

Before the
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

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

v.

REPUBLIC OF PANAMA,
Respondent.

ICSID CASE NO. ARB/16/34

**Panama's Expedited Objections Pursuant to Article 10.20.5
of the Panama-U.S. Trade Promotion Agreement**

30 May 2017

**ARNOLD & PORTER
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I. Introduction

1. The 7 October 2016 Request for Arbitration (“**Request for Arbitration**”) sows so much confusion about the identity of the parties, the alleged rights and investments in dispute and the claims alleged¹ in this case that the Republic of Panama (“**Panama**”) feels compelled to clarify these basic points,² which will demonstrate for the Tribunal that the present arbitration has no foundation and should be dismissed on the basis of the objections set forth herein, which are advanced pursuant to Article 10.20.5 of the governing Trade Promotion Agreement between the United States of America and Panama (“**TPA**”).

2. The present case is an arbitration between Panama, on the one hand, and Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. (“**Claimants**”), on the other. Panama, of course, is a sovereign State. Claimants, for their part, are members of “the Bridgestone group of companies”³ — which, according to the Request for Arbitration, “is the

¹ See, e.g., **Request for Arbitration** (7 October 2016), ¶ 1 (“Request for Arbitration”) (lumping together (1) the two Claimants in this arbitration, (2) their Japanese parent company, and (3) the entire “Bridgestone group of companies,” and stating that the Request for Arbitration will refer to all of the foregoing entities “collectively [as] Bridgestone”), ¶ 3 (asserting that the claims in this arbitration relate to a Panamanian Supreme Court decision “that Bridgestone should pay millions of dollars in damages to a Panamanian company,” without explaining which Bridgestone entities supposedly were affected by this decision), § III.A (“Bridgestone’s Decision to Invest in Panama and the Americas”), § III.L (“Loss Suffered by Bridgestone”); see also *id.*, ¶ 1 (requesting “the institution of arbitration proceedings against the Republic of Panama”), ¶¶ 56–58 (claiming injury based on the potential future actions of *other* Latin American States); **Letter from ICSID to Claimants** (19 October 2016), p. 2 (asking Claimants, *inter alia*, to “elaborate on: a) Whether there is an investment within the meaning of Article 25(1) of the ICSID Convention, for each [Claimant]; [and] b) Whether each [Claimant] has an ‘investment’ meeting the definition of Article 10.29 of the US-Panama FTA, and the notion of ‘covered investment’ referred to in Articles 10.1 and 2.1 of the US-Panama FTA”).

² See **ICSID Institution Rule 2(1)** (stating that a “request [for arbitration] shall [*inter alia*]: (a) designate precisely each party to the dispute . . . [and] (e) contain information concerning the issues in dispute”); **Ex. R-001**, TPA, Art. 10.16.2 (explaining that “[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration,” and that “[t]he notice shall specify: (a) the name and address of the claimant . . . ; (b) for each claim, the provision of this Agreement . . . alleged to have been breached and any other relevant provisions; (c) the legal and factual basis for each claim; and (d) the relief sought and the approximate amount of damages claimed”).

³ **Request for Arbitration**, ¶ 1.

world’s largest manufacturer of tire and rubber products.”⁴ Both Claimants are “wholly-owned subsidiaries of Bridgestone Corporation, a Japanese incorporated company headquartered in Tokyo, Japan.”⁵

3. The first Claimant, Bridgestone Licensing Services, Inc. (“**Bridgestone Licensing**”), is incorporated in the U.S. State of Delaware.⁶ According to the Request for Arbitration, it is “the owner of the FIRESTONE trademark in all countries outside of the United States,”⁷ including Panama, where it is the registered owner of Trademark No. 894.⁸ Claimants contend that Bridgestone Licensing’s “investment” consists of “intellectual property rights in the FIRESTONE trademark.”⁹

4. The second Claimant, Bridgestone Americas, Inc. (“**Bridgestone Americas**”), is incorporated in the U.S. State of Nevada.¹⁰ Unlike the first Claimant, it does not appear to own any trademarks in Panama; it simply licenses the right “to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas”¹¹ from Bridgestone Corporation and Bridgestone Licensing,¹² and then turns around and sub-licenses this right to various “subsidiaries,”¹³ which then “manufacture, sell, distribute and market

⁴ Request for Arbitration, ¶ 1.

⁵ Request for Arbitration, ¶ 1.

⁶ See Request for Arbitration, ¶ 4.

⁷ Request for Arbitration, ¶ 6.

⁸ See Request for Arbitration, ¶ 12 and note 7 (citing Ex. C-007, Firestone Panamanian Trademark Registration Record).

⁹ Letter from ICSID to Claimants (25 October 2016), p. 3 (“Claimants’ Submission on Registration”).

¹⁰ Request for Arbitration, ¶ 4.

¹¹ Claimants’ Submission on Registration, p. 4; see also Ex. C-048, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001) (which is a former name of Bridgestone Americas) for the FIRESTONE mark); Ex. C-050, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. for the BRIDGESTONE mark (1 January 2002)).

¹² Request for Arbitration, ¶ 6.

¹³ Request for Arbitration, ¶ 7.

BRIDGESTONE and FIRESTONE tires into different markets in the region.”¹⁴ In Panama, for example, “Bridgestone and Firestone tires are sold to third party distributors through BSCR”¹⁵ — a Costa Rican entity¹⁶ whose full name is “Bridgestone Costa Rica.” Claimants contend that “[t]hese assets and activities”¹⁷ constitute Bridgestone Americas’ “investment.”

5. The claims in this case arise out of the following sequence of events.¹⁸ On 4 February 2005, the Panamanian Trademark and Patent Office published an application by an entity called Muresa Intertrade, S.A. (“**Muresa**”) for the registration of the RIVERSTONE trademark.¹⁹ Because the Bridgestone group of companies “has a general policy of opposing tire marks with . . . a ‘STONE’ suffix,”²⁰ Bridgestone Corporation (*i.e.*, Claimants’ Japanese parent company) and Claimant Bridgestone Licensing initiated a proceeding in the Panamanian courts, formally opposing registration of the RIVERSTONE trademark.²¹ Claimant Bridgestone Americas was not a party to this proceeding.

6. Muresa defended its trademark registration application, and two other entities — U.S. company L.V. International and Chinese company Tire Group of Factories Ltd. (“**Tire**

¹⁴ **Request for Arbitration**, ¶ 7.

¹⁵ **Request for Arbitration**, ¶ 7; *see also id.*, ¶ 13 (“Currently, BSAM [*i.e.*, Bridgestone Americas], through its wholly-owned subsidiary, BSCR [*i.e.*, Bridgestone Costa Rica], sells tires into Panama through authorized third party distributors”); **Claimants’ Submission on Registration**, p. 4 (explaining that “[Bridgestone Americas’] subsidiaries include Bridgestone Costa Rica (‘BSCR’), which sells BRIDGESTONE and FIRESTONE brand tires to third party dealers and distributors in Panama”).

¹⁶ *See Ex. C-049*, Trademark Sublicense Agreement (1 January 2015), p. 2 (referring to “Bridgestone de Costa Rica, a corporation organized and existing under the laws of Costa Rica, having its principal office at La Ribera de Belen, Marginal Autodista General Canas, Heredia, Costa Rica, (hereinafter called ‘BSCR’)”) (emphasis added).

¹⁷ **Claimants’ Submission on Registration**, p. 4.

¹⁸ The discussion in this Section is drawn exclusively from the Request for Arbitration, Claimants’ Submission on Registration, and the exhibits that accompanied those two submissions. Panama reserves its right to contest Claimants’ description of events at a later date, including by submitting documentary evidence and witness and expert testimony.

¹⁹ **Request for Arbitration**, ¶ 24.

²⁰ **Request for Arbitration**, ¶ 20.

²¹ **Request for Arbitration**, ¶ 25; *see also Ex. C-014*, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 2.

Group”) — participated as third-party interveners.²² On 21 July 2006, the opposition claim by the two Bridgestone entities was denied.²³ Muresa and Tire Group then filed a claim against Bridgestone Corporation and Bridgestone Licensing in a different Panamanian court, asserting that “the trademark opposition proceedings initiated by Bridgestone . . . [had resulted in a] loss of revenue in excess of USD 5,000,000.”²⁴ Once again, Bridgestone Americas was not a party to the proceeding.

7. The claim by Muresa and Tire Group was rejected at the first instance and appellate court levels,²⁵ but was eventually upheld by the Panamanian Supreme Court in a 28 May 2014 decision. The decision held Bridgestone Corporation and Bridgestone Licensing “jointly and severally liable” to Muresa and Tire Group for USD 5 million in damages, plus USD 431,000 in attorney’s fees.²⁶ It is this decision that is at the center of Claimants’ claims;²⁷ Claimants contend that the decision violated Articles 10.3, 10.5, and 10.7 of the TPA,²⁸ causing USD 16 million in damages to Claimants.²⁹

²² **Request for Arbitration**, ¶ 25; *see also id.*, ¶ 21 (explaining that L.V. International is “a company incorporated in Florida”).

