

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

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

v.

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

ICSID Case No. ARB/16/34

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

11 October 2017

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I. INTRODUCTION

1. Bridgestone Licensing Services, Inc. (“**BSLS**”) and Bridgestone Americas, Inc. (“**BSAM**”) (together, the “**Claimants**”) hereby make these submissions following the Hearing on 3 to 6 September 2017 (the “**Hearing**”) on the Expedited Preliminary Objections submitted by the Republic of Panama under Article 10.20.5 of the U.S.-Panama Trade Promotion Agreement (“**TPA**”) on 30 May 2017 (the “**Objections**”).
2. In these submissions, the Claimants do not repeat all of the submissions made in the pleadings and at the Hearing, but instead seek to address certain matters raised by the Respondent and the Tribunal during the Hearing.

II. SUMMARY

3. The Claimants respectfully submit that the Tribunal should dismiss all of the Objections for at least the following reasons:
 - (a) First, the Tribunal must determine whether the Objections were appropriately brought under Article 10.20.5 of the TPA and should dismiss any Objection that is not properly a matter of competence. Objections 2, 4 and 5 should be dismissed on this basis.
 - (b) Second, the Tribunal should dismiss any Objection where the issue of competence is intertwined with issues of merits and where, by reason of the preliminary and expedited nature of the Objection all the necessary evidence is not before the Tribunal, and so the Respondent has failed to discharge its burden of proof. Objections 1, 2 and 5 (if not already dismissed) should be dismissed on this basis.
 - (c) Third, the Tribunal should dismiss the Objection if it is properly a matter of competence, and there is sufficient evidence before the Tribunal for it to safely decide the Objection, but where the Respondent has failed to make out such Objection. On that basis:
 - i. Objection 1 should be dismissed because the Claimants have clearly demonstrated that BSAM has a qualifying investment in Panama. Its investment is the intellectual property rights contained within (i) the trademark license granted by BSLS to Bridgestone/Firestone Americas Holding, Inc.¹ on 1 December 2001 (the “**FIRESTONE Trademark License Agreement**”) ² and (ii) the trademark license granted by Bridgestone Corporation (“**BSJ**”) to Bridgestone/Firestone North American Tire, LLC³ on 1 December 2001 (the “**BRIDGESTONE Trademark**”).

¹ Bridgestone/Firestone Americas Holding, Inc. is the predecessor of BSAM. *See* Exhibit C-0056, Exhibit C-0057, and Response n. 112.

² Exhibit C-0048.

³ Bridgestone/Firestone North American Tire, LLC is the predecessor of Bridgestone American Tire Operations LLC. *See* Exhibit C-0053, Exhibit C-0054, and Response n. 104.

License Agreement”).⁴ These intellectual property rights are assets, owned directly (in the case of FIRESTONE) or indirectly (in the case of BRIDGESTONE) by BSAM, and they have the characteristics of an investment. They are derived from intellectual property registered in Panama and therefore they are an investment in Panama.

- ii. Objection 2 should be dismissed because BSAM’s dispute arises directly out of its investment, namely its trademark rights. The Supreme Court judgment has damaged BSAM’s investment by lessening the strength and enforceability of the trademarks, thus causing BSAM’s investment to lose value.
- iii. Objection 3 should be dismissed because BSLS has amply shown that it has “*substantial business activities*” in the United States.
- iv. Objection 4 should be dismissed because the Respondent has failed to articulate why BSLS has engaged in an abuse of process in circumstances where BSLS paid a judgment that it was ordered to pay.
- v. Objection 5 should be dismissed because there is nothing for the Tribunal to decide, as the Claimants do not seek damages for actions taken by other states.

III. THE ARTICLE 10.20.5 REGIME

4. The Tribunal asked the Parties to address two questions at the preliminary session of the Hearing on 3 September 2017. These were set out at paragraph 5 of Procedural Order No. 2 as follows:

- (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?*

5. Following the Parties’ submissions on 3 September 2017, the Tribunal issued Procedural Order No. 4, determining that “*the 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.*” The Tribunal therefore determined only the first part of paragraph 5(1) of Procedural Order No. 2, namely that the approach laid down in Article 10.20.4(c) would not apply to the determination of the Respondent’s Objections.

⁴ Exhibit C-0052.

No determination was made as to whether the Tribunal is obliged (a) to make final and definitive findings of fact and law in relation to Article 10.20.5 objections (*i.e.*, the second part of paragraph 5(1)) or (b) to decide all objections to competence, including those that are intertwined with the merits and that therefore require the Tribunal also to determine aspects of the Claimants' substantive claim.

A. Mini-trial, Evidence, and Merits

6. The Respondent positively contends that their Objections require a mini-trial,⁵ and that is what they have achieved. The hearing was spread over four days and involved substantial volumes of documentary evidence,⁶ as well as the evidence of four witnesses, of which two were cross examined. This was contrary to the authority on preliminary expedited objections under Article 10.20.5, which is very clearly that such proceedings are not to become a mini-trial.⁷ There are a number of reasons for this, including that much of the purpose of expedited preliminary objections is to save costs, and a preliminary mini-trial is likely to increase costs (except in the unlikely event that the outcome is that all claims are disposed of).⁸ Furthermore, under preliminary expedited objections, there is a real risk that one or both sides will not have had a proper opportunity to produce the evidence that is needed in order for a satisfactory mini-trial to be held.
7. And that is precisely the problem that now arises. The Hearing took place at a very early stage in the Arbitration and under a highly compressed expedited timetable. The Claimants have not yet submitted a memorial, the Respondent's allegations and positions in respect to its Objections have evolved, and under an expedited timetable the Claimants have simply not had a proper opportunity to submit all of their evidence on all of the issues. This is especially important for those Objections in which jurisdiction and merits are intertwined—Objections 1, 2 and 5 in particular. As examples of what Claimants have had to contend with, the Tribunal should note that:
 - (a) The nature of the Objections has changed during the course of the proceeding (for example, the way in which the abuse of process objection and the denial of benefits objection have been argued changed throughout the hearing);⁹ and
 - (b) New points have been raised by both the Respondent (*e.g.*, the examination of Mr. Kingsbury focused in part on the tax treatment of BSLS's income,¹⁰ and the Claimants would wish to respond to this by adducing further evidence), and the Tribunal (*e.g.*, the Tribunal asked questions about certain aspects of the case for which there is no evidence yet on the record, such as the purpose of the US \$31 million loan from BSAM to BSLS,¹¹ how profits pass from BSCR to BSAM,¹²

⁵ Transcript Day 1 at 100:15-22 -101:1-6.

⁶ In total, 144 exhibits and 106 legal authorities were submitted by the Parties.

⁷ CLA-0019 ¶ 107.

⁸ CLA-0018 ¶ 112.

⁹ See ¶¶ 47, 48 and 54, below. *See also* Transcript Day 2 at 215:8, 216:18-217:4, 241:15-18, 250:9-10; Transcript Day 4 at 551:3-6, 560:17-18.

¹⁰ Transcript Day 3 at 456:9-12; Transcript Day 4 at 615:1-16.

¹¹ Transcript Day 4 at 559:17-19.

¹² Transcript Day 4 at 612:6-22.

and whether there is any agreement between BSLs and BSJ with respect to payment of the Supreme Court damages¹³). As a consequence, the Claimants have simply not had a proper opportunity to deal with these issues in evidence.

8. In the above circumstances, the Tribunal is obliged to decide the Objections, but where the evidence is clearly incomplete we submit is not obliged to make final and definitive findings of fact and law or to decide those Objections that are intertwined with the merits. In those circumstances, it is open to the Tribunal to decide against the relevant Objection or Objections on the basis that the Respondent has failed to discharge its burden of proof. We note the President's comments to the effect that burden of proof is seldom useful,¹⁴ but in circumstances of preliminary expedited objections where the evidence may necessarily be incomplete and where there is clear authority that the burden rests with the Respondent,¹⁵ we respectfully submit that the application of burden of proof is appropriate.¹⁶ Indeed, the alternative would be for the Tribunal to be boxed into making final decisions where the Claimant has not had a fair opportunity to present its evidence and where the Tribunal does not have the material it would need to safely and properly make such a decision.

B. Objections Are Not Properly on the Issue of Competence

9. There is also a threshold question as to whether the Objections are properly brought under the "competence" limb of Article 10.20.5. If they are not, then the Objections must fail on that basis. The Claimants submit that while the first Objection is properly one of competence, albeit intertwined with the merits as noted above, the remaining Objections are not.
10. Objections 2 and 5 are both characterized by the Respondent as competence objections, but they are in fact objections on the merits, as they go to issues of causation. This is explained further in paragraphs 39 to 43 and 59 to 61 below. Objection 5 should be dismissed in any event because there is nothing for the Tribunal to decide, but Objection

¹³ Transcript Day 4 at 632:9-633:12.

¹⁴ Transcript Day 1 at 136:16-19.

¹⁵ CLA-019 ¶¶ 111, 114.

¹⁶ The burden of proof is with the Respondent for the following reasons: (1) this is a preliminary, expedited process in which the Parties have not yet submitted all of their evidence; (2) the Respondent has "a second bite of the cherry" under ICSID Arbitration Rule 41 and it has indicated that it may take that opportunity (*see* Reply n. 56); (3) if the Claimants have the burden of proof under Article 10.20.5, then the regime under ICSID Arbitration Rule 41 would be pointless because the Claimants would already have discharged that burden the first time; (4) the Respondent has accepted that it bears at least an initial burden of proof with respect to its denial of benefits objection (*see* Reply ¶ 61). Since the Respondent argues that denial of benefits is a competence issue like all of its other Objections, it is hard to see why a different standard should be applied to this Objection alone; (5) the Respondent has argued that it does not even bear the burden of proof for its abuse of process objection (*see*, for example, the Respondent's statement at Transcript Day 1 at 60:19-20 that "*it's not so much that the Respondent is required to prove anything*") but this is contrary to the case law (*see* CLA-0022 ¶ 536), which makes clear that the Respondent bears the burden of proof for this kind of objection; (6) none of the decisions cited by the Respondent and the United States as authority for the premise that claimants bear the burden of proof relate to preliminary expedited procedures; all deal with jurisdictional issues *after* claimants submitted full memorials on jurisdiction, with evidence (*see* RLA-0048, RLA-0049, CLA-0041, and RLA-0020; *see also* Transcript Day 1 at 57:3-60:3).

2 should be dismissed unless the Tribunal is confident that it has sufficient evidence at this stage to make a final determination.

11. It was agreed that the Tribunal would decide the denial of benefits objection—Objection 3—in any event, but it is worth noting that this is also not strictly a competence issue. As Lord Phillips stated during the Hearing, the purported denial of benefits is “*a condition subsequent which removes our jurisdiction*,”¹⁷ the Tribunal has jurisdiction to decide BSLS’s claims even if it was the case that it did not have substantial business activities in the United States, unless the Respondent effectively denies the benefits of the TPA to BSLS. Therefore, the issue for the Tribunal here is whether the Respondent has validly denied benefits to BSLS, not whether it has jurisdiction to hear BSLS’s claims.
12. Finally, in a similar vein, Objection 4 on abuse of process is not typically considered to be a competence question because the question of whether a party has abused process is typically a factual inquiry that the tribunal would need to determine after already having determined that it has jurisdiction to hear the claim.¹⁸

IV. OBJECTION ON HYPOTHETICAL CONDUCT IS OUT OF TIME

13. The Respondent has raised a new objection during the Hearing which did not appear in its pleaded Objections. As drafted, Objection 5 is an objection that the “*Tribunal cannot entertain claims based on the hypothetical actions of other States*.”¹⁹ Similar language appears in the Reply,²⁰ which makes very clear that the question of whether “*hypothetical future actions of private actors*”²¹ is one that would fall to be considered by the Tribunal in the future, if the Respondent failed on this Objection.²² On the first day of the Hearing, when discussing Objection 5, the Respondent’s submissions related only to “*hypothetical conduct of states other than Panama*.”²³ But on the second day of the Hearing, a new head of objection was added: “*hypothetical conduct or the conduct – hypothetical or not – of States other than Panama*.”²⁴ This new objection was not made in time, since an objection under Article 10.20.5 must be brought within 45 days of constitution of the Tribunal. This issue therefore may not be determined by the Tribunal at this stage, and therefore that new objection must be dismissed.

V. PANAMA’S FIRST OBJECTION: BSAM DOES NOT HAVE A “COVERED INVESTMENT”

¹⁷ Transcript Day 4 at 541:2-3.

¹⁸ See CLA-0039 ¶ 115; CLA-0040 ¶¶ 224-225.

¹⁹ Objections ¶ 48.

²⁰ Reply ¶ 98.

²¹ Reply ¶ 97.

²² Reply ¶ 97 (stating “*If there ever came a time when the Tribunal needed to consider . . .*”).

²³ Transcript Day 1 at 76:4-7, 87:14-18.

²⁴ Transcript Day 2 at 185:9-13.

14. The Tribunal raised a number of questions in relation to this Objection, and these were dealt with in the Claimants' closing arguments.²⁵ In the following paragraphs, we summarize the Claimants' position in relation to BSAM's investment.
15. BSAM's investment in Panama is primarily in the form of the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreements, both of which license Panamanian trademark rights. In order to demonstrate that it has an investment in Panama, BSAM must show that: (i) there is an asset; (ii) that BSAM owns or controls the asset, directly or indirectly; and (iii) that the asset has the characteristics of an investment. Such investment may take the form of one of those listed in Article 10.29, and in this case, BSAM's investment is its intellectual property rights. In order to qualify for protection under the TPA, the investment must be an investment in Panama. Each of these points is disputed by the Parties, and we consider each in turn below.

A. BSAM's Intellectual Property Rights Are Assets

16. Article 10.29 of the TPA provides, "*investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.*" Therefore the first thing BSAM must show is that it owns or controls an asset. The Respondent argued in its closing arguments that the Claimants are reading the TPA wrong, by reading the definition of "investment" from the "*bottom up*": "*They started with the list that follows this sentence and said, 'Well, there are 'intellectual property' rights and 'intellectual property' rights have the characteristics of an 'investment' and they quickly glossed over whether there was an asset owned or controlled. You can't read a document from the bottom up.'*"²⁶ The Respondent says that the question of whether the rights contained in the BRIDGESTONE Trademark License Agreement and the FIRESTONE Trademark License Agreement are "*intellectual property rights*" does not arise because the Claimants fail at the first hurdle of demonstrating that they have an asset that BSAM owns or controls.
17. This is a convoluted way of deconstructing the Claimants' argument. To be clear, the Claimants' 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. The question is then whether these trademark license agreements, and the IP rights conferred by those agreements, are "*assets.*" According to the definition of "*asset*" in *Emmis v. Hungary*,²⁷ the license agreements and the intangible property rights conferred thereby must be items of value and available to meet debts. The BRIDGESTONE Trademark License Agreement and the FIRESTONE Trademark License Agreement are unquestionably valuable; it is these agreements that allow BSAM to use the BRIDGESTONE and FIRESTONE marks to generate revenue through sales of BRIDGESTONE and FIRESTONE branded tires. The Respondent has argued, incorrectly, that the license agreements "*are not capable of being*

²⁵ Transcript Day 4 at 589:7-615:5.

²⁶ Transcript Day 4 at 517:14-20.

²⁷ RLA-0054 ¶ 161 ("*The Oxford English Dictionary definition of 'asset' is: (usually assets) an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies.*").

*sold by Bridgestone Americas,*²⁸ as if that alone determines the definition of “*asset*.” But, even with respect to this flawed argument, these license agreements can be “*converted to cash*”²⁹ because they can be assigned to another for consideration.³⁰ The fact that the licensor must agree to such an assignment does not mean that the license rights are of no value. Oil exploration and production licenses, for example, will typically have similar restrictions on transfer, but they comprise one of the primary assets of any oil company and the basis for valuation of any oil company.

B. BSAM Owns or Controls the Assets

18. It is clear that BSAM owns and controls, directly or indirectly, the intellectual property rights provided for in the two trademark license agreements. Specifically, BSAM is the named rights holder in the FIRESTONE Trademark License Agreement, while BSAM’s wholly-owned subsidiary, Bridgestone Americas Tire Operations LLC (“**BATO**”), is the named rights holder in the BRIDGESTONE Trademark License Agreement. While Ms. Williams indicated in her evidence that under Panamanian law the terms “*ownership*” and “*possession*” of intellectual property rights are used in a particular way such 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.³¹ Indeed, under Panamanian law, as Ms. Williams stated, it is clear that intellectual property rights may be licensed, and the licensee is the one who may use and benefit from those rights.³² While the licensor may be the record owner of a trademark, it is the licensee which, by virtue of the license granted by the licensor, owns or controls the right to use and commercially exploit the mark in the territory.
19. In determining whether the criterion of ownership or control in the TPA definition is met, the Tribunal should look to the substance and not the nomenclature of Panamanian law, because the TPA is to be interpreted in accordance with the Vienna Convention on the Law of Treaties (“**VCLT**”), and not with Panamanian law.³³ In substance, therefore, the intellectual property rights conferred on BSAM by the FIRESTONE Trademark License Agreement, and conferred on BSAM’s subsidiary BATO by the BRIDGESTONE Trademark License Agreement, are owned directly and indirectly by BSAM.
20. BSAM also directly and indirectly controls the intellectual property rights conferred by the two trademark licensing agreements, as established by the terms of those agreements. While its control is not unfettered, given the nature of intellectual property license agreements, BSAM nonetheless controls. For example, under the FIRESTONE Trademark License Agreement, BSAM has control over how to commercially exploit the license. It is for BSAM to determine how to use the trademarks, who to sub-license to, how to market and promote the tires in Panama and other markets, and it must exercise

²⁸ Transcript Day 4 at 520:5-6.

²⁹ Transcript Day 3 at 392:13.

³⁰ Exhibit C-0048 § 27; Exhibit C-0052, Art. 12.

³¹ Transcript Day 3 at 380:8-12.

³² Witness Statement of Audrey Williams ¶ 9.

³³ RLA-0054 ¶¶ 162-163.

quality control over the products.³⁴ BSAM provides an indemnity to BSLs against any liabilities arising out of the manufacture, use, or sale of the products made by BSAM or resulting from any use of the marks by BSAM.³⁵ Similarly, BSAM indirectly controls the trademark rights conferred on its subsidiary BATO by the BRIDGESTONE Trademark License Agreement.

C. BSAM's Assets have the Characteristics of an Investment

21. It is clear that the assets have the characteristics of an investment, examples of which are provided in Article 10.29. There is the expectation of gain or profit, as the whole point of the trademark license agreements is so that BSAM and its subsidiaries can use them to manufacture branded tires to be sold for profit.
22. Significant capital has been committed to the investment. This point was discussed during closing arguments, in which Professor Thomas sought to clarify whether capital had been committed to the asset, or whether capital had been committed to the sale and distribution of tires instead.³⁶ This question goes to the heart of how trademarks work and what added value is provided by intellectual property rights. Put simply, there is no sale and distribution of FIRESTONE and BRIDGESTONE tires without the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement. BSAM could manufacture and sell unbranded tires, but it could not sell FIRESTONE and BRIDGESTONE branded tires without a trademark license to do so, and it is the brands that add the significant value to the tires. Thus capital is being committed to obtaining the intellectual property rights, *i.e.* the assets, through royalty payments.³⁷ Capital is also being committed to marketing these trademarked tires, not just the tires themselves. And while there is also capital put into the sale and distribution of physical product, *i.e.* the tires, this is quite different from the capital committed to obtaining the IP right to use the FIRESTONE and BRIDGESTONE brands on those tires, which without dispute adds significant value to the physical product. It is the brands that BSAM is spending capital to use and market, to build brand awareness and brand loyalty, which leads of course to increased sales. This is the value of the intellectual property rights provided by the trademark licenses. The value in turn accrues to not just the original trademark owners, such as BSLs, but also to the owners of the licensed trademark rights, such as BSAM.
23. In cross examination, Mr. Kingsbury was asked whether Mattel, Inc. (“**Mattel**”), which has a license for the FIRESTONE mark from BSLs and sells “*Hot Wheels*” toy cars with the FIRESTONE logo on the toy tires, also has an investment in Panama if Mattel sells its toys in Panama.³⁸ The purpose of the question was presumably to attempt to draw a parallel between BSAM’s activities in Panama, and those of Mattel, as both companies have a license to use the FIRESTONE trademark from BSLs. It may be helpful to consider this comparison further in order to understand the nature of BSAM’s investment.

³⁴ Exhibit C-0048 § 1.

³⁵ Exhibit C-0048 § 16.

³⁶ Transcript Day 4 at 602:19-22-603:1-12.

³⁷ Exhibit C-0048 § 2; Exhibit C-0052, Art. 3.

³⁸ Transcript Day 3 at 491:15-494:6; Exhibit C-0091.

24. Mattel produces (amongst other things) toy cars marketed under the brand “*Hot Wheels*”. It has an asset, the intellectual property rights conferred on it by BSLs, which it uses to put the FIRESTONE name on the tires of its toy cars. However, unlike BSAM, Mattel has not contributed any capital to its asset, as it did not pay BSLs for the use of the FIRESTONE trademark. Rather, Mattel invests capital in marketing its Hot Wheels-branded toys, and it is not marketing the FIRESTONE branded products. While Mattel presumably profits from the sales of its “*Hot Wheels*” toys, the incremental value to it of having FIRESTONE branded tires on its toys as opposed to unbranded tires is likely to be miniscule, if anything. By contrast, the difference to BSAM in selling FIRESTONE branded tