s business activities in the Request for Arbitration and October 2016 letter and refuse to consider the disputed facts alleged by the Respondent.

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<sup>353</sup> Cl. Res. Exp. Obj., ¶ 142.

<sup>354</sup> Cl. Res. Exp. Obj., ¶¶ 14; 146-148.

<sup>355</sup> Cl. Rej. Exp. Obj., ¶¶ 11, 47.

<sup>356</sup> Cl. Rej. Exp. Obj., ¶ 12.

- *Second*, to consider the evidence adduced by both sides mindful of the limited opportunity the Claimants have had to adduce evidence given the expedited nature of the proceeding, and dismiss the objection as not being capable of being resolved in an expedited basis.
- *Third*, to review the evidence adduced so far, and conclude that the Claimants have provided sufficient evidence to demonstrate BSLS’s substantial business activities.

268. In connection with the *second* alternative, the Rejoinder on Expedited Objections indicated that had the Claimants had more time, they would have been able to provide more evidence. Thus, the Claimants added, if the Tribunal was minded to consider the evidence, and concluded that it was not sufficient to establish that BSLS has substantial business activities in the United States, it could not “*thereby safely conclude that BSLS fails to satisfy that standard.*”<sup>357</sup> They also argued that if the Tribunal not minded to dismiss this objection on the ground that the Respondent has failed to put forward sufficient evidence to make the objection, the Tribunal should dismiss it “*on the basis of the evidence, while bearing in mind that the Claimants have not had a full opportunity to put forward all the evidence that they would like to [...] due to the compressed timetable required by the Respondent’s expedited process.*”<sup>358</sup>

269. Notwithstanding the foregoing, in the Post-Hearing Brief the Claimants acknowledge that “*it was agreed that the Tribunal would decide the denial of benefits objection.*”<sup>359</sup>

(iii) Substantial Business Activities

270. The Claimants do no dispute that BSLS is an entity incorporated in Delaware, and that it is wholly-owned by BSJ, a Japanese incorporated entity.<sup>360</sup> However, they submit that this alone is not sufficient to allow the denial of benefits, as Panama cannot prove that BSLS lacks substantial business activities in the United States.<sup>361</sup>

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<sup>357</sup> Cl. Rej. Exp. Obj., ¶ 25.

<sup>358</sup> Cl. Rej. Exp. Obj., ¶ 60.

<sup>359</sup> Cl. PHB Exp. Obj., ¶ 11. As recorded in Procedural Order No. 3 “*as agreed in the course of the Pre-Hearing Call, the denial of benefits issue will be definitively heard at the Hearing on the basis of the evidence that relates to that issue, [...].*” Procedural Order No. 3, ¶ 36.

<sup>360</sup> Cl. Res. Exp. Obj., ¶¶ 139, 143.

<sup>361</sup> Cl. Res. Exp. Obj., ¶ 144.

271. The Claimants agree that there is no “*bright line standard*” for determining substantial business activities, but:

- Submit that the decision in *Pac Rim* serves as a “*useful benchmark*”, in that: *first*, it found that the claimant 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*”; and *second*, referred to evidence showing that the claimant (i) did not have employees, (ii) did not lease office space, (iii) only held assets, (iv) did not have a bank account, (v) did not have a board of directors.<sup>362</sup>
- Refer to the decision *AMTO* (i) holding that substantial means “*of substance and not merely of form*”, it “*does not mean ‘large’*” and “*the materiality not the magnitude [...] is the decisive question*”; and (ii) concluding that the requirement was met because the claimant conducted activities from premises in the relevant country, employed a “*a small but permanent staff*”, paid taxes, held a bank account and rented office space in that country.<sup>363</sup>

272. Further, while not disputing the contention that “*substantial*” means “*of ample or considerable amount or size, or sizeable*”, the Claimants argue that the Respondent has not contributed to clarifying with authority what this means in relation to an entity.<sup>364</sup> The Claimants submit that annual revenue exceeding US\$ 5 million (as BSLS’s) is substantial.<sup>365</sup>

273. The Claimants agree that the activities of the wider Bridgestone Group cannot be attributed to BSLS in the analysis of its activities for purposes of this objection, but dispute the notion that this should then lead to disregarding the activities of external contractors (for example, legal counsel), when these services are engaged and paid by BSLS.<sup>366</sup> The Claimants further clarify that they are not asking the Tribunal to attribute

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<sup>362</sup> Cl. Res. Exp. Obj., ¶ 150 (referring to **CLA-018**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012) [hereinafter, “*Pac Rim*, Jurisdiction”]).

<sup>363</sup> Cl. Res. Exp. Obj., ¶ 151 (referring to **CLA-013**, *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Award (26 March 2008) [hereinafter, “*AMTO*”]).

<sup>364</sup> Cl. Res. Exp. Obj., ¶ 49.

<sup>365</sup> Cl. Res. Exp. Obj., ¶ 49.

<sup>366</sup> Cl. Res. Exp. Obj., ¶ 50.

activities of other group companies to BSLS, but simply to understand the significant role of BSLS in the corporate structure.<sup>367</sup>

274. According to the Claimants, the U.S. Second Submission makes clear that the “*substantial business activities*” threshold is not high, when it observes that “*shell companies*” could be subject to the denial, but not “*firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.*”<sup>368</sup>
275. The Claimants refute Panama’s allegation at the Hearing that the test for “*substantial*” is necessarily subjective, arguing that it is unsupported by authority and it contradicts Panama’s other argument that the activities of other companies of the group cannot be taken into account.<sup>369</sup>
276. The Claimants further reject the Respondent’s contention at the Hearing that the term “*business*” activities refers to activities linked to buying or selling goods or services, and to dealing with third parties (rather than intra-group activities).<sup>370</sup> According to the Claimants, that is contrary to the plain English meaning of the words, and in fact, the word “*activities*” in the term “*business activities*” broadens the scope, as it refers to “*activities connected with business.*” Even if not all of BSLS’s activities involve buying or selling goods or services to third parties, the Claimants argue, they are certainly connected with that business as they enable other companies to sell goods to third parties.<sup>371</sup> And in any event, even if these narrow tests were accepted (*quod non*), BSLS meets them as explained further *infra* paragraph 280.
277. Arguing that Panama has the burden of establishing that BSLS has no substantial business activities in the United States, the Claimants deny that the standard is whether BSLS shows in the selected databases searched by the Respondent, or the volume of

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<sup>367</sup> Cl. PHB Exp. Obj., ¶ 52.

<sup>368</sup> Cl. PHB Exp. Obj., ¶ 46.

<sup>369</sup> Cl. PHB Exp. Obj., ¶ 47.

<sup>370</sup> Cl. PHB Exp. Obj., ¶¶ 49, 51.

<sup>371</sup> Cl. PHB Exp. Obj., ¶ 49.



BSLS's activities compared to BSAM's.<sup>372</sup> According to the Claimants, the Respondent has failed to demonstrate that BSLS lacks substantial business activities.<sup>373</sup>

278. Referring to the first alternative course of action for the Tribunal discussed *supra*, paragraph 267, in the Response on Expedited Objections, the Claimants submit that the following facts regarding BSLS's business activities in the United States were asserted in the Request for Arbitration and letter of October 2016, and should be assumed as true:

- BSLS is a U.S. incorporated company, and the incorporation documents show that it has a board of directors, it has been duly constituted under the laws of the State of Delaware, and has a physical location in the United States.<sup>374</sup>
- The FIRESTONE Trademark License between BSLS and BSAM is governed by U.S. law, and thus it demonstrates that BSLS is engaged in business activities in the United States, as it enters into contracts such as this one, which also includes a provision requiring that contractual notices be delivered to BSLS at its address in the United States.<sup>375</sup>

279. And, in connection with the third alternative course of action for the Tribunal discussed *supra*, paragraph 267, the Claimants assert that BSLS “*easily*” meets the “*substantial business activities*” standard because:<sup>376</sup>

- It has a Board of Directors, who pass resolutions, are empowered to act for the company, meets regularly by phone, and has a member located in the United States.<sup>377</sup>
- It owns intellectual property assets in foreign jurisdictions, administers these assets from the United States applying for registrations, monitoring the markets and protecting the trademarks.<sup>378</sup>
- It has officers based in the United States, who perform specific functions for BSLS, including an Assistant Secretary.<sup>379</sup>

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<sup>372</sup> Cl. Res. Exp. Obj., ¶ 153.

<sup>373</sup> Cl. Res. Exp. Obj., ¶ 163.

<sup>374</sup> Cl. Res. Exp. Obj., ¶ 145(a) (referring to **C-004**, Certificates of Incorporation for BSLS and BSAM).

<sup>375</sup> Cl. Res. Exp. Obj., ¶ 145(b) (referring to **C-048**, FIRESTONE Trademark License).

<sup>376</sup> Cl. Res. Exp. Obj., ¶¶ 153, 162. *See also*, **CD-002**, Chart on BSLS's Business Activities in the United States (4 September 2017).

<sup>377</sup> Cl. Res. Exp. Obj., ¶¶ 155, 162(1).

<sup>378</sup> Cl. Res. Exp. Obj., ¶¶ 154, 162(2).

<sup>379</sup> Cl. Res. Exp. Obj., ¶¶ 157, 162(3).

- It does the necessary legal work itself “*thorough Bridgestone personnel*”, who while not officially employed by BSLS are required to spend certain portion of their time on BSLS business.<sup>380</sup>
- It currently engages external counsel including various U.S. law firms, to deal with intellectual property matters and corporate matters.<sup>381</sup>
- It enters into contracts (license agreements and product placement agreements) with foreign and local companies, which are governed by U.S. law, earning royalties from some of those contracts.<sup>382</sup>
- It holds a U.S. bank account into which royalties are paid, and out of which it pays expenses including legal fees.<sup>383</sup>
- It pays taxes in the United States.<sup>384</sup>
- It has an office in Nashville and pays a handling fee to BSAM for its shared services.<sup>385</sup>
- It has been located since its inception in the United States, performing the same function.<sup>386</sup>
- Profits generated by BSLS are reinvested by the company into the FIRESTONE IP portfolio in the form of brand enhancement initiatives through initiatives with Bridgestone Brands LLC.<sup>387</sup>

280. In response to Panama’s assertions regarding the Claimants’ evidence of substantial business activities, in the Rejoinder on Expedited Objections and in the Post-Hearing Brief the Claimants argue that:

- It is not problematic that BSLS’s address is the same as BSAM’s. It is a large office in which various Bridgestone companies are located; an address and number are provided to third parties; and while office space is not formally leased by BSLS a

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<sup>380</sup> Cl. Res. Exp. Obj., ¶ 162(4).

<sup>381</sup> Cl. Res. Exp. Obj., ¶¶ 157-158, 162(5).

<sup>382</sup> Cl. Res. Exp. Obj., ¶¶ 156, 162(6).

<sup>383</sup> Cl. Res. Exp. Obj., ¶¶ 156, 159, 162(7).

<sup>384</sup> Cl. Res. Exp. Obj., ¶¶ 160, 162(8).

<sup>385</sup> Cl. Res. Exp. Obj., ¶¶ 159, 162(9).

<sup>386</sup> Cl. Res. Exp. Obj., ¶ 162(10).

<sup>387</sup> See **CD-002**, Chart on BSLS’s Business Activities in the United States (4 September 2017) (*citing* Kingsbury First WS, ¶ 20, and **C-097**, Firestone Global Brand Position Funding Proposal).

board member and officer work at this address, and hard copy documents are stored there and in another location in Tennessee.<sup>388</sup>

- The board of directors holds conference calls rather than in-person meetings because two directors are in Japan and one in Nashville; and the two officers communicate regularly with the board.<sup>389</sup>
- Several people are engaged to work part-time for BSLS, one spending 7-10% of his time, the other 30% and a third one spends “*some time*” working for BSLS.<sup>390</sup>
- The bank statements for the October 2016 period and relevant tax forms for years 2013-2015 are provided with the Rejoinder, and the tax forms show substantial tax liability, income, assets and liabilities of BSLS.<sup>391</sup> They further provide insight into the relationship between BSJ and BSLS, including a loan for US\$ 31 million in the process of being repaid, showing that BSLS is not just an entity for BSJ to pass funds.<sup>392</sup>
- There is no reason to disregard the activities on trademark management carried out by external legal counsel retained, instructed and paid by BSLS. The situation is similar to paying an employee to do the work.<sup>393</sup> And internal records of invoices paid to external counsel since January 2015 are attached to the Rejoinder.<sup>394</sup>
- As distinguished from the Respondent’s allegations regarding “*shell companies*”, legal counsel and accountants are not just hired to do corporate and tax filings, but rather they do trademark work and are paid around US\$600,000 a year.<sup>395</sup>
- While some of BSLS’s licensing agreements are not revenue generating, they have material value in the way of product advertisement.<sup>396</sup>
- The licensing agreements generate revenue exceeding US\$ 5 million for BSLS, which is substantial.<sup>397</sup> And contrary to the Respondent’s contention, this is not passive holding of licensing agreements because: the agreements are negotiated, signed, renegotiated, discussed with board and officers; they generate income; BSLS

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<sup>388</sup> Cl. Rej. Exp. Obj., ¶ 51.

<sup>389</sup> Cl. Rej. Exp. Obj., ¶ 52.

<sup>390</sup> Cl. Rej. Exp. Obj., ¶ 53.

<sup>391</sup> Cl. Rej. Exp. Obj., ¶ 54.

<sup>392</sup> Cl. Rej. Exp. Obj., ¶ 54.

<sup>393</sup> Cl. Rej. Exp. Obj., ¶ 55.

<sup>394</sup> Cl. Rej. Exp. Obj., ¶ 56.

<sup>395</sup> Cl. PHB Exp. Obj., ¶ 48.

<sup>396</sup> Cl. Rej. Exp. Obj., ¶ 57.

<sup>397</sup> Cl. Rej. Exp. Obj., ¶ 58.

pays lawyers to draft them; disputes arising out of these agreements are litigated; and BSLs generates revenue deriving from those agreements.<sup>398</sup>

- The suggested contradiction between putting forward these license agreements (including the FIRESTONE Trademark License) as evidence of activities in the United States, and the argument that it amounts to an investment in Panama is confused and confusing. It fails to appreciate that the agreement grants rights to two parties: for the licensor (BSLS) it generates revenue in the United States; and for the licensee (BSAM) it provides intellectual property rights in various jurisdictions, including Panama. The other agreements serve to demonstrate that BSLs as the licensor has business activities in the United States, where BSLs is situated.<sup>399</sup>
- Even the narrow test articulated by the Respondent at the Hearing discussed *supra*, paragraph 276 is met because: (i) through license agreements BSLs grants the right to use the FIRESTONE trademark and receives payment therefor, and (ii) disregarding licenses to other Bridgestone companies and concluding that BSLs is licensing to itself would ignore corporate identity and reality.<sup>400</sup>

281. Finally, according to the Claimants, BSLs has a “*real and continuous link with the country where [it is] established*”, a test mentioned in the U.S. Second Submission. The Claimants observe that BSLs’s predecessor was established in the United States in 1900, and after the acquisition of the FIRESTONE Group by BSJ in 1998, the decision was made to continue to run the brand from the United States, maintaining work relationships with U.S. trademark lawyers. The trademarks were previously held by BSAM, and BSLs purchased them from it in 2001 taking a US\$31 million loan, and immediately licensed them back.<sup>401</sup>

## **(2) The U.S. Submissions**

282. The United States observes that Article 10.12.2 of the TPA allows the TPA Parties to deny the benefits of Chapter 10 under certain circumstances specified in that provision. It describes the two substantial requirements as follows: that the enterprise (i) must have no substantial business activities in the territory of the non-denying TPA Party; and (ii)

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<sup>398</sup> Cl. Rej. Exp. Obj., ¶ 58.

<sup>399</sup> Cl. Rej. Exp. Obj., ¶ 59.

<sup>400</sup> Cl. PHB Exp. Obj., ¶ 50.

<sup>401</sup> Cl. PHB Exp. Obj., ¶ 53.

must be owned or controlled by persons of a non-TPA Party or of the denying TPA Party.<sup>402</sup>

283. With regard to the term “*substantial business activities*”, the United States explains that although its long practice is to omit a precise definition so that the existence of such activities is “*evaluated on case-by-case basis*”, for example the United States has indicated in its Statement of Administrative Action on the NAFTA that “*shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.*”<sup>403</sup>
284. The United States further submits that Article 10.12.2 does not impose a timing requirement for invoking the provision, nor does it preclude its invocation “*at any appropriate time, including as part of jurisdictional objection (expedited or otherwise) after a claim has been submitted to arbitration [...]*”<sup>404</sup>
285. Finally, referring to Article 20.4.1 of the TPA, the United States notes that when a TPA Party seeks to deny the benefits of Chapter 10, it *may* but it is not required to request consultations, which are discretionary. According to the United States, the TPA provides no basis to draw any inferences from a TPA Party’s decision not to engage in consultations.<sup>405</sup>

### **(3) The Tribunal’s Analysis**

286. Article 10.12 of the TPA, under the heading “*Denial of Benefits*”, in so far as material provides:

“2. [...] a [TPA] Party may deny the benefits of this Chapter to an investor of the other [TPA] Party that is an enterprise of such other [TPA] Party and to investments of that investor if the enterprise has *no substantial business activities* in the territory of the other

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<sup>402</sup> U.S. First Sub., ¶ 18.

<sup>403</sup> U.S. Second Sub., ¶ 2.

<sup>404</sup> U.S. First Sub., ¶ 18. *See also, id.*, ¶¶ 19-21.

<sup>405</sup> U.S. First Sub., ¶¶ 22-23.

[TPA] Party, and persons of a non-[TPA] Party, or of the denying [TPA] Party, own or control the enterprise.”<sup>406</sup>

287. Panama has invoked this provision and purported to deny the benefits to BSLS. At one time BSLS contended that Panama had failed to comply with temporal obligations that were a condition precedent to the denial of benefits, but that challenge has not been pursued, wisely in the view of the Tribunal. It is common ground that BSAM is owned by a “*person of a non-Party*”, namely BSJ. The only issue that arises in relation to this Objection is whether BSLS has “*no substantial business activities in the territory of [the United States].*”
288. Two initial issues arise in relation to this Objection. The first is whether or not it is an objection that goes to competence. Panama submits that it is; the Claimants submit that it is not. The Tribunal is satisfied that it is. This is because one of the benefits of Chapter 10 is the right to arbitrate. That right is subject to the condition subsequent that it is not removed by a valid denial of benefits.
289. The other preliminary issue is which Party to this proceeding bears the burden of proof. The Tribunal considers that the overall burden is on Panama as the Party asserting an entitlement to deny benefits. As, however, Panama has to prove a negative in relation to matters that fall essentially within the knowledge of the Claimants, the evidential burden is readily shifted. In this case, as the Tribunal anticipated, the burden of proof is immaterial as there is ample material to enable the Tribunal to reach its decision. That decision is final and has to be reached on the evidence.
290. In a helpful Supplemental Written Submission the United States notes:

“This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of ‘free rider’ investors, *i.e.*, third party entities that may only as a matter of formality be entitled to the benefits of a particular agreement. While it has long been U.S. practice to omit a precise definition of the term ‘substantial business activities’ in order that the existence of such activities may be evaluated on a case-by-case basis, the United

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<sup>406</sup> C-003/C-117, TPA, Art. 10.12.2 (emphasis added).

States has indicated in, for example, its Statement of Administrative Action on the NAFTA that ‘shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established.’”<sup>407</sup>

291. The Tribunal is in no doubt that when the TPA was agreed the object and purpose of including a denial of benefits provision, as explained in this Submission, was notorious and, thus, in accordance with Article 31 of the Vienna Convention the Tribunal can properly have regard to this.
292. The facts that follow are derived from the evidence of Mr. Kingsbury, who gave two witness statements and was tendered for cross-examination at the Hearing.
293. BSLs was incorporated as a wholly owned subsidiary of BSJ under the laws of the State of Delaware on 10 September 2001. Its registered address is the same as that of BSAM in Nashville Tennessee.<sup>408</sup> BSAM provides corporate services for the Bridgestone Group from that address. It has not been suggested that BSAM does not perform substantial business activities in the U.S. Some of those activities consist of providing services for BSLs. Thus, for instance, Mr. Kingsbury himself, while employed by BSAM, provided intellectual property related legal services to BSLs under a support services agreement between the two companies for about 5 years prior to November 2014, when he became Assistant Secretary for BSLs in addition to his primary role as Chief Counsel for Intellectual Property for BSAM.<sup>409</sup> Mr. Kingsbury now spends 7% to 10% of his time working for BSLs.<sup>410</sup>
294. The incorporation of BSLs formed part of the reorganization of that part of the group's activities that related to FIRESTONE tires – tires sold bearing the FIRESTONE mark. This reflects the fact that when BSJ took over the Firestone Group the latter appears to have continued, at least to some extent, to be managed separately from the business

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<sup>407</sup> U.S. Second Sub., ¶ 2.

<sup>408</sup> Kingsbury First WS, ¶ 3.

<sup>409</sup> Kingsbury First WS, ¶ 2.

<sup>410</sup> Kingsbury First WS, ¶ 9.

relating to BRIDGESTONE tires, with corporate services being provided by companies based in the United States.

295. BSLS's primary role was concerned with the FIRESTONE trademarks.<sup>411</sup> Thus, after the company had been incorporated, all the FIRESTONE trademarks were assigned to BSLS, which received a loan from BSJ of US\$ 31 million.<sup>412</sup> The Tribunal was informed by counsel that this was used to pay for the trademarks and this would seem to be the obvious inference as there was no evidence of any other activity carried on by BSLS that would explain the need for such a large sum. BSLS then licensed the use of the trademarks to BSAM, as already described.
296. Under the licenses BSLS is entitled to royalties. These are paid into BSLS' bank account with JP Morgan Chase Bank in San Antonio, Texas. Between 2014 and 2016 these generated over US\$ 18 million.<sup>413</sup> Taxes were paid on these, with the filings being managed internally at Nashville.<sup>414</sup> After taxes and expenses BSLS generated profits of US\$2,834,924, some of which was spent on brand enhancement initiatives.<sup>415</sup>
297. Between 2010 and 2013 Mr. Kingsbury spent 20% of his time working for BSLS.<sup>416</sup> His work included helping to administer trademark registrations, trademark renewals and serving as the liaison between BSLS and service providers retained by BSLS,<sup>417</sup> for most of the work of BSLS was contracted out to professionals working within the United States.
298. An important part of BSLS's work consisted of protecting the FIRESTONE trademark from infringement and confusingly similar marks in foreign jurisdictions – as evidenced by this case. Before the reorganization in 2001, the FIRESTONE international trademark portfolio was owned by the Firestone Tire and Rubber Company and was managed by a

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<sup>411</sup> Kingsbury First WS, ¶¶ 8-9, 14.

<sup>412</sup> Tr. Day 3, 461:3-7 (Mr. Kingsbury); Tr. Day 4, 623:1-5 (Mr. Williams); Cl. PHB Exp. Obj., ¶ 53.

<sup>413</sup> Kingsbury First WS, ¶ 17.

<sup>414</sup> Kingsbury First WS, ¶ 18.

<sup>415</sup> Kingsbury First WS, ¶ 20.

<sup>416</sup> Kingsbury First WS, ¶ 10.

<sup>417</sup> Kingsbury First WS, ¶ 10.



New York law firm that specialized in international property work, called Ladas & Parry.<sup>418</sup> BSLs continued to employ this firm to manage the protection of the FIRESTONE trademark in foreign jurisdictions.<sup>419</sup>

299. The supervision of this work was done at Akron, Ohio, between 2010 up to 2013 by Mr. Kingsbury and after 2013 by an intellectual property attorney named Mallory Smith, hired from the Law Firm Emerson Thompson Becket, who works three days a week for BSLs.<sup>420</sup>
300. Apart from licensing the use of the FIRESTONE trademark on tires, BSLs conducted quite a significant business licensing the use of the trademark on games, toys and other similar merchandise.<sup>421</sup> Where royalties were payable, and sometimes none were imposed, the amounts involved were not great. The interest in this business was the publicity that it gave to the FIRESTONE brand. But quite a lot of activity was involved and the Tribunal does not accept a submission made by Panama that business activities will not be substantial unless they are money-making.
301. Panama submitted in its Post Hearing Brief<sup>422</sup> that much of this evidence demonstrated that BSLs had no real presence in the United States. It had no offices, no full-time employees, no letterhead, no product, no public visibility and three Japanese directors, only one of whom lived in the United States and which met by internet. It was serviced by employees of BSAM. Its activities were all farmed out to contractors, some inside the United States and some outside it. Most activities could have been carried out anywhere. *“The only reason why a U.S.-incorporated entity sits at the centre of the matrix (between Bridgestone Corporation and all of these contractors) is because that is how things worked when Bridgestone Corporation took over Firestone.”*<sup>423</sup>

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<sup>418</sup> Kingsbury First WS, ¶ 11.

<sup>419</sup> Kingsbury First WS, ¶¶ 11-12.

<sup>420</sup> Kingsbury First WS, ¶¶ 9-10.

<sup>421</sup> Kingsbury First WS, ¶¶ 14-16.

<sup>422</sup> Resp. PHB Exp. Obj., ¶¶ 25-30.

<sup>423</sup> Resp. PHB Exp. Obj., ¶ 28.

302. The Tribunal agrees with that last comment, which in its view is the nail in the coffin of Objection No. 3. As the United States said at the end of the U.S. Second Written Submission, the TPA’s benefits should not be denied to “*firms that [...] have a real and continuous link with, the country where they are established.*”<sup>424</sup> Whether “*substantial activities*” mean “*activities of substance*” or “*significant activities*”, and different tribunals have expressed different views on this question, BSLS carried out such activities in the United States. They had been a significant part of the business activities of the American Firestone Group, with its headquarters in the United States, before it was taken over by BSJ and continued to be after the takeover. Some of the activities were carried out with assistance from the U.S. based sister company BSAM. The nature of many of the activities was such that they were contracted out to specialist lawyers, as they had been before BSLS existed, but this was mostly done within the United States. It is true that BSLS’s activities were overseen by its Japanese parent, and no doubt decisions of principle were taken in Japan. But that is a natural feature of the relationship between a parent company and its subsidiary. It is not incompatible with the subsidiary carrying on substantial business activities. The Tribunal is satisfied that BSLS has and had substantial business activities within the United States and dismisses Objection No. 3.

**B. Fourth Objection: BSLS’s Claims Amount to an Abuse of Process**

**(1) The Parties’ Positions**

**a. The Respondent’s Position**

303. The Respondent argues that the Tribunal lacks jurisdiction over BSLS’s claims because “[BSLS] *committed an abuse of process: it attempted to manipulate the nationality of a claim after the dispute had already materialized*”, to create a jurisdictional basis when none existed.<sup>425</sup> For the Respondent, the abuse occurred when BSLS paid the damages

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<sup>424</sup> U.S. Second Sub., ¶ 2.

<sup>425</sup> Resp. Exp. Obj., ¶¶ 42, 43.

awarded by the Supreme Court – which the Claimants argue occurred on 19 August 2016<sup>426</sup> – after the present dispute had already arisen.<sup>427</sup>

304. In the Reply on Expedited Objections, the Respondent submits in slightly different terms that if the Tribunal finds that “*the Bridgestone group of companies took steps after the present dispute was foreseeable to manufacture jurisdiction [...] the claims by [BSLS] automatically would constitute an abuse of process, and would need to be dismissed.*”<sup>428</sup> This bars BSLS’s claims even if the technical standards for jurisdiction under the TPA are met.<sup>429</sup>
305. Discussing the standard for an abuse of process objection at the Hearing, the Respondent further explained relying on *Phillip Morris v. Australia*, that: (i) the test for this objection is an objective one, and accordingly, there is no requirement to show bad faith, nor does the Tribunal need to find the motive of the abusing party; and (ii) in this case the abuse “*is seen in the fact that an investor whose claim is not protected by an investment treaty takes action in such a fashion as to ensure that its claim falls within the scope of protection of a treaty in view of a specific foreseeable or, in this case, actual dispute.*”<sup>430</sup>
306. To support its allegation of abuse, the Respondent points out that it is uncontested that the dispute arose some time in 2015.<sup>431</sup> It also notes that both BSLS and BSJ had been held jointly and severally liable by the Supreme Court in May 2014.<sup>432</sup> However, Panama argues, in 2015 and most of 2016 there was not clear jurisdictional path available for the claim because BSAM (a non-party to the domestic proceeding) had no “*investment*” in Panama, BSJ did not have investment treaty protection as it is a Japanese entity, and BSLS needed to show that it had “*incurred loss or damage*” in order to file a claim under the TPA, which it could not do as the amount ordered by the Supreme Court had not been

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<sup>426</sup> Resp. Exp. Obj., ¶ 42 (referring to the Request for Arbitration). The Respondent has taken issue with the 19 August 2016 letter the Claimants initially presented as evidence of payment, arguing that it only indicates that BSJ and BSLS “*will proceed*” to make the payment. Resp. Reply Exp. Obj., ¶ 86.

<sup>427</sup> Resp. Exp. Obj., ¶ 39.

<sup>428</sup> Resp. Reply Exp. Obj., ¶ 80.

<sup>429</sup> Resp. Reply Exp. Obj., ¶ 81.

<sup>430</sup> Tr. Day 4, 564:17-565:22 (Ms. Gehring-Flores)

<sup>431</sup> Resp. Exp. Obj., ¶ 39; Resp. Reply Exp. Obj., ¶ 82.

<sup>432</sup> Resp. Exp. Obj., ¶ 39.

paid.<sup>433</sup> Had BSJ made the payment, Panama argues, BSLS could not have styled it as “*loss or damage*”, and no Bridgestone entity had an investment treaty case.<sup>434</sup> In fact, Panama observes, the payment was made a year after the dispute arose, and just seven weeks before the filing of the Request for Arbitration.<sup>435</sup>

307. Relying on Article 10.16.1(a) of the TPA, Panama disputes the allegation that the relevant date to assert BSLS’s eligibility to bring a claim is the date of the treaty breach, and not that of the loss.<sup>436</sup>
308. Nor does the Respondent accept that the date of the loss is the date on which the Supreme Court ordered BSLS to pay damages. Panama argues that this ignores that: (i) BSLS did not pay the damages when they were awarded, and instead “*Bridgestone*” spent over two years trying to avoid payment during which no formal enforcement action was taken by the creditors; and (ii) as *both* BSLS and BSJ were jointly and severally liable, neither entity could claim loss unless and until payment was made, and each could only recover for the sum it paid itself.<sup>437</sup> For Panama, even assuming arguendo that the damages awarded constituted an incurred “*loss*”, BSLS could still not establish that *it* and not BSJ (the other equally liable entity) was the one who incurred that loss.<sup>438</sup>
309. In fact, for the Respondent, the timing of the payment alone would be sufficient to demonstrate the abuse.<sup>439</sup> Panama submits that under the objective standard the Tribunal does not need to consider the reason why BSLS (and not BSJ) chose to pay.<sup>440</sup> However, if that is to be considered, Panama argues that the “*only plausible explanation*” is that BSLS was trying to bring itself into compliance with the TPA.<sup>441</sup>

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<sup>433</sup> Resp. Exp. Obj., ¶ 40; Resp. Reply Exp. Obj., ¶ 82. *See also*, Resp. PHB Exp. Obj., ¶¶ 33-34.

<sup>434</sup> Resp. Exp. Obj., ¶ 41.

<sup>435</sup> Resp. Reply Exp. Obj., ¶ 82. *See also, id.*, ¶ 90.

<sup>436</sup> Resp. Reply Exp. Obj., ¶ 83. *See also*, Resp. PHB Exp. Obj., ¶ 32.

<sup>437</sup> Resp. Reply Exp. Obj., ¶ 84. *See also*, Resp. PHB Exp. Obj., ¶ 34.

<sup>438</sup> Resp. PHB Exp. Obj., ¶ 34.

<sup>439</sup> Resp. Reply Exp. Obj., ¶ 85.

<sup>440</sup> Resp. Reply Exp. Obj., ¶ 85.

<sup>441</sup> Resp. Reply Exp. Obj., ¶ 85. *See also*, Resp. PHB Exp. Obj., ¶ 40.

310. While questioning the evidence presented by the Claimants to establish the payment was made on 19 August 2016, the Respondent submits that accepting that this is what occurred shows the abuse.<sup>442</sup> For Panama, the payment by BSLS raises more questions because: (i) BSLS had no discernible assets to pay the judgement, whereas BSJ did; and (ii) by the Claimants' own allegations, the decision to pay "through" BSLS had a negative impact on BSLS's finances, which could have been avoided if BSJ had paid.<sup>443</sup>
311. The Respondent submits that the Claimants have failed to explain why the choice to have BSLS incur the loss was logical; and does not accept that the Claimants had "no choice", given that it was up to the entities jointly and severally liable (BSLS and BSJ) to decide which one would pay and when.<sup>444</sup>
312. Moreover, Panama argues that it is not true that BSLS did nothing to bring itself into compliance with the TPA. In the Respondent's account, the evidence at the Hearing showed that in the Spring of 2016, the Bridgestone Group, advised that BSLS had no case under the TPA if BSJ paid the damages, devised a plan to get around the jurisdictional barriers centred on having BSLS pay.<sup>445</sup> This decision, Panama argues, was guided by what the Bridgestone Group knew about the TPA jurisdictional requirements.<sup>446</sup> And "[m]aking this happen required months of advanced planning, and a USD 6 million loan from BSAM."<sup>447</sup> Therefore, while still maintaining that the test of abuse does not require a showing of motive, the Respondent now argues that it has indeed established a motive for the abuse.<sup>448</sup>
313. The Respondent also questions the allegation that BSLS paid with its own funds. Panama argues that, the Claimants' own witness in cross-examination, the pleadings, the exhibits and the transcript confirm that the reality was that BSJ paid "through" BSLS,

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<sup>442</sup> Resp. Reply Exp. Obj., ¶¶ 86-87.

<sup>443</sup> Resp. Reply Exp. Obj., ¶ 88.

<sup>444</sup> Resp. Reply Exp. Obj., ¶ 89.

<sup>445</sup> Resp. PHB Exp. Obj., ¶ 35.

<sup>446</sup> Resp. PHB Exp. Obj., ¶ 40.

<sup>447</sup> Resp. PHB Exp. Obj., ¶ 35.

<sup>448</sup> Tr. Day 4, 572:15-573:1 (Ms. Gehring-Flores).

and that it did so, deliberately, with the help of outside counsel, after the dispute arose, to enable BSLS to assert a claim, despite considering the payment a loss for the *group*.<sup>449</sup>

314. The Respondent accepts that when BSLS paid it was “*on some level*” doing what the Supreme Court ordered it and BSJ to do. It argues, however, that the issue is *when* it did it. And given the *when*, the Respondent argues, “*an ulterior ‘why’ must be presumed.*”<sup>450</sup>
315. Finally, referring to the Claimants’ assertion that the significant point on timing is that the payment was made after all local remedies were exhausted, the Respondent submits that this does not absolve the impropriety. However, Panama argues, the point *is* significant to undermine the Claimants’ case, including *inter alia* to: confirm that the denial of justice claim lacked merit when asserted; undermine the argument that the loss was automatic with the issuance of the Supreme Court decision; and cast doubt on compliance with the mandatory sequence for submitting claim to arbitration.<sup>451</sup>

#### **b. The Claimants’ Position**

316. The Claimants ask the Tribunal to dismiss this objection.<sup>452</sup> According to their last submission, the objection should be dismissed for either of the following alternative reasons: (i) it is not a matter of competence; and (ii) if the objection is a matter of competence and the Tribunal has sufficient evidence before it to decide it safely, then it should conclude that the Respondent has failed to articulate the abuse.<sup>453</sup>
317. The Claimants contend that this objection is “*vague*”, “*confused*”, “*illogical and meritless.*”<sup>454</sup> It ignores that BSJ and BSLS were held jointly and severally liable, and that BSLS did not force itself to incur in loss, but rather that it was Panama’s Supreme Court decision who did.<sup>455</sup>

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<sup>449</sup> Resp. PHB Exp. Obj., ¶ 36.

<sup>450</sup> Resp. PHB Exp. Obj., ¶ 38.

<sup>451</sup> Resp. PHB Exp. Obj., ¶ 39.

<sup>452</sup> Cl. Rej. Exp. Obj., ¶ 68.

<sup>453</sup> Cl. PHB Exp. Obj., ¶ 3(a), 3(c)(iv).

<sup>454</sup> Cl. Res. Exp. Obj., ¶ 164.

<sup>455</sup> Cl. Res. Exp. Obj., ¶ 164.

318. Relying on *Phillips Morris*, the Claimants argue that an abuse of process allegation must meet a “high bar”, and that abuse has been found when “*an investor who is not protected by an investment treaty restructures its investment in such as fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.*”<sup>456</sup>
319. For the Claimants, Panama has not explained which was the abuse committed by BSLS. They argue that (i) it cannot be manipulation of its nationality, because BSLS has always been a U.S. company; and (ii) it cannot be manipulation of the investment’s nationality because the investment has always been Panamanian.<sup>457</sup> Accordingly, the Claimants understand that the allegation is that the nationality of the claim was manipulated, and argue that this is “*incoherent.*”<sup>458</sup> The Claimants submit that:
- The treaty breach occurred with the Supreme Court’s decision on 28 May 2014, and the dispute arose following that judgement.<sup>459</sup>
  - BSLS incurred the loss on the date the Supreme Court decision ordered it to pay the damages, *i.e.*, 28 May 2014, and thus it does not matter when the payment was made.<sup>460</sup> Relying on *Mobil Investments*, the Claimants contend that “*damages are incurred and compensation is due when there is a firm obligation to make a payment [...].*”<sup>461</sup>
  - Even if were correct that loss for the US\$ 5.4 million ordered by the Supreme Court only occurred when the payment was made, the Claimants also claim loss in excess of that sum, which is a loss consequential to the Supreme Court decision, that the Claimants began to incur on the date of the decision.<sup>462</sup>
  - Because BSLS and BSJ were held jointly and severally liable for the whole sum, while BSJ could have paid, BSLS can hardly be charged with abuse of process for

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<sup>456</sup> Cl. Res. Exp. Obj., ¶ 166 (quoting **CLA-022**, *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) [hereinafter, “*Philip Morris, Australia*”]). See also, Cl. Rej. Exp. Obj., ¶ 68.

<sup>457</sup> Cl. Res. Exp. Obj., ¶ 168. See also, Cl. Rej. Exp. Obj., ¶ 68.

<sup>458</sup> Cl. Res. Exp. Obj., ¶ 168.

<sup>459</sup> Cl. Rej. Exp. Obj., ¶¶ 61-62.

<sup>460</sup> Cl. Res. Exp. Obj., ¶ 169; Cl. Rej. Exp. Obj., ¶ 15.

<sup>461</sup> Cl. Rej. Exp. Obj., ¶ 62 (citing **CLA-038**, *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) [hereinafter, “*Mobil Investments*”]). In the Rejoinder on Expedited Objections, the Claimants accept that under the TPA they “*must show both breach by the Respondent and loss incurred by the Claimant in order to submit a claim to arbitration*”, but observe that the loss was incurred the day BSLS was ordered to make the payment, that is, the same day of the breach. *Id.*, ¶ 62.

<sup>462</sup> Cl. Rej. Exp. Obj., ¶ 63.

paying a sum it was ordered by a court to pay.<sup>463</sup> While BSJ could have paid, it is not surprising that BSLS being the entity specifically tasked with protecting intellectual property rights made the payment.<sup>464</sup>

- The assertion that it was illogical for BSLS to pay because it is a “*shell*” company with no assets is both circular and disingenuous. It is also entirely reliant on the success of the denial of benefits objection, which should fail.<sup>465</sup> In fact, BSLS is an entity with assets and substantial business activities, able to make the payment.<sup>466</sup> And even if the Tribunal found that BSLS has no business activities in the United States (*quod non*), the fact remains that BSLS was liable for the sum.<sup>467</sup>
- It is absurd to argue that BSLS paid to put itself into a better position. Had BSLS not discharged the liability imposed by the Supreme Court decision, it was exposed to enforcement actions against its assets in Panama.<sup>468</sup> It is also absurd to suggest that BSLS and BSJ did not need to pay and should have put themselves in contempt of court or wait for enforcement action.<sup>469</sup>

320. The Claimants explain that BSLS paid after it exhausted all possibilities to overturn the Supreme Court judgement and had no other option; and it made that payment because it was jointly and severally liable, and because its board considered that settling the liability was in the best interest of the company.<sup>470</sup>

321. The argument that BSLS used the time between the Supreme Court decision and the payment to bring itself into compliance with the TPA jurisdictional requirements is “*hopeless*” given that: (i) BSLS has always been a U.S. incorporated company; (ii) it is plainly not the case that it lacks substantial business activities; and (iii) there is no allegation that within this time BSLS tried to increase activities to make them more “*substantial*.”<sup>471</sup>

322. In response to Panama’s allegations concerning the identity of the entity that made the payment, the Claimants: (i) provide additional proof of BSLS’s payment in the form of a

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<sup>463</sup> Cl. Res. Exp. Obj., ¶ 170. *See also, id.*, ¶ 16; Cl. Rej. Exp. Obj., ¶¶ 15, 68.

<sup>464</sup> Tr. Day 4, 631:6-14 (Mr. Williams).

<sup>465</sup> Cl. Res. Exp. Obj., ¶ 170. *See also, id.*, ¶ 15.

<sup>466</sup> Cl. Rej. Exp. Obj., ¶ 68.

<sup>467</sup> Cl. Res. Exp. Obj., ¶ 170.

<sup>468</sup> Cl. Res. Exp. Obj., ¶ 171.

<sup>469</sup> Cl. Rej. Exp. Obj., ¶ 64.

<sup>470</sup> Cl. Rej. Exp. Obj., ¶¶ 15, 64, 68.

<sup>471</sup> Cl. Rej. Exp. Obj., ¶ 65.



bank statement from BSLS and; (ii) argue that the suggestion that it was not BSLS who paid, but rather BSJ “*through*” BSLS ignores corporate identity.<sup>472</sup>

## (2) The Tribunal’s Analysis

323. Two preliminary issues arise. The first is whether this is an issue that goes to the Tribunal’s jurisdiction. The Tribunal’s view is as follows. On the face of it, BSLS’s claim falls within the jurisdiction of the Tribunal. It is for an alleged loss caused by alleged breaches of obligation under the TPA by Panama. Both the alleged breaches and the alleged losses occurred at a time when the Claimant, BSLS, was a company incorporated and carrying on business (as the Tribunal has just found) in the United States. Panama’s position is that BSLS brought this position about by an abuse of process. If that contention is made good, the response of the Tribunal should be, in its view, not that it has no jurisdiction but that it declines to exercise that jurisdiction. The contrary could, however be argued – see *Mobil Corporation*.<sup>473</sup> Which view is correct has no significance on the facts of this case.
324. The second preliminary issue is that of burden of proof. As Panama alleges abuse on the part of BSLS the burden is on Panama to prove the abuse. Once again, however, the decision of the Tribunal does not turn on burden of proof.
325. Panama’s case can be summarised as follows. The alleged wrongs on the part of Panama occurred when the Supreme Court gave its decision on 28 May 2014. On that date the possibility of a dispute, that is a claim under the TPA, arose and thereafter BSLS and its lawyers considered how such a claim might be advanced. On that date, however, BSLS had suffered no loss or damage upon which to found a claim under the TPA. The payment by BSLS of the sum awarded by the Supreme Court, on or after 19 August 2016, resulted for the first time in damage suffered by BSLS that was essential to give rise to jurisdiction under the TPA. Making the payment that had this result was an abuse of process. It does not matter whether or not the payment was made deliberately in order

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<sup>472</sup> Cl. Rej. Exp. Obj., ¶ 66.

<sup>473</sup> **RLA-042**, *Mobil Corporation, Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) [hereinafter, “*Mobil Corporation*”].

to create jurisdiction under the TPA, albeit Panama's case is that it was. The chronology of the sequence of the relevant events is, of itself, enough to constitute the abuse.

326. In support of its submission Panama relies on *Philip Morris*.<sup>474</sup> That case was one of a series in which corporate restructuring had taken place that had brought the claimant company within the protection of an investment treaty at a time when it was foreseeable that a dispute might arise that would give rise to jurisdiction under the treaty. At paragraph 554 the tribunal set out the following statement of principle derived from the cases:

“[...] the 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.”

327. Panama's case is that this principle applies in the present case. At the time that BSLS paid the damages and costs awarded by the Supreme Court a dispute under the TPA was foreseeable. The payment by BSLS had the effect of creating jurisdiction in relation to that dispute. It follows that the payment was an abuse of process.

328. The analogy that Panama seeks to draw with cases of corporate restructuring is not exact. The corporate structure of the Bridgestone Group was not changed in order to gain the protection of the TPA. Nor was the payment made by BSLS necessary to create jurisdiction for the claim by BSLS. All the elements necessary to enable BSLS to bring a claim under the TPA were in existence as soon as the Supreme Court had delivered its judgment awarding damages against BSJ and BSLS. The claim brought by BSLS is not limited to the payment that it made on or after 19 August 2016 in discharge of the Supreme Court's award. BSLS has a separate claim in relation to damage alleged to have been done to its investment, the FIRESTONE trademark registered in Panama, by the Supreme Court's judgment. This mirrors the claim made by BSAM in relation to the damage alleged to have been made to its investment, the license to use the FIRESTONE trademark, by the Supreme Court's judgment. BSLS further contends that the award of

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<sup>474</sup> CLA-022, *Philip Morris*, Australia, ¶ 554.

damages and costs made against it and BSJ, itself constituted damage giving rise to a claim, even before it discharged that liability by payment. Thus, the principle set out by the tribunal in *Philip Morris* has no direct application.

329. It seems to the Tribunal that the gravamen of Panama's case of abuse of process is that, by deliberately discharging the entirety of the judgment debt against itself and BSJ, its parent company, BSLS made that sum part of its claim under the TPA to the benefit of its parent, which indisputably lacks standing to bring a claim under the TPA. It may well be that BSLS's motive for paying the entirety of the judgment debt was to achieve that end. Whether it was or not, the consequences of BSLS's payment is an issue that will fall to be resolved if and when quantum comes to be considered. It does not follow that the whole of the payment will be recoverable as loss sustained by BSLS.
330. There was, in the opinion of the Tribunal, nothing improper or colorable in BSLS discharging the whole of the judgment debt for which it was jointly liable when it did. Where two related companies are under a joint liability against which one is insured and one is not, it may make sound commercial sense for the one that is insured to discharge the entire liability in the hope that this may be covered by its insurance, whether at the end of the day this proves to be the case or not. The same is true in respect of the position of BSJ and BSLS.
331. For these reasons, there is no basis upon which it would be proper to strike out this head of claim as an abuse of process. The Tribunal dismisses Objection No. 4.

## VIII. OBJECTIONS RELATING TO BOTH BSAM AND BSLS

### A. Fifth Objection: The Tribunal Cannot Entertain Claims Based on Hypothetical Actions of Other States

#### (1) The Parties' Positions

##### a. The Respondent's Position

332. The Respondent contends that there is no jurisdictional basis for the claim for over US\$10 million dollars (in excess of the US\$ 5,431,000 million ordered by the Supreme Court judgment) for “*the ‘loss’ that supposedly ‘has been and will be incurred’*” as a result of the Supreme Court decision.<sup>475</sup>
333. In particular, Panama takes issue with the Claimants’ contentions that (i) the loss arises out of the fact that the Supreme Court decision may be followed by other countries in Latin America, or (ii) may lead to more trademark applications similar and confusingly similar to the Bridgestone mark in Panama and other Latin American countries.<sup>476</sup> Referring to Articles 10.17, 10.1 and 10.16 of the TPA, Panama argues that “[t]he only claims that the Tribunal has jurisdiction to entertain are claims that Panama allegedly has breached the TPA, though ‘measures’ that **Panama** ‘has adopted or maintained’”, and therefore, the Tribunal “cannot entertain claims based on the hypothetical actions of other States [...]”.<sup>477</sup>
334. According to the Respondent, this conclusion is supported by two principles of international law, namely, “that each State is responsible for its **own** conduct and in respect of its **own** international obligations” and that “a tribunal cannot adjudicate any claim where ‘the vital issue to be settled concerns the international responsibility of a third State.’”<sup>478</sup> The Respondent points out that while Article 10.1.2 of the TPA states that the TPA Party’s obligations apply to a state enterprise or other person that exercises

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<sup>475</sup> Resp. Exp. Obj., ¶¶ 44-45. See also, *id.*, ¶ 51.

<sup>476</sup> Resp. Exp. Obj., ¶ 45.

<sup>477</sup> Resp. Exp. Obj., ¶ 48 (emphasis in original). See also, Resp. Reply Exp. Obj., ¶ 93.

<sup>478</sup> Resp. Exp. Obj., ¶ 49 (emphasis in original). See also, Resp. Reply Exp. Obj., ¶ 93.

governmental authority, it says nothing about extending that to the conduct of *other States*.<sup>479</sup>

335. For Panama, the issue is not a matter of causation, but rather of consent.<sup>480</sup> This is so, Panama explains, because consent is limited to claims for breaches of Articles 10.1 to Article 10.14 of the TPA, and those obligations only apply with respect to “*measures adopted or maintained by a [TPA] Party [...]*.” “*They do not apply in respect of (hypothetical) measures that other States (might) thereafter adopt in reaction thereto.*”<sup>481</sup>
336. The Respondent explains that this objection does not need to address all of the four “*inter-related*” factors underlying the US\$ 10 million claim, nor could it have given the nature of the objection. As Claimants argue that it is the “*combination*” of the various factors which led to the loss, a problem with two of those factors is enough to defeat the claim.<sup>482</sup>
337. However, Panama adds, “*if it ever came a time when the Tribunal needed to consider*” whether those other factors have any merit, it would find flaws: (i) they amount to the assertion that BSAM’s non-payment of the judgement prevented it from reinvesting in sale, marketing and distribution of products; (ii) “*Claimants are requesting damages based on the hypothetical future conduct of private actors*”; and (iii) the Tribunal is being asked to accept that “*Bridgestone*” trademark policy efforts did not cause injury to competitors, but that trademark applications by competitors injure the Claimants.<sup>483</sup> The Respondent goes on to conclude that:

“[F]or present purposes, those other factors do not matter. The issue here is that Claimants are asserting claims based on the conduct of other States, but the TPA does not impose any obligations on Panama in respect of their conduct, and international law in any event precludes the Tribunal from

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<sup>479</sup> Resp. Reply Exp. Obj., ¶ 93.

<sup>480</sup> Resp. Reply Exp. Obj., ¶ 95.

<sup>481</sup> Resp. Reply Exp. Obj., ¶ 95.

<sup>482</sup> Resp. Reply Exp. Obj., ¶ 96.

<sup>483</sup> Resp. Reply Exp. Obj., ¶ 97.

evaluating such conduct without the consent of those other States. Claimants do not provide any real response on this issue.”<sup>484</sup>

338. In the Post-Hearing Brief, Panama sums up the objection saying that the Claimants’ attempt to seek compensation for “*hypothetical future injury that supposedly will result from hypothetical future action of States other than Panama*” is “*improper*” for two reasons:<sup>485</sup>

- *First*, consent to arbitration in the TPA is limited to claims arising out of measures already “*adopted or maintained*” and the resulting damage already incurred.<sup>486</sup> (The Respondent rejects the allegation that this aspect of the problem was not mentioned before the Hearing.<sup>487</sup>)
- *Second*, Chapter 10 of the TPA does not apply to investments in other States or to measures by other States different from Panama.<sup>488</sup> Dismissing the allegation that the only measure at issue is the Supreme Court judgement from which the conduct of the other States flows causally, the Respondent argues that this type of reasoning would only work if the other State had committed an internationally wrongful-act,<sup>489</sup> which is an issue the Tribunal cannot evaluate.<sup>490</sup>

339. The Respondent emphasizes that it is not asking the Tribunal to make findings about the *quantum* of the alleged injury, but rather, to confirm that it lacks jurisdiction over “(1) *hypothetical future events or injury*, (2) *investments outside of Panama*, or (3) *the conduct of other States*.”<sup>491</sup> Once that is done, Panama argues, there is no remaining claim for damages by BSAM and the only remaining claim for BSLS is for the payment of the Supreme Court damages award (if it survives the other jurisdictional challenges).<sup>492</sup>

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<sup>484</sup> Resp. Reply Exp. Obj., ¶ 98.

<sup>485</sup> Resp. PHB Exp. Obj., ¶¶ 41-43.

<sup>486</sup> Resp. PHB Exp. Obj., ¶ 42.

<sup>487</sup> Tr. Day 4, 578:12-22 (Ms. Gehring-Flores); Resp. PHB Exp. Obj., ¶ 42.

<sup>488</sup> Resp. PHB Exp. Obj., ¶ 43.

<sup>489</sup> Resp. PHB Exp. Obj., ¶ 43.

<sup>490</sup> Resp. PHB Exp. Obj., ¶ 44.

<sup>491</sup> Resp. PHB Exp. Obj., ¶ 45.

<sup>492</sup> Resp. PHB Exp. Obj., ¶ 45, nn. 194-195.

## b. The Claimants' Position

340. The Claimants ask the Tribunal to dismiss this objection.<sup>493</sup> According to their last submission, the objection should be dismissed for either of the following alternative reasons: (i) it is not a matter of competence; (ii) it is intertwined with the merits, and all the necessary evidence is not before the Tribunal such that the Respondent has not discharged its burden of proof; or (iii) if the objection is a matter of competence and the Tribunal has sufficient evidence before it to decide it safely, then it should conclude that there is nothing for the Tribunal to decide as there is no claim for actions by other States.<sup>494</sup>

341. The Claimants argue that this objection fails as:

- It only impacts two of the four possible grounds for loss under this head of damage. And even though the four grounds are “*inter-related*” that does not mean that they are inextricably linked so that if one fails all do.<sup>495</sup>
- The loss claimed arises directly out of the decision of Panama’s Supreme Court, and the TPA does not preclude a claim for loss suffered outside of Panama or the United States, as long as it meets the basic test for causation.<sup>496</sup>
- In reality, the objection relates to matters of causation, foreseeability and loss, and it cannot be determined under Article 10.20.5 of the TPA, because it is not a jurisdictional objection, and would require extensive evidence to be resolved.<sup>497</sup>

342. The Claimants observe, however, that “*it appears that this objection is not directed to the facts of causation and loss*” and for that reason they have not put in evidence of fact on the matter.<sup>498</sup> Under the Article 10.20.5 proceeding on preliminary objections, the Respondent is not allowed to argue that the Claimants cannot show causation, which is an issue that can only be dealt with a trial.<sup>499</sup>

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<sup>493</sup> Cl. Res. Exp. Obj., ¶ 179.

<sup>494</sup> Cl. PHB Exp. Obj., ¶ 3(a), 3(b), 3(c)(v).

<sup>495</sup> Cl. Res. Exp. Obj., ¶¶ 18, 174-175, 178; Cl. Rej. Exp. Obj., ¶ 73; Cl. PHB Exp. Obj., ¶ 61.

<sup>496</sup> Cl. Res. Exp. Obj., ¶¶ 18, 172. *See also*, Cl. Rej. Exp. Obj., ¶ 71.

<sup>497</sup> Cl. Res. Exp. Obj., ¶¶ 18, 173, 178. *See also*, Cl. Rej. Exp. Obj., ¶¶ 69, 72.

<sup>498</sup> Cl. Res. Exp. Obj., ¶ 178.

<sup>499</sup> Cl. Res. Exp. Obj., ¶ 178.

343. In addition, according to the Claimants, “*there is nothing for the Tribunal to decide at this point*”, since the Claimants do not claim for measures adopted by other States, and agree that the Tribunal does not have jurisdiction to hear those claims.<sup>500</sup> The Claimants explain that they accept that if the measures of other States caused loss to the Claimants that would not be recoverable, but argue that this is a “*question of fact as to what has caused the loss and to what extent the measures result in loss.*”<sup>501</sup>
344. Finally, the Claimants argue that the Respondent raised a new objection during the Hearing that did not appear in the written pleadings, namely, one concerning “*hypothetical future actions of private actors.*”<sup>502</sup> Because this objection was not raised within the 45-day time limit prescribed in Article 10.20.5 of the TPA, the Claimants argue, it is out of time and must be dismissed.<sup>503</sup>

## (2) The Tribunal’s Analysis

345. Dealing with the last point first, the Tribunal agrees that it is not open to Panama to pursue, outside the 45-day period, the general objection that the Claimants cannot advance a claim founded on the hypothetical future actions of private actors. Objection No. 5 is limited to the contention that the Claimants cannot advance a claim based on the hypothetical action *of other States*. Furthermore, the only timely grounds for this Objection were those set out at paragraph 334 *supra*, not that the alleged actions of other States were *hypothetical and future*.
346. This Objection arises out of the following passages in the Claimants’ Request for Arbitration:

“56. Second, the decision of the Panamanian Supreme Court may be followed in other Latin American countries as a matter of government policy. Many countries in Latin America have historically followed each other’s lead in the implementation of protectionist trade policies in the area of intellectual property

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<sup>500</sup> Cl. PHB Exp. Obj., ¶ 59.

<sup>501</sup> Cl. PHB Exp. Obj., ¶ 60.

<sup>502</sup> Cl. PHB Exp. Obj., ¶ 13. *See also*, Tr. Day 4, 634:22-636:7 (Mr. Williams).

<sup>503</sup> Cl. PHB Exp. Obj., ¶ 13.



rights, and the decision of the Panamanian Supreme Court operates as a *de facto* protectionist device, allowing potentially confusingly similar marks to enter into the market because intellectual property rights holders are unwilling to risk significant, apparently arbitrary, penalties for their good faith use of the legal mechanisms intended to preserve those rights. [...]

57. Third, the decision of the Panamanian Supreme Court establishes a precedent that is likely to be followed in other Latin American legal systems. Such concerns are warranted in light of the fact that it is not uncommon for ideas developed in the courts in one national legal system to be transferred to another. [...]

58. Fourth, the decision of the Panamanian Supreme Court to impose damages for the good faith use of Panama's own trademark opposition proceedings is likely to result in more trademark applications that are similar and confusingly similar to the Bridgestone mark, both in Panama and elsewhere in Latin America. Muresa and L.V. International, through the so-called Luque Group, operate all over the Americas. There is therefore a significant risk that the Luque Group will seek to achieve the same result in those and other jurisdictions across the region. Other unrelated competitors are also likely to use this opportunity to follow the Luque Group's lead and try to enter the various tire markets in the region by filing and using confusingly similar trademarks.

59. Accordingly, the risk that similar decisions may be issued in other countries makes it much costlier for Bridgestone to invest not only in Panama, but in other countries in Latin America."<sup>504</sup>

347. In order to follow these averments it is necessary to consider what it is that the Claimants allege was objectionable about the decision of the Panamanian Supreme Court. The Claimants object that the decision was "*unjust and arbitrary.*"<sup>505</sup> The Tribunal understands this allegation to be fact specific. The Claimants do not suggest that Muresa was pursuing a new and unrecognized cause of action that the Panamanian courts should never have entertained. No complaint is made of the reasoning and approach of the two Panamanian lower courts. The complaint is that, in reversing the decision of the lower courts, the majority in the Panamanian Supreme Court perversely ignored the evidence, or lack of evidence, and the reasoning based upon it by the lower courts:

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<sup>504</sup> Request for Arbitration, ¶¶ 56-59.

<sup>505</sup> Request for Arbitration, ¶ 3.

“In its decision, the Supreme Court did not consider evidence submitted by Bridgestone nor the decision of the Eleventh Circuit Court and the First Superior Court, which found that Bridgestone had not acted recklessly in opposing the trademark, and that Muresa and TGLF had not suffered any harm caused by the trademark opposition action.”<sup>506</sup>

348. What then is intended by the Claimants’ allegation in paragraph 56 that “*the decision of the Panamanian Supreme Court may be followed in other Latin American countries as a matter of government policy*”? This appears to be suggesting administrative, not judicial, activity for paragraph 57 deals with the latter. The Tribunal reads this as suggesting that by some form of executive action the governments of other Latin American countries may penalize the owners of trademarks that take legitimate action to protect those trademarks.
349. And what is suggested by paragraph 57? What is the *precedent* alleged to have been set by the Panamanian Supreme Court; is it the perverse disregard of evidence? It seems to the Tribunal that both paragraph 56 and paragraph 57 envisage that other Latin American countries may, in one way or another, be influenced by the example of the Panama Supreme Court to act – if the allegations are to be accepted – in abuse of recognized intellectual property rights.
350. As the Tribunal reads paragraph 58, the scenario there painted in relation to countries outside Panama is premised on the likelihood that the governments and the courts of these countries will copy the abuse of intellectual property rights shown by the Supreme Court of Panama. This is evident from paragraph 59. The Claimants have made it clear that they do not seek to impose on Panama liability for the *direct* consequences of actions by other States. What, however, they are seeking to do is to impose liability for the indirect consequences of those actions, namely the challenges to the Claimants’ intellectual property rights that the predicted actions by other States will encourage.
351. The contention made by Panama in its Expedited Objections is that this head of claim requires the Tribunal to evaluate the likelihood of States other than Panama committing

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<sup>506</sup> Request for Arbitration, ¶ 42.

intentionally wrongful acts, and that this is something that the Tribunal has no jurisdiction to do under established principles of international law.<sup>507</sup>

352. Panama submits that it would be contrary to international law for the Tribunal to rule on the likelihood of sovereign States committing wrongs when those States are not subject to the jurisdiction of the Tribunal. Panama relies on the decision of the International Court of Justice in the *Monetary Gold Case*.<sup>508</sup> That case concerned a dispute between the United Kingdom and Italy as to whether Italy had a prior claim to gold owned by Albania that Albania wished to be paid to the United Kingdom. This depended upon whether or not Italy had a claim against Albania to be paid the gold that took priority over that of the United Kingdom. Although the United Kingdom and Italy had agreed to the jurisdiction of the International Court of Justice, Albania had not. In these circumstances the Court ruled that it had no jurisdiction to decide the issue as:

“[...] To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.”<sup>509</sup>

353. The Tribunal does not consider that this decision is precisely in point. The *Monetary Gold* case involved rival claims to be paid by Albania gold owned by Albania and thus Albania was directly concerned with the result. In the present case, a finding as to the likely conduct of Latin American countries other than Panama would not purport to affect their legal rights or amount to an assertion of jurisdiction over them. Nonetheless, the Tribunal considers that it would be an extraordinary interpretation of the ICSID Convention and the TPA that would bring within the jurisdiction of ICSID a dispute as to whether or not sovereign States not party to the TPA are likely to act in abuse of established intellectual property rights and, if they are, whether the respondent host State

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<sup>507</sup> Resp. Exp. Obj., ¶¶ 48-51.

<sup>508</sup> **RLA-029**, *Case of the Monetary Gold Removed from Rome in 1943*, ICJ, Judgment on Preliminary Objections (15 June 1954) [hereinafter, “*Monetary Gold*”].

<sup>509</sup> **RLA-029**, *Monetary Gold*, p. 17.

is liable for the consequences. Neither the United States, nor Panama could possibly have envisaged such a claim arising under the TPA, and for good reason.

354. In the opinion of the Tribunal, a dispute as to whether States other than Panama are likely to copy Panama's alleged abuse of the Claimants' intellectual property rights to the detriment of the Claimants is both speculative and remote from each of the Claimants' investments. That part of the overall dispute cannot possibly be said to "*arise directly out of*" either Claimant's investment. Thus, so far as BSAM is concerned, this Objection succeeds not by reason of the grounds relied on in support of it but by reason of the grounds advanced in support of Objection No. 2.
355. What is the position of BSLS? Objection No. 2 was only made against BSAM. Is it open to the Tribunal to uphold Objection No. 5 against BSLS not on the grounds advanced in support of that Objection but on the grounds advanced against BSAM in Objection No. 2? The Tribunal does not consider that it is. Accordingly, so far as BSLS is concerned Objection No. 5 must be dismissed. But the Tribunal will add this. BSLS will no doubt consider carefully whether to pursue a claim in relation to events outside Panama in circumstances where the Tribunal has ruled that it has no jurisdiction to entertain an identical claim by BSAM.

## **IX. COSTS**

### **A. The Parties' Positions**

356. Panama has requested that the Claimants be held "*jointly and severally*" liable for all the costs of the arbitration.<sup>510</sup> Contrary to the Claimants' allegations at the Hearing, the Respondent argues that it is inapposite that some objections relate to one of the Claimants and not the others: the Claimants decided to bring the case jointly, have tried to argue it blurring the lines between the Claimants, and should not be permitted to draw a line now,

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<sup>510</sup> Resp. PHB Exp. Obj., ¶ 47; Resp. Exp. Obj., ¶ 55(b); Resp. Reply Exp. Obj., ¶ 99; Tr. Day 4, 643:12-644:6 (Mr. Deveboise).

when the record demonstrates that BSLS is entirely dependent financially from BSJ and loans from affiliates.<sup>511</sup>

357. Panama submits that its cost and expenses in this expedited phase amount to US\$ \$1,691,447.72, consisting of (i) advance payments made to ICSID; (ii) counsel’s fees and expenses; and (iii) fees and expenses of a non-testifying expert.<sup>512</sup>
358. In turn, the Claimants have asked for “*an order requiring the Respondent to pay the costs of its Objections immediately*”<sup>513</sup> rather than to wait until a final award is rendered at the end of the proceeding.<sup>514</sup> In their Response on Expedited Objections, the Claimants have explained that the request is grounded *inter alia* on Panama’s non-cooperative approach, and its refusal to explain prior to the Response the basis for the contention that Article 10.20.4(c) does not apply to an Article 10.20.5 expedited procedure.<sup>515</sup> This, the Claimants argue, has left them with little option but to submit evidence in relation to numerous factual matters raised in the objections (without prejudice to their position that such evidence was unnecessary), putting them through more effort and cost, and leaving the Tribunal with a greater volume of submissions and evidence.
359. As to the Respondent’s request for a cost award holding both Claimants jointly and severally liable, the Claimants submitted that in considering that request, the Tribunal would have to also consider the specific nature of its decision given that some objections are addressed only to one of the Claimants or to the other.<sup>516</sup>
360. The Claimants submit that their costs and expenses in this expedited phase amount to US\$1,179,110.97,<sup>517</sup> consisting of counsel’s fees and expenses.

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<sup>511</sup> Resp. PHB Exp. Obj., ¶ 47.

<sup>512</sup> Resp. Costs Exp. Obj., ¶¶ 1, 4.

<sup>513</sup> Cl. Res. Exp. Obj., ¶ 180. *See also*, Cl. PHB Exp. Obj., ¶ 62 (but removing the word “*immediately*”).

<sup>514</sup> Cl. Res. Exp. Obj., ¶ 61.

<sup>515</sup> Cl. Res. Exp. Obj., ¶ 61.

<sup>516</sup> Tr. Day 4, 644:10-19 (Mr. Williams).

<sup>517</sup> Cl. Costs Exp. Obj., ¶ 10.

**B. The Tribunal's Decision**

361. The Tribunal considers that it will be better placed to resolve issues of costs at the end of this arbitration and will therefore make no order as to costs at this stage.

**X. DECISION**

362. For the reasons set out above the Tribunal decides as follows:

- (1) Objection No. 1 is dismissed.
- (2) Objection No. 2 is dismissed in respect of damage alleged to have been sustained within Panama but allowed in respect of damage alleged to have been sustained outside Panama.
- (3) Objection No. 3 is dismissed.
- (4) Objection No. 4 is dismissed.
- (5) Objection No. 5 is allowed as against BSAM on the grounds advanced by Panama in support of Objection No. 2 but dismissed as against BSLs.
- (6) The Tribunal reserves all questions of costs.

[Signed]

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Mr. Horacio A. Grigera Naón  
Arbitrator

[Signed]

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Mr. J. Christopher Thomas, QC  
Arbitrator

[Signed]

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Lord Nicholas Phillips Baron of Worth Matravers  
President