²³ **Request for Arbitration**, ¶ 26; **Ex. C-014**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006).

²⁴ **Request for Arbitration**, ¶ 29.

²⁵ **Request for Arbitration**, ¶¶ 31, 36; *see also Ex. C-021*, Judgment 70, 11th Circuit Civil Court of the Republic of Panama (17 December 2010); **Ex. C-024**, Decision, First Superior Court of the Republic of Panama (23 May 2013).

²⁶ **Request for Arbitration**, ¶ 43.

²⁷ *See Request for Arbitration*, ¶ 3 (“The claims herein concern an extraordinary decision by the Supreme Court of Panama that Bridgestone should pay millions of dollars in damages to a Panamanian company . . .”); **Claimants’ Submission on Registration**, p. 2 (“The claims asserted by the Claimants in this arbitration arise out of a Supreme Court decision of the Republic of Panama”).

²⁸ *See Request for Arbitration*, ¶¶ 61–63. Articles 10.3, 10.5, and 10.7 of the TPA are on “National Treatment,” “[The] Minimum Standard of Treatment,” and “Expropriation and Compensation,” respectively.

²⁹ *See Request for Arbitration*, ¶¶ 54, 90.

8. As discussed below, there are at least five reasons why the Tribunal cannot entertain these claims³⁰ — two reasons that relate solely to Bridgestone Americas, two reasons that relate solely to Bridgestone Licensing, and one reason that relates to both Claimants. In accordance with Article 10.20.5 of the TPA,³¹ Panama requests that the Tribunal address these issues on an expedited basis, and, ultimately, render an award declining jurisdiction in this case and awarding all costs to Panama.

II. Jurisdictional Bars Relating to Claimant Bridgestone Americas

9. There are two simple reasons why the Tribunal cannot entertain Bridgestone Americas' claims. *First*, as discussed below in **Part A**, Bridgestone Americas does not have a qualifying “investment.” *Second*, even assuming *arguendo* that Bridgestone Americas *did* have an investment, as explained below in **Part B**, the present dispute does not “aris[e] directly out of” that alleged investment, as required by the ICSID Convention.³²

³⁰ Panama reserves its right to raise additional objections to jurisdiction in the event any claims survive the expedited proceeding that Panama seeks herein. As Article 10.20.4(d) of the TPA states, “The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph *or make use of the expedited procedure set out in paragraph 5.*” (emphasis added).

³¹ Article 10.20.5 of the TPA states as follows: “*In the event that the respondent so requests* within 45 days after the tribunal is constituted, *the tribunal shall decide on an expedited basis* an objection under paragraph 4 and *any objection that the dispute is not within the tribunal’s competence*. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.” (emphasis added).

³² See **ICSID Convention**, Art. 25(1).

A. Bridgestone Americas Does Not Have a Qualifying Investment

10. Because an investment is the *sine qua non* of investment arbitration,³³ it is imperative that each Claimant demonstrate that it has a qualifying investment — under both the ICSID Convention and the TPA.³⁴

11. In their Request for Arbitration, Claimants devoted virtually no attention to this basic threshold task.³⁵ However, when prompted by the ICSID Secretariat to “elaborate on”³⁶ the paltry discussion in the Request for Arbitration, and to address whether each Claimant had an “investment” within the meaning of Article 25(1) of the ICSID Convention³⁷ and Articles 2.1,³⁸

³³ See, e.g., **RLA-001**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press 2009) ¶ 101 (“Investment disputes are about investments . . .”); see also *id.*, p. 165, ¶ 345 (explaining that “[q]uestions relating to the existence or scope of an investment are fundamental to each phase of an investment treaty dispute. The attribution of jurisdiction to the tribunal is contingent upon the claimant having made an investment in the host state The boundaries of the tribunal’s *ratione materiae* jurisdiction are shaped by the nexus between the claims and the investment. The tribunal’s *ratione personae* jurisdiction extends to a claimant with control over the investment at the time of the alleged breach and its *ratione temporis* jurisdiction depends on the timing of the claimant’s acquisition of the investment. The tribunal’s examination of the question of the host state’s liability is intertwined with an assessment of the prejudice alleged by the claimant can properly be linked to the rights that comprise the investment”).

³⁴ **RLA-002**, Christoph H. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), Art. 25, ¶ 124 (“In examining whether the requirements for an ‘investment’ have been met, most tribunals apply a dual test: whether the activity in question is covered by the parties’ consent and whether it meets the Convention’s requirements. If jurisdiction is to be based on a treaty containing an offer of consent, the treaty’s definition of investment will be relevant. *In addition*, the tribunal will have to establish that the activity is an investment in the sense of the Convention”) (citations omitted; emphasis added); see also, e.g., **RLA-003**, *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02/3 (Decision on Respondent’s Objections to Jurisdiction, 21 October 2005), ¶ 278 (Caron, Alberro-Semerena, Alvarez); **RLA-004**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11 (Award, 1 December 2010), ¶ 43 (Berman, Gaillard, Thomas); **RLA-005**, *El Paso Energy International Co. v. Argentina*, ICSID Case No. ARB/03/15 (Award, 31 October 2011), ¶ 142 (Caflich, Bernardini, Stern); **RLA-006**, *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7 (Decision on the Application for Annulment of the Award, 1 November 2006), ¶ 31 (Dimolitsa, Dossou, Giardina).

³⁵ See **Request for Arbitration**, ¶¶ 71–72 (quoting the TPA’s definition of “investment,” devoting a single sentence to the issue of how the alleged rights and interests supposedly come within that definition, and omitting any discussion of the ICSID Convention). Although paragraph 72 refers to “distribution licenses and agreements with Panamanian entities,” Claimants have not provided evidence of any such licenses or agreements to date.

³⁶ See **Letter from ICSID to Claimants** (19 October 2016), p. 2.

³⁷ In relevant part, Article 25(1) of the ICSID Convention states as follows: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

³⁸ In relevant part, Article 2.1 of the TPA states as follows: “[C]overed investment means, with respect to a Party, an investment, as defined in Article 10.29 (Definitions), in its territory of an investor of the other Party in existence

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10.1,³⁹ and 10.29⁴⁰ of the TPA, Claimants provided a bit more information.⁴¹ With respect to Bridgestone Americas, Claimants’ argument is that the “investment” consists of: (1) tire sales (and profits from tire sales) in Panama,⁴² (2) “revenue-sharing and license rights in Panama,”⁴³ and (3) “intellectual property rights in Panama.”⁴⁴ This argument falls flat, for two reasons.

12. **First**, it is clear from the TPA’s definition of “investment,”⁴⁵ from the drafting history of the ICSID Convention,⁴⁶ and from the case law on the objective meaning of the term “investment”⁴⁷ that ordinary commercial transactions — like the cross-border sale of goods —

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as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter” (emphasis omitted).

³⁹ In relevant part, Article 10.1 of the TPA states as follows: “This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.”

⁴⁰ In relevant part, Article 10.29 of the TPA states as follows: “[I]nvestment 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” (emphasis omitted).

⁴¹ See **Claimants’ Submission on Registration**, pp. 2–6.

⁴² See **Claimants’ Submission on Registration**, p. 4 (“BSAM [Bridgestone Americas], including through its subsidiaries, is authorized to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas. BSAM’s subsidiaries include Bridgestone Costa Rica (‘BSCR’), which sells BRIDGESTONE and FIRESTONE brand tires to third party dealers and distributors in Panama. Profits from sales to Panamanian dealers and distributors are paid to BSCR and reported on BSAM’s consolidated financial statements. *These assets and activities fall within the broad wording of Article 25(1) [of the ICSID Convention] . . . as well as within the express meaning of ‘investment’ under the US-Panama FTA*”) (emphasis added); see also *id.* (asserting that “these assets in Panama possess the characteristics of an ‘investment’” because “they involve an assumption of risk (as to the volume of *sales of tires in Panama*),” “require substantial capital expenditure in the form of corporate services *to conduct tire sales in Panama*,” and involve an expectation of gain, *since profits from sales to Panamanian dealers and distributors* are paid to [Bridgestone Costa Rica]”) (emphasis added).

⁴³ **Claimants’ Submission on Registration**, p. 5.

⁴⁴ **Claimants’ Submission on Registration**, p. 5.

⁴⁵ **Ex. R-001**, TPA, Art. 10.29, note 8 (explaining that “[f]or purposes of this Agreement, claims to payment that are immediately due and result from the sale of goods or services are not investments”).

⁴⁶ **RLA-002**, Christoph H. Schreuer, *et al.*, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009), Art. 25, ¶ 122 (“The drafting history [of the ICSID Convention] leaves no doubt that the Centre’s services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction no matter how far-reaching the parties’ consent might be”).

⁴⁷ See **RLA-007**, *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10 (Decision on Annulment, 16 April 2009), ¶ 72 (Schwebel, Shahabuddeen, Tomka) (“[T]he nature of the dispute’ appears to refer to the dispute being a legal dispute. The reference to ‘the parties thereto’ merely means that for a dispute to be

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do not qualify as an “investments.” Even Claimants themselves concede this point.⁴⁸

Accordingly, neither the tire sales nor the profits derived therefrom can establish jurisdiction.⁴⁹

13. **Second**, the mere fact that Claimants have identified some “licenses” that confer limited “revenue sharing” and “intellectual property” rights upon Bridgestone Americas does not necessarily mean that Bridgestone Americas has an “investment.” Licenses, revenue sharing contracts, and intellectual property rights certainly are among the “[f]orms [identified by the TPA] that an investment may take.”⁵⁰ The TPA, however, does not put form over substance. In fact, it states expressly that substance shall prevail over form.⁵¹

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within the Centre’s jurisdiction, the parties must be a Contracting State and a national of another Contracting State. These fundamentals, and the equally fundamental assumption that the term ‘investment’ does not mean ‘sale,’ appear to comprise ‘the outer limits,’ the inner content of which is defined by the terms of the consent of the parties to ICSID jurisdiction”); **RLA-008**, *Philip Morris Brand Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Uruguay*, ICSID Case No. ARB/10/7 (Decision on Jurisdiction, 2 July 2013), ¶ 203 (Bernardini, Born, Crawford) (describing as outside of the Centre’s jurisdiction a “commercial transaction, such as the mere delivery of goods against payment of the price”); **RLA-009**, *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13 (Decision on Jurisdiction, 6 August 2003), ¶ 133, note 153 (Feliciano, Thomas, Faurès); **RLA-010**, *Mytilineos Holdings S.A. v. State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL (Partial Award on Jurisdiction, 8 September 2006), ¶ 125 (Reinisch, Koussoulis, Mitrovic); **RLA-011**, *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. v. Venezuela*, ICSID Case No. ARB/11/26 (Award, 29 January 2016), ¶ 284 (Beechey, Kessler, Landau) [“*Tenaris*”]; **RLA-012**, *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3 (Decision on Jurisdiction, 11 July 1997), ¶ 28 (Orrego Vicuña, Heth, Owen).

⁴⁸ **Claimants’ Submission on Registration**, p. 3 (conceding that “transactions that involve a ‘simple sale and like transient commercial transactions’ are excluded from the Centre’s jurisdiction”).

⁴⁹ Panama notes that although Claimants contend that Bridgestone Costa Rica sells tires to third-party distributors in Panama (*see, e.g., Request for Arbitration*, ¶ 7), Claimants have not submitted any evidence that corroborates this assertion.

⁵⁰ **Ex. R-001**, TPA, Art. 10.29.

⁵¹ *See, e.g., Ex. R-001*, TPA, Art. 10.29 (identifying “bonds, debentures, other debt instruments, and loans” and “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law” as examples of “[f]orms that an investment may take”), *id.*, note 7 (stating that “[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics”), note 9 (stating that “[w]hether 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 characteristics of an investment”).

14. Accordingly, to satisfy their burden of proving that a qualifying investment exists, Claimants must show that the “revenue-sharing” and “intellectual property” rights that Bridgestone Americas allegedly derived from licenses meet the TPA’s definition of “investment” — *viz.*, “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.”⁵² As discussed below, Claimants cannot make this showing.

15. **The “revenue-sharing” rights.** As best Panama can discern, these rights consist of Bridgestone Americas’ right under a 2015 sublicense agreement to a miniscule share of the “net sales value” of whatever tire products Bridgestone Costa Rica sells.⁵³ It is not clear to Panama, however, how this right — which was created *after* the Panamanian Supreme Court decision here at issue — could possibly be deemed a relevant “investment.” In fact, this right does not qualify as an “investment”⁵⁴ at all, because the TPA expressly states that “claims to payment that are immediately due and result from the sale of goods or services are not investments.”⁵⁵

16. **The “intellectual property” rights.** Because the TPA states that it is only the “asset[s] that an investor owns or controls” that qualify as an “investment”⁵⁶ — and it is clear

⁵² **Ex. R-001**, TPA, Art. 10.29 (emphasis added).

⁵³ **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015), Arts. 1.3, 3.2. Pursuant to Article 3.2 of the Sublicense Agreement, these funds are to be paid “in U.S. Dollars . . . at Nashville, TN (USA)” Although the other two licenses that Claimants have submitted also contain revenue-sharing provisions, in those licenses, it is Bridgestone Americas that must make payment.

⁵⁴ See **RLA-040**, *State Enterprise “Energorynok” (Ukraine) v. Moldova*, SCC Arb. 2012/175 (Final Award, 29 January 2015), ¶¶ 89–92, 101 (Turck, Knieper, Tirado) (holding that the claimant did not have an investment because its claim was based on a claim to payment in the absence of any actual involvement of the economic activity in the host State).

⁵⁵ **Ex. R-001**, TPA, Art. 10.29, note 8.

⁵⁶ **Ex. R-001**, TPA, Art. 10.29.

that Bridgestone Americas does not own or control either the BRIDGESTONE or FIRESTONE trademarks⁵⁷ — the only “intellectual property” rights that Bridgestone Americas could even attempt to style as an “investment” would be those that were created by means of the three trademark licensing agreements that Claimants appended to their 25 October 2016 Submission on Registration.⁵⁸ However, not even those rights qualify for protection under the TPA.

17. This is so because Chapter 10 only applies to investments located *in Panama*,⁵⁹ and to prove that rights derived from a license are located in Panama, Claimants must demonstrate that such rights exist under Panamanian domestic law.⁶⁰ Article 10.29 makes this point expressly, stating that “[w]hether a particular type of license . . . has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has

⁵⁷ See **Request for Arbitration**, ¶ 6; **Ex. C-048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 11 (confirming that Bridgestone *Licensing*, as “LICENSOR[,] owns of [sic] the Marks and all the goodwill associated therewith,” that “LICENSOR shall retain all right, title and interest in and to the Marks, the goodwill associated therewith, and all registrations thereon,” “[a]ny and all uses of the Marks by [Bridgestone Americas as] LICENSEE shall inure to the benefit of LICENSOR,” and, most importantly, that Bridgestone Americas, as “LICENSEE shall have no rights to the Marks . . .”); **Ex. C-050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Art. 6–1 (explaining that, “except for the right to use [Bridgestone Corporation] Trademarks to identify Tire Products, [Bridgestone Americas’ predecessor] shall not acquire and shall not claim, whether by reason of this Agreement, by use or otherwise, *any* right, title or interest, direct or indirect, in [Bridgestone Corporation] Trademarks”) (emphasis added); **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015), Art. 1.2. (referring to the trademarks described therein as “trademarks owned by BSJ [*i.e.*, Bridgestone Corporation]”).

⁵⁸ See generally **Ex. C-048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001); **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015); **Ex. C-050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002).

⁵⁹ **Ex. R-001**, TPA, Art. 10.1.1 (emphasis added) (“Chapter [10] applies to measures adopted or maintained by a Party relating to (a) *investors of the other Party*; (b) *covered investments*; and (c) with respect to Articles 10.9 and 10.11, all *investments in the territory of the Party*”) (emphasis added); see also *id.*, Art. 10.29 (explaining that the term “investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an *investment in the territory of the other Party*”) (emphasis added); Art. 2.1 (explaining that “covered investment means, with respect to a Party, *an investment, as defined in Article 10.29 (Definitions) in its territory* of an investor of the other Party . . .”) (emphasis added).

⁶⁰ See **Ex. R-001**, TPA, Art. 10.29, note 9.

*under the law of the Party. Among the licenses . . . that do not have the characteristics of an investment are those that do not create any rights protected under domestic law.”*⁶¹

18. The three licenses that Claimants have submitted as “evidence” of Bridgestone Americas’ rights clearly fall into the category of licenses that “do not have the characteristics of an investment,” as they “do not create any rights protected under [Panamanian] law.” The first license (Exhibit C-48) is a 2001 “agreement to license trademarks” between (1) Bridgestone Licensing, and (2) an entity called “Bridgestone/Firestone Americas Holding, Inc.,” which was a predecessor of Bridgestone Americas. Claimants contend that this document “grant[ed] intellectual property rights to [Bridgestone/Firestone Americas Holding, Inc.] over the FIRESTONE mark in markets outside of the United States.”⁶² However, all of the “revenue sharing,” “license,” and “intellectual property” rights described in this document were created under U.S. law, are expressly governed by U.S. law, and are performed under U.S. law.⁶³ The document accordingly did not create any “revenue sharing,” “license,” or “intellectual property” rights protected under Panamanian domestic law.

19. The second license (Exhibit C-050) is a 2002 “trademark license agreement” between Bridgestone Corporation (*i.e.*, the Japanese parent company of Bridgestone Americas) and Bridgestone/Firestone Americas Holding, Inc. (*i.e.*, Bridgestone Americas’ predecessor). This agreement authorizes Bridgestone/Firestone Americas Holding to use Bridgestone

⁶¹ **Ex. R-001**, TPA, Art. 10.29, note 9 (emphasis added).

⁶² **Claimants’ Submission on Registration**, note 8.

⁶³ **Ex. C-048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 28 (“This Agreement shall be *governed by and construed under the laws of the State of Delaware and of the United States of America*, as applicable, excluding its conflicts of law doctrine. *LICENSEE* [*i.e.*, the predecessor of Bridgestone Americas] *agrees that Ohio and Tennessee have a substantial relationship to the creation and administration of this agreement, that it conducts commerce in Ohio and Tennessee at least by virtue of its performance of its obligations to LICENSOR under this Agreement, and that it consents to personal jurisdiction in the federal and state courts located in Summit Country, Ohio, and Davidson County, Tennessee*, as a choice of forum and of convenience”) (emphasis added).

Corporation’s trademarks “in relation to all Tire Products *within the United States of America* . . . ; and the term ‘Bridgestone’ as part of a corporate name or trade name.”⁶⁴ This agreement is to “be construed and interpreted in accordance with *the laws of Japan*.”⁶⁵

Accordingly, this document also failed to create any rights protected under Panamanian domestic law.

20. The same is true of the third license (Exhibit C-049), which is a 2015 “trademark sublicense agreement” between Bridgestone Americas Tire Operations, LLC (an entity that Claimants describe as a “subsidiary” of Claimant Bridgestone Americas),⁶⁶ and Bridgestone Costa Rica. Drawing on rights that Claimants’ Japanese parent company, Bridgestone Corporation, supposedly licensed to Bridgestone Americas Tire Operations by means of a December 2001 license agreement that Claimants have not submitted,⁶⁷ this agreement purports to authorize Bridgestone Costa Rica to use the Costa Rican trademarks owned Bridgestone Corporation⁶⁸ “to manufacture Tire Products in Costa Rica,”⁶⁹ and to sell them worldwide.⁷⁰ Article 12.7 states that “[t]his Agreement shall be construed and interpreted in accordance with the laws of Tennessee.”⁷¹

⁶⁴ **Ex. C-050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Art. 2-1.

⁶⁵ **Ex. C-050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Art. 12-7 (emphasis added).

⁶⁶ See **Claimants’ Submission on Registration**, note 8.

⁶⁷ Claimants *have* submitted a December 2001 licensing agreement (*viz.*, **Ex. C-048**), but that agreement is one involving Bridgestone Licensing, and the FIRESTONE trademark. It does not appear to involve the trademarks owned by Bridgestone Corporation.

⁶⁸ See **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015), Arts. 1.2, 2.

⁶⁹ **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015), Art. 2.

⁷⁰ See **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015), Art. 2.

⁷¹ **Ex. C-049**, Trademark Sublicense Agreement (1 January 2015), Art. 12.7.

21. It therefore is amply clear that Claimant Bridgestone Americas does not have a qualifying “investment.”

B. Even If Bridgestone Americas *Did* Have an Investment (*Quod Non*), the Present Dispute Does Not “Aris[e] Directly Out Of” that Investment

22. Article 25(1) of the ICSID Convention limits the Tribunal’s jurisdiction to “legal dispute[s] arising directly out of an investment”⁷² Thus, even if Claimants somehow found a way to demonstrate that Bridgestone Americas has a qualifying investment, they still would have to prove that the present dispute “aris[es] directly out of [that] investment”⁷³

23. In their 25 October 2016 submission to ICSID, Claimants asserted that “[t]he claims brought in the Request in the present case arise directly out of [Claimants’] respective intellectual property rights in Panama”⁷⁴ That cannot be so — at least, not with respect to Bridgestone Americas.

24. For a dispute to “aris[e] directly out of an investment” within the meaning of Article 25, there must be an “immediate ‘cause and effect’ between the actions of the host State and the effects of such actions on the protected investments.”⁷⁵ In other words, “one must be able to establish firsthand a causal link between the investment and the actions of the host State that produce the harm.”⁷⁶ For Bridgestone Americas, no such link exists.

⁷² ICSID Convention, Art. 25(1).

⁷³ ICSID Convention, Art. 25(1).

⁷⁴ Claimants’ Submission on Registration, p. 3.

⁷⁵ RLA-013, *Metalpar S.A. and Buen Aire S.A. v. Argentina*, ICSID Case No. ARB/03/5 (Decision on Jurisdiction, 27 April 2006), ¶ 95 (Oreamuno Blanco, Cameron, Chabaneix) [*“Metalpar”*] (unofficial translation from Spanish).

⁷⁶ RLA-013, *Metalpar*, ¶ 95 (unofficial translation from Spanish).

25. To recall, the “claims . . . in this arbitration arise out of a Supreme Court decision of the Republic of Panama”⁷⁷ that imposed a USD 5,431,000 penalty on Bridgestone Corporation and Bridgestone Licensing,⁷⁸ which Bridgestone Licensing eventually chose to pay.⁷⁹ The proceeding that gave rise to the Supreme Court decision was a lawsuit by a Panamanian entity and a Chinese entity for injuries that they sustained as a result of efforts by Bridgestone Corporation and Bridgestone Licensing to police the BRIDGESTONE and FIRESTONE trademarks.

26. In the Request for Arbitration, Claimants contend that, “[a]s a consequence of the Supreme Court decision, and the penalty imposed therein, [Bridgestone Americas] and [Bridgestone Licensing] have suffered loss and damage in excess of USD 16,000,000.”⁸⁰ This figure supposedly corresponds to: (1) the “penalty” that the Supreme Court ordered Bridgestone Corporation and Bridgestone Licensing to pay,⁸¹ and (2) the “diminution of value of the FIRESTONE and BRIDGESTONE trademarks”⁸² resulting from the fact that the Supreme Court decision allegedly “deprived [Bridgestone Licensing] and [Bridgestone Americas] [of] the ability to oppose confusingly similar trademark applications.”⁸³

27. However, none of this has anything to do with Bridgestone Americas. Bridgestone Americas was not a party to the Panamanian court proceedings, did not pay (and did not have any obligation to pay) the “penalty” mentioned above, did not own the

⁷⁷ **Claimants’ Submission on Registration**, p. 3.

⁷⁸ **Request for Arbitration**, ¶ 43.

⁷⁹ **Request for Arbitration**, ¶ 53.

⁸⁰ **Request for Arbitration**, ¶ 54.

⁸¹ **Request for Arbitration**, ¶ 54.

⁸² **Request for Arbitration**, ¶ 66; *see also id.*, ¶ 67.

⁸³ **Request for Arbitration**, ¶ 66.

BRIDGESTONE or FIRESTONE trademarks,⁸⁴ and did not have any authority to police such trademarks.⁸⁵ At most, Bridgestone Americas had the right to “sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas.”⁸⁶ Claimants do not even attempt to explain how this right possibly could have been harmed by the Supreme Court decision. Accordingly, there is no direct link between the “investment” that Bridgestone Americas supposedly has, and the injury that Claimants allege. In these circumstances, the dispute cannot be said to “aris[e] directly out of an investment.”⁸⁷

III. Jurisdictional Bars Relating to Claimant Bridgestone Licensing

28. The claims by Bridgestone Licensing also should be rejected for lack of jurisdiction. As discussed below in **Part A**, Bridgestone Licensing is wholly owned by Bridgestone Corporation, a Japanese corporation, and does not have any discernible operations in the territory of the United States. It therefore cannot bring *any* claims on the basis of Chapter 10

⁸⁴ See **Request for Arbitration**, ¶ 6.

⁸⁵ See **Ex. C-048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 11 (“LICENSEE [Bridgestone Americas] agrees that LICENSOR [Bridgestone Licensing Services] owns of the Marks and all the goodwill associated therewith. LICENSOR shall retain all right, title and interest in and to the Marks”), Art. 14 (“LICENSEE will cooperate fully and in good faith with LICENSOR for the purpose of securing and preserving LICENSOR’S rights including rights in the Marks and rights in any dispute . . . LICENSEE agrees to give LICENSOR notice of any known or suspected infringements of the marks and to cooperate with the efforts by LICENSOR to police the Marks”); **Ex. C-050**, Trademark License Agreement between Bridgestone Corporation (“BSJ”) and Bridgestone/Firestone Americas Holding, Inc. (“BFAH”) (1 January 2002), Art. 6-1 (“It is understood that, except for the right to use BSJ Trademarks to identify Tire Products, BFAH [and its successor Bridgestone Americas] shall not acquire and shall not claim, whether by reason of this Agreement, by use or otherwise, any right, title or interest, direct or indirect, in BSJ Trademarks”), Art. 6-3 (“BFAH shall immediately inform BSJ [*i.e.*, Bridgestone Corporation] in writing of any such situation [involving possible infringement] . . . [and i]n such event, BSJ hereunder may take all necessary action to restrain such infringement or unfair competition”).

⁸⁶ **Claimants’ Submission on Registration**, p. 4.

⁸⁷ See, e.g., **RLA-014**, *Burimi SRL and Eagle Games S.H.A. v. Albania*, ICSID Case No. ARB/11/18, (Award, 29 May 2013), ¶¶ 144–45 (Price, Cremades, Fadlallah) (concluding that jurisdiction *ratione materiae* under the ICSID Convention did not exist because the claimant’s alleged investment consisted of a financing agreement with a woman named Alma Leka, and “the dispute at hand does not arise out of any government measure affecting [the claimant]’s agreement with Ms. Alma Leka”), ¶¶ 86, 144 (explaining that the claims at issue in the arbitration were based on the assertion that the respondent had “prevented [an entity named] Eagles Games from carrying out its business,” and that the claimant’s financing agreement did not create any ownership interest in Eagle Games).

of the TPA.⁸⁸ In any event, as discussed below in **Part B**, the claims that Bridgestone Licensing has asserted amount to an abuse of process.

A. Bridgestone Licensing Is Not Entitled to the Benefits of TPA Chapter 10

29. Although Chapter 10 of the TPA offers protection to U.S. “investors,” including “enterprises,” who have made “investments” in Panama,⁸⁹ the offer is subject to one important caveat, established in Article 10.12.2:

Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), *a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.*⁹⁰

If a Party to the TPA chooses to “deny the benefits of [Chapter 10] to an investor” — as Panama does, for the reasons set forth below — this has “the effect of depriving the Tribunal of jurisdiction.”⁹¹

30. As indicated by the plain language of Article 10.12.2, there are three substantive requirements that must be satisfied before a State can deny the benefits of Chapter 10 to an

⁸⁸ See **Ex. R-001**, TPA, Art. 10.12 (authorizing each State Party to “deny the benefits of [Chapter 10] to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party, and persons of a non-Party, or of the denying Party, own or control the enterprise”).

⁸⁹ See **Ex. R-001**, TPA, Art. 10.1.1 (“This Chapter applies to measures adopted or maintained by a Party relating to (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 10.9 [Performance Requirements] and 10.11 [Investment and Environment], all investments in the territory of the Party”), Art. 2.1 (stating that the term “covered investment means, with respect to a Party, an investment as defined in Article 10.29 (Definitions), in its territory of *an investor of the other Party* in existence on the date of entry into force of this Agreement or established, acquired, or expanded thereafter”) (original emphasis omitted; new emphasis added). The term “investor of a Party” is defined to include “an enterprise of a Party.” The term “enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.” **Ex. R-001**, TPA, Art. 10.29 (original emphasis omitted).

⁹⁰ **Ex. R-001**, TPA, Art. 10.12.2 (emphasis added).

⁹¹ See **RLA-015**, *Ulysseas, Inc. v. Ecuador*, PCA Case No. 2009-19 (Interim Award, 28 September 2010), ¶ 172 (Bernardini, Pryles, Stern) [*“Ulysseas”*] (describing the consequences of a similarly-worded denial of benefits clause).

investor of the other Party: (1) the “investor of the other Party” must be an “enterprise of such other Party,” (2) the enterprise must “ha[ve] no substantial business activities in the territory of the other Party,” and (3) the enterprise must be “own[ed] or control[led]” by “persons of a non-Party, or of the denying Party.” The only procedural requirement for a denial of benefits is that the denying Party provide advance notice to the other Party to the TPA, to the maximum extent possible.⁹² The State is *not* required to provide advance notice to the claimant.⁹³ Nor is it required to carry out a denial of benefits before the arbitration begins.⁹⁴

⁹² See **Ex. R-001**, TPA, Art. 10.12.2 (explaining that a denial of benefits is “[s]ubject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations)”), Art. 18.3.1 (“To the maximum extent possible, each Party shall notify the other Party of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party’s interests under this Agreement”); **RLA-016**, *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Non-Disputing Party Submission of the United States (20 May 2011), note 9 [“United States’ Non-Disputing Party Submission in *Pac Rim*”] (explaining, with respect to the similarly-worded denial of benefits clause in DR-CAFTA, that “to invoke the denial of benefits provision . . . , a CAFTA-DR Party is not required to provide notice to another CAFTA-DR Party of its intent to invoke that provision before arbitration commences”). Although a denial of benefits is also subject to Article 20.4 of the TPA, as the plain language of Article 20.4 indicates — and the United States has explained and the *Pac Rim v. El Salvador* tribunal has confirmed, in connection with the similarly-worded denial of benefits clause in DR-CAFTA — the consultations contemplated in Article 20.4 are discretionary. See **Ex. R-001**, TPA, Art. 20.4 (“Either Party *may* request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement”) (emphasis added); **RLA-017**, *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12 (Decision on Jurisdiction, 1 June 2012), ¶ 4.91 (Veeder, Santiago Tawil, Stern) [“*Pac Rim (Decision on Jurisdiction)*”] (rejecting the claimant’s argument that the respondent did not notify the United States in time to allow for consultations as allegedly mandated by the treaty); **RLA-016**, United States’ Non-Disputing Party Submission in *Pac Rim*, note 10 (explaining, with respect to DR-CAFTA, that “[a] host State’s denial of benefits is also ‘subject to’ Article 20.4, which provides for consultations among Parties in certain circumstances. Article 20.4.1 states that ‘[a]ny Party may request in writing consultations with any other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.’ Given that a request for consultations pursuant to Article 20.4.1 is discretionary (‘[a]ny Party *may* request’), there is no basis in the Agreement to draw any inference from a Party’s decision not to request consultations”) (emphasis in original).

⁹³ See **RLA-016**, United States’ Non-Disputing Party Submission in *Pac Rim*, ¶¶ 9–10.

⁹⁴ See, e.g., **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.85 (explaining that, for purposes of the similarly-worded denial of benefits clause in DR-CAFTA, the deadline for the State to deny benefits was the counter-memorial, and that “[a]ny earlier time-limit could not be justified on the wording of CAFTA Article 10.12.2; and further, it would create considerable practical difficulties for CAFTA Parties inconsistent with this provision’s object and purpose, as observed by Costa Rica and the USA from their different perspectives as host and home States”); **RLA-018**, *Empresa Eléctrica del Ecuador, Inc. v. Ecuador*, ICSID Case No. ARB/05/9, (Award, 2 June 2009), ¶ 71 (Sepúlveda, Rooney, Reisman) (“The Tribunal considers that Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, *i.e.* upon raising its objections on jurisdiction”), p. 22, note 34 (“Counsel for the Claimant objected to the Respondent’s denial [of benefits]. The President of the Tribunal stated that . . . according to the ICSID Arbitration Rules, the Respondent has the right to raise any objections to jurisdiction no later than the expiration of the time limit fixed for the filing of its counter-memorial”); **RLA-019**, *Guaracachi*

[FOOTNOTE CONTINUED ON NEXT PAGE]

31. In the present case, all of the requirements are satisfied. Claimants themselves argue that Bridgestone Licensing is an “enterprise” of the United States,⁹⁵ and that it is wholly-owned by Bridgestone Corporation⁹⁶ (which, as a company incorporated in Japan,⁹⁷ qualifies as a “person of a non-Party”).⁹⁸ Panama additionally gave notice to the United States on 22 May 2017 of its intention to deny Bridgestone Licensing the benefits of Chapter 10.⁹⁹ The only question that is not expressly answered in the Request for Arbitration is whether Bridgestone Licensing has “substantial business activities in the territory” of the United States.

32. As far as Panama is aware, there is no bright-line standard for determining whether an enterprise has “substantial business activities” in a particular country; any number of factors may be relevant to the analysis¹⁰⁰ — the goal of which is to determine whether Bridgestone Licensing has an actual “physical presence” in the United States,¹⁰¹ or if it is “more akin to a shell company with no geographical location for its nominal, passive, limited

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

America, Inc. and Rurelec PLC v. Bolivia, PCA Case No. 2011-17 (Award, 31 January 2014, ¶ 377 (Júdice, Conthe, Vinuesa); **RLA-015**, *Ulysseas*, ¶ 172; **RLA-016**, United States’ Non-Disputing Party Submission in *Pac Rim*, ¶ 7.

⁹⁵ See **Request for Arbitration**, ¶ 70.

⁹⁶ **Request for Arbitration**, ¶ 1.

⁹⁷ See **Request for Arbitration**, ¶ 1.

⁹⁸ See **Ex. R-001**, TPA, Art. 2.1 (defining a “person of a Party” as “a national or an enterprise of a Party”); **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶¶ 4.79, 4.82 (explaining that the fact that an entity is that a claimant is “wholly owned” by a parent company that is “a legal person of a non-[treaty] Party” is sufficient to satisfy the ownership criterion).

⁹⁹ See **Ex. 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. The notice, which is dated 16 May 2017, was delivered via courier on 22 May 2017 to the Office of the Legal Adviser of the U.S. State Department and the United States Trade Representative. See *id.*, p. 1 (reflecting proof of delivery to the United States Trade Representative); see also **Ex. R-014**, Proof of Delivery to U.S. State Department.

¹⁰⁰ See, e.g., **RLA-011**, *Tenaris*, ¶ 224 (taking note of certain facts relevant to determining the corporate seat of an entity); **RLA-041**, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Award (redacted version), 5 March 2011), ¶ 217 (Crivellaro, Kelin, Stuber) (requiring clear indicia of business operations to identify the corporate seat of an entity).

¹⁰¹ **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.72.

and insubstantial activities.”¹⁰² However, it is clear that the date of assessment is the date of the Request for Arbitration¹⁰³ (in this case, 30 September 2015), and that only “substantial”¹⁰⁴ business activities of *Bridgestone Licensing* itself¹⁰⁵ will suffice.

33. To determine whether Bridgestone Licensing has an actual “physical presence” in the United States,¹⁰⁶ or if it is “more akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities,”¹⁰⁷ Panama consulted a broad range of databases, including corporate directories, domestic and international litigation reporters, business news sources, trade journals, and trademark registration databases. However, as the table below illustrates, only a handful of these databases even had entries for Bridgestone Licensing, and none of those entries indicates that Bridgestone Licensing has *any* business activities in the United States.¹⁰⁸ (For the Tribunal’s convenience, Panama has also included the search results for *Bridgestone Americas*, to serve as a point of comparison.)

¹⁰² **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.75.

¹⁰³ See **RLA-015**, *Ulysseas*, ¶ 174.

¹⁰⁴ See **Ex. R-001**, TPA, Art. 10.12.2; see also **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.67 (upholding a denial of benefits objection, and explaining that even though “there were and are certain activities by the Claimant in the USA,” and “there can be no criticism of their legitimacy under the laws of the USA,” “the question remains whether such activities were ‘substantial’ within the meaning of . . . Article 10.12.2”).

¹⁰⁵ *Pac Rim (Decision on Jurisdiction)*, ¶ 4.66 (explaining that the “substantial business activities” criterion “under CAFTA Article 10.12.2 relates not to the collective activities of a group of companies, but to activities attributable to the ‘enterprise’ itself, here the Claimant. If that enterprise’s own activities do not reach the level stipulated by CAFTA Article 10.12.2, it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprise’s activities for the purpose of applying CAFTA Article 10.12.2”).

¹⁰⁶ **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.72.

¹⁰⁷ **RLA-017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.75.

¹⁰⁸ This abridged table only provides a picture of the searches conducted by Panama. The full table of searches conducted is attached as **Annex A**.

Table 1

<u>Category of Search</u>	<u>Database</u>	<u>Search Results for Bridgestone Licensing</u>	<u>Search Results for Bridgestone Americas</u>
Corporate Directories	LexisNexis US Companies Reports	None	Yes - 1,293 results, including company records, advertising directories, and corporate affiliations reports
	LexisNexis Accurint Business Credit search	None	Yes - more than 1,000 results of credit reports
Litigation Research	PACER Case Locator	None	Yes - 500 federal district court docket results for BSAM and affiliated companies
	Courthouse News Service	Yes - single trademark infringement litigation in Canada	Yes - 321 international litigation results, including many within the United States
	Bloomberg Law dockets	Yes - single docket result in Hong Kong	Yes - 769 domestic and international docket results
Business News, Trade Journals	Gale Group Trade & Industry Database™	None	Yes - 696 media results from industry sources
	LexisNexis All English Language Mega News	Yes - 58 reports of trademark registrations and disputes in Australia, Brazil, Canada, the European Union, India, Mexico, New Zealand, Switzerland, and the United Kingdom	Yes - more than 3,000 reports of trademark registrations
	Bloomberg Law News	None	Yes - 1,000 law-related media reports

34. As best Panama can discern, Bridgestone Licensing is precisely the type of “shell company”¹⁰⁹ that the Parties intended to exclude from TPA protection. Despite having been incorporated in the United States, Bridgestone Licensing:

- a. does not appear to own any assets (or registered trademarks) in the United States,¹¹⁰
- b. has issued 1,000 shares which have a par value of zero,¹¹¹
- c. does not appear in publicly-available documents depicting the corporate structure of the Bridgestone family of companies,¹¹²
- d. was not mentioned in Bridgestone Corporation’s public 2015 Annual Reports (“Operational Review” and “Financial Review”),¹¹³ and
- e. has virtually no presence in the public databases (including corporate directories, litigation databases, and business news services) that typically

¹⁰⁹ United States’ Non-Disputing Party Submission in *Pac Rim*, ¶ 3 (explaining further that the denial of benefits provision in DR-CAFTA (which is nearly identical to Article 10.12.2 of the TPA) is designed to be a “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”).

¹¹⁰ See **Ex. R-002**, Corporate Registry Results (various dates); **Ex. R-003**, Trademark Search Results (various dates).

¹¹¹ See **Ex. R-004**, “2016 Annual Franchise Tax Report,” State of Delaware (2016); **Ex. C-004**, Certificates of Incorporation for Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc. (various dates).

¹¹² **Ex. R-009**, Business Report for the 98th Fiscal Period, Bridgestone Corp. (2016) (listing Bridgestone Americas as a subsidiary but not Bridgestone Licensing); **Ex. R-010**, LexisNexis Corporate Affiliations, Bridgestone Corp. (10 April 2017); **Ex. R-011**, Standard & Poors Capital IQ Corporate Structure Tree, Bridgestone Corp. (14 April 2017). Bridgestone Licensing also does not appear on the “Subsidiaries and Business Units” page of the Bridgestone Americas website, which is described as the “Regional Headquarters” and would presumably list *all* regional subsidiaries and Bridgestone Units. See **Ex. R-006**, Subsidiaries and Business Units, Bridgestone Americas Website (10 May 2017).

¹¹³ See **Ex. R-007**, Annual Report 2015: Operational Overview (2015); **Ex. R-008**, Our Headquarters, Bridgestone Americas Website (10 May 2017).

would yield results for companies with substantial business activities in the United States.¹¹⁴

35. Moreover, Claimants’ evidence that Bridgestone Licensing “ha[d] taken all necessary internal actions to authorize the request [for arbitration]”¹¹⁵ was apparently signed and notarized in Japan.¹¹⁶

36. Bridgestone Licensing does list an official business address in the United States.¹¹⁷ However, this address is the exact same one used by Bridgestone Americas as its “headquarters,”¹¹⁸ and other Bridgestone entities appear to use this address as well.¹¹⁹ It is not clear whether Bridgestone Licensing — as distinguished from all of the other Bridgestone entities that use this address — has any employees who actually work at this address.

37. In sum, it appears that Bridgestone Licensing has no business activities at *all* in the United States, let alone the “substantial business activities” needed to survive a denial of benefits objection. The Tribunal should therefore decline jurisdiction over all of the claims by Bridgestone Licensing.

B. Bridgestone Licensing’s Claims Amount to an Abuse of Process

38. As several investment tribunals have held, if a jurisdictional defect exists at the time a dispute arises, a claimant cannot simply take matters into its own hands and “fix” the

¹¹⁴ See Table 1, above.

¹¹⁵ See **ICSID Institution Rule 2(1)(f)**.

¹¹⁶ See **Ex. C-001**, Power of Attorney and Internal Approval Statement for Bridgestone Licensing Services, Inc. (2016).

¹¹⁷ See **Ex. R-004**, “2016 Annual Franchise Tax Report,” State of Delaware (2016).

¹¹⁸ See **Ex. R-008**, Our Headquarters, Bridgestone Americas Website (10 May 2017).

¹¹⁹ See **Ex. R-012**, Dun & Bradstreet Hoovers Corporate Hierarchy, Bridgestone Corp. (12 April 2017) (revealing that Bridgestone Americas Tire Operations, LLC; Bridgestone Brands, LLC; Bridgestone Retail Operations, LLC; Bridgestone Finance, Bsa Sourcing, LLC; and others are registered to the same address).

defect unilaterally by manipulating its own nationality,¹²⁰ the nationality of the investment,¹²¹ or the nationality of the claim.¹²² It is widely considered an abuse of process for a claimant to proceed in that manner.¹²³ Yet, that is precisely what Bridgestone Licensing has done here.

39. As Claimants have explained on multiple occasions, the claims in this case arise out of a May 2014 decision by the Supreme Court of Panama which deemed two entities — Bridgestone Corporation and Bridgestone Licensing — “jointly and severally liable”¹²⁴ to Muresa and Tire Group for USD 5,431,000.¹²⁵ Although Claimants have not yet staked out a position on when precisely the dispute arose, it would be difficult for them to argue that the dispute arose later than 2015, given that Claimants’ own exhibits indicate: (1) that “the Bridgestone family of companies”¹²⁶ was contemplating an investment treaty claim against

¹²⁰ See, e.g., **RLA-025**, *Renée Rose Levy and Gremcitel S.A. v. Peru*, ICSID Case No. ARB/11/17 (Award, 9 January 2015), ¶¶ 185, 195 (Kaufmann-Kohler, Zuleta, Vinuesa) [“Levy”].

¹²¹ See, e.g., **RLA-020**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Award, 15 April 2009), ¶ 142 (Stern, Bucher, Fernández-Armesto) [“Phoenix Action”]; **RLA-021**, *ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06 (Award on Jurisdiction, 18 July 2013), ¶ 423 (Stern, Klein, Thomas) [“ST-AD”]; **RLA-042**, *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Venezuela*, ICSID Case No. ARB/07/27 (Decision on Jurisdiction, 10 June 2010), ¶ 205 (Guillaume, Kaufmann-Kohler, El-Kosheri); **RLA-043**, *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. Venezuela*, ICSID Case No. ARB/10/5 (Decision on Jurisdiction, 8 February 2013), ¶¶ 146–48 (McLachlan, Rigo Sureda, Stern).

¹²² See, e.g., **RLA-022**, *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2 (Award, 15 March 2002), ¶ 24 (Sucharitkul, Rogers, Suratgar); **RLA-023**, *Vito G. Gallo v. Canada*, PCA Case No. 55798 (Award, 15 September 2011), ¶ 336 (Fernández-Armesto, Castel, Lévy); **RLA-044**, *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12 (Award on Jurisdiction and Admissibility, 17 December 2015), ¶ 588 (Böckstiegel, Kaufmann-Kohler, McRae).

¹²³ See, e.g., **RLA-024**, *Lao Holdings N.V. v. Laos*, ICSID Case No. ARB(AF)/12/6 (Decision on Jurisdiction, 21 February 2014), ¶ 70 (Binnie, Hanotiau, Stern) [“Lao Holdings”]; **RLA-025**, *Levy*, ¶¶ 185, 195.

¹²⁴ **Request for Arbitration**, ¶ 43.

¹²⁵ See, e.g., **Request for Arbitration**, ¶ 3 (“The claims herein concern an extraordinary decision by the Supreme Court of Panama that Bridgestone should pay millions of dollars in damages to a Panamanian company”); **Claimants’ Submission on Registration**, p. 2 (“The claims asserted by the Claimants in this arbitration arise out of a Supreme Court decision of the Republic of Panama”).

¹²⁶ **Ex. C-032**, Special 301 Public Hearing Oral and Written Statement (24 February 2015), p. 1 (defining “Bridgestone”).

Panama in February 2015,¹²⁷ (2) that Claimants’ counsel raised a “potential investor state arbitration” matter with the Panamanian ambassador to the United States in March 2015,¹²⁸ and (3) Claimants submitted a formal Notice of Intent on 30 September 2015.¹²⁹

40. In 2015 (and for much of 2016), no clear jurisdictional path was available for investment treaty claims based on the Supreme Court proceeding and decision. As noted above, only two Bridgestone were parties in that proceeding, and subject to that decision: (1) Bridgestone Corporation, and (2) Bridgestone Licensing. Bridgestone Corporation, as a Japanese entity,¹³⁰ did not have any investment treaty to invoke.¹³¹ Bridgestone Licensing, for its part, had a major obstacle in its way: in order to submit a claim under the TPA, Bridgestone Licensing would have to be able to show that it had “incurred loss or damage” as a result of the “decision by the Supreme Court of Panama that Bridgestone should pay millions of dollars in damages to a Panamanian company.”¹³² However, the amount contemplated in the Supreme Court decision had not been paid,¹³³ and the question of which Bridgestone entity would incur

¹²⁷ See **Ex. C-032**, Special 301 Public Hearing Oral and Written Statement (24 February 2015), p. 3 (discussing the claims that “Bridgestone” planned to raise).

¹²⁸ See **Ex. C-034**, Correspondence from Charlie Johnson, Akin Gump, to Juan Heilbron, Embassy of Panama (12 September 2016), p. 1 (referencing a meeting held in March 2015).

¹²⁹ **Ex. C-043**, Notice of Intent to Arbitrate (30 September 2015).

¹³⁰ See **Request for Arbitration**, ¶ 1.

¹³¹ There is no investment treaty between Panama and Japan. See **RLA-026**, List of International Investment Agreements for the Republic of Panama, UNCTAD, Investment Policy Hub Website (last visited 10 May 2017).

¹³² See **Request for Arbitration**, ¶ 3 (stating that “[t]he claims herein concern an extraordinary decision by the Supreme Court of Panama that Bridgestone should pay millions of dollars in damages to a Panamanian company”); **Ex. R-001**, TPA, Art. 10.17.1 (“Each party *consents to the submission of a claim to arbitration under this Section* in accordance with this Agreement”) (emphasis added), Art. 10.16 (“Submission of a Claim to Arbitration”), Art. 10.16.1 (“[T]he claimant, on its own behalf, *may submit to arbitration under this Section* a claim (i) that the respondent has breached an obligation under Section A [i.e., Articles 10.1 to 10.14], . . . and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach”) (emphasis added).

¹³³ In fact, payment does not even seem to have been *solicited* until June 2016. See **Request for Arbitration**, ¶ 52.

“loss or damage” as a result of the “USD 5,431,000 in damages and fees that were ordered by the Supreme Court”¹³⁴ still remained. “Bridgestone” was therefore at a crossroads.

41. If Bridgestone *Corporation* made the payment (which would have been logical, since Bridgestone Licensing is a shell company with no discernible assets of its own¹³⁵) then Bridgestone *Licensing* would not be able to style the payment as “loss or damage.” But that would mean that *no* Bridgestone entity could bring investment treaty claims. If, on the other hand, Bridgestone *Licensing* made the payment, it would be in a better position to claim “loss or damage.”

42. As Claimants explain in their Request for Arbitration, on 19 August 2016, Bridgestone Licensing “paid the damages award to Muresa and [Tire Group].”¹³⁶ In doing so, Bridgestone Licensing committed an abuse of process: it attempted to manipulate the nationality of the claim after the dispute had already materialized, in an attempt to create a basis for jurisdiction where none otherwise existed.¹³⁷

43. In these circumstances, the Tribunal should not hesitate to decline jurisdiction. As the *Phoenix Action v. Czech Republic* tribunal stated in similar circumstances, “[i]t is the duty of the Tribunal *not* to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.”¹³⁸

¹³⁴ **Request for Arbitration**, ¶ 54.

¹³⁵ See Section III.A, above.

¹³⁶ **Request for Arbitration**, ¶ 53.

¹³⁷ Unfortunately for Bridgestone Licensing Services, it is an entity subject to denial of benefits.

¹³⁸ **RLA-020**, *Phoenix Action*, ¶ 144 (emphasis added); see also **RLA-024**, *Lao Holdings*, ¶ 70.

IV. Jurisdictional Bars Relating to Both Claimants

44. At the conclusion of the Request for Arbitration, Claimants seek “an award . . . [o]rdering Panama to pay an amount in excess of USD 16,000,000 in damages.”¹³⁹ As Claimants explain, “[t]his sum includes the USD 5,431,000 in damages and fees that were ordered by the Supreme Court, as well as an estimate of the loss that has been and will be incurred by [Bridgestone Licensing] and [Bridgestone Americas] as a result of the decision.”¹⁴⁰ The claim for USD 5,431,000 should be rejected for the reasons discussed above. The claim for the remaining USD 10 million dollars, based on the “loss” that supposedly “has been and will be incurred,” is addressed herein.

45. In the Request for Arbitration, Claimants contend that “[s]uch . . . loss arises from a number of inter-related factors,”¹⁴¹ including the fact that “the decision of the Panamanian Supreme Court may be followed in other Latin American countries,”¹⁴² and the possibility that the Panamanian Supreme Court decision will lead to “more trademark applications that are similar and confusingly similar to the Bridgestone mark, both in Panama and elsewhere in Latin America.”¹⁴³ There is no jurisdictional basis for these claims.

46. As Professor Zachary Douglas has stated, “consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting

¹³⁹ Request for Arbitration, ¶ 90.

¹⁴⁰ Request for Arbitration, ¶ 54.

¹⁴¹ Request for Arbitration, ¶ 54.

¹⁴² Request for Arbitration, ¶ 56; *see also id.*, ¶ 57 (asserting that “the decision of the Panamanian Supreme Court establishes a precedent that is likely to be followed in other Latin American legal systems”).

¹⁴³ Request for Arbitration, ¶ 58. The only other “factor” that Claimants have offered is the alleged “[in]ability of the U.S. Bridgestone entities to re-invest” the amount of “damages awarded to Muresa and [Tire Group].” *See id.*, ¶ 55.

of adjudicative power in the tribunal.”¹⁴⁴ Absent such consent, an investor has no right to sue a State directly in an international forum,¹⁴⁵ and an investment tribunal has no authority to act.¹⁴⁶ For purposes of this case, the parties’ consent to arbitration is established in Article 10.17, which states that “[e]ach Party”¹⁴⁷ — meaning each State Party to the TPA¹⁴⁸ “consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.”¹⁴⁹

47. To determine what “the submission of a claim to arbitration under this Section in accordance with this Agreement” entails, one must advert to the other parts of Chapter 10. For present purposes, the most relevant parts of Chapter 10 are the following passages from Articles 10.1 and 10.16:

Article 10.1

This Chapter applies to measures adopted or maintained *by a Party*¹⁵⁰

Article 10.16

[A] claimant . . . may submit to arbitration under this Section a claim (i) that *the respondent* has breached (A) an obligation under Section A [*i.e.*, Articles 10.1 to 10.14] . . . and (ii) that the claimant has incurred loss or damage by reason of, or arising out of that breach¹⁵¹

¹⁴⁴ **RLA-001**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press 2009), ¶ 317; *see also Report of the Executive Directors on the ICSID Convention*, ¶ 23 (“Consent is the cornerstone of the jurisdiction of the Centre”).

¹⁴⁵ *See RLA-021, ST-AD*, ¶ 337 (explaining that “no participant in the international community, be it a State, an international organization, or a physical or legal person, has an inherent right of access to a jurisdictional recourse. Just as a State cannot sue another State unless there is a specific consent to that effect . . . in the same manner, within the framework of BITs, investors cannot intervene at the international level against States for the recognition of their rights unless the States have granted them such rights under conditions that they determined”).

¹⁴⁶ *See RLA-021, ST-AD*, ¶ 361 (“An arbitral tribunal — just as the ICJ or any other international court — does not have a general jurisdiction; it only has a ‘compétence d’attribution,’ which has to respect the limits provided for by the States”).

¹⁴⁷ **Ex. R-001**, TPA, Art. 10.17.1.

¹⁴⁸ *See Ex. R-001*, TPA, Art. 2.1 (defining the term “Party” as “any State for which this Agreement is in force”).

¹⁴⁹ **Ex. R-001**, TPA, Art. 10.17.1.

¹⁵⁰ **Ex. R-001**, TPA, Art. 10.1 (emphasis added).

¹⁵¹ **Ex. R-001**, TPA, Art. 10.16 (emphasis added). The term “respondent means the Party that is a party to an investment dispute.” *Id.*, Art. 10.29.

48. These passages leave no room for doubt. The only claims that the Tribunal has jurisdiction to entertain are claims that Panama allegedly has breached the TPA, through “measures” that *Panama* has “adopted or maintained.” The Tribunal cannot entertain claims based on the hypothetical actions of other States, as Claimants ask it to do.

49. This conclusion is consistent with two basic principles of international law: (1) “that each State is responsible for its *own* conduct in respect of its *own* international obligations,”¹⁵² and (2) that a tribunal cannot adjudicate any claim where “the vital issue to be settled concerns the international responsibility of a third State.”¹⁵³ The former principle is articulated in the International Law Commission’s Draft Articles on State Responsibility.¹⁵⁴ The latter principle was recognized by the International Court of Justice (“**ICJ**”) in the case concerning *Monetary Gold Removed from Rome in 1943* (“*Monetary Gold*”).¹⁵⁵ It has since been repeatedly reaffirmed by the ICJ,¹⁵⁶ and applied in international arbitrations.¹⁵⁷

¹⁵² See **RLA-027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Cambridge University Press (17 January 2002), Art. 1, ¶ 6 (emphasis added).

¹⁵³ **RLA-029**, *Monetary Gold Removed from Rome in 1943 (Italy v. France; United Kingdom v. United States)*, I.C.J. Reports 19, 32, Judgment on Preliminary Objections (15 June 1954), p. 34 [*“Monetary Gold”*].

¹⁵⁴ **RLA-028**, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, International Law Commission, United Nations (2001), Art. 1 (“Every internationally wrongful act of a State entails the international responsibility of *that* State”) (emphasis added); **RLA-030**, *United States Diplomatic and Consular Staff in Tehran*, ICJ, Judgment (24 May 1980) ¶ 56 (“First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State”)

¹⁵⁵ **RLA-029**, *Monetary Gold*, p. 33.

¹⁵⁶ See, e.g., **RLA-031**, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Reports 392, Judgment on Jurisdiction and Admissibility (26 November 1984), ¶ 88; **RLA-032**, *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 554, 576, Judgment (22 December 1986), ¶ 44; **RLA-033**, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, I.C.J. Reports 240, Judgment on Preliminary Objections (26 June 1992), ¶ 55; **RLA-034**, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, I.C.J. Reports 6, Judgment (3 February 1994), ¶ 63; **RLA-035**, *Case Concerning East Timor (Portugal v. Australia)*, I.C.J. Reports 90, Judgment (30 June 1995), ¶ 28; **RLA-036**, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, I.C.J. 275, Judgment on Preliminary Objections (11 June 1998), ¶ 79.

¹⁵⁷ See, e.g., **RLA-037**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. 2009-23 (Third Interim Award on Jurisdiction and Admissibility, 27 February 2012), ¶ 4.61 (Veeder, Grigera Naón, Lowe) (explaining that *Monetary Gold* “gives effect to the principle that no international tribunal may exercise

[FOOTNOTE CONTINUED ON NEXT PAGE]

50. In *Monetary Gold*, Italy filed an application asserting its right to a consignment of monetary gold that had been removed by German forces in 1943. The gold — which had been awarded to Albania in a separate arbitral proceeding — was due to be delivered to the United Kingdom to satisfy a damages award against Albania in a separate ICJ case. However, Italy claimed that *it* was entitled to the gold, on the basis of an internationally-wrongful act by Albania. It accordingly asked that the Court to give priority to its claim.¹⁵⁸

51. However, the Court concluded that, to decide Italy’s claims, it would be “necessary to determine whether Albania had committed any internationally wrongful act.”¹⁵⁹ Because the Court concluded that it would not be appropriate to make this determination in Albania’s absence,¹⁶⁰ the Court declined jurisdiction. The same conclusion applies here, and the same result should obtain.

V. Proposed Calendar

52. As noted above, in accordance with Article 10.20.5 of the TPA, Panama requests that the Tribunal address the objections articulated herein on an expedited basis. Article 10.20.5 states as follows:

In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

jurisdiction over a State without the consent of that State”); **RLA-038**, *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1 (Award, 22 August 2012), ¶ 175 (Dupuy, Brower, Bello Janeiro) (affirming the relevance of the *Monetary Gold* principle as an aspect of the principle of consent in international arbitration); **RLA-039**, *Larsen v. Hawaiian Kingdom*, PCA Case No. 1999-01 (Award, 15 May 2014), ¶ 11.17 (Crawford, Griffith, Greenwood) (explaining that the “rule [of *Monetary Gold*] applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings . . . [since] a tribunal . . . operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings”).

¹⁵⁸ **RLA-029**, *Monetary Gold*, p. 22 (asserting that “Italy’s right to receive the said share of monetary gold must have priority over the claim of the United Kingdom”).

¹⁵⁹ **RLA-029**, *Monetary Gold*, p. 32.

¹⁶⁰ **RLA-029**, *Monetary Gold*, pp. 32–33.

objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.¹⁶¹

53. Assuming that Claimants oppose these objections, Panama proposes the following submission schedule:

- a. Claimants' Response: 30 June 2017
- b. Panama's Reply: 21 July 2017
- c. Claimants' Rejoinder: 11 August 2017
- d. Two-Day Oral Hearing: Date TBD

54. In view of the time limits contemplated in Article 10.20.5 of the TPA, and the time needed to prepare adequately for a hearing, Panama suggests that the hearing be held on two contiguous weekdays during the third full week in September (*i.e.*, September 18 to 22).

VI. Conclusion

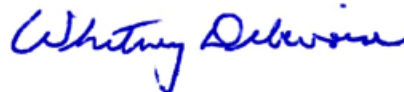
55. For all of the reasons articulated above, Panama respectfully requests:

- a. that, in accordance with Article 10.20.5 of the TPA, the Tribunal evaluate the objections articulated herein on an expedited basis, using the calendar proposed in Section V; and

¹⁶¹ Ex. R-001, TPA, Art. 10.20.5.

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.

Respectfully submitted,



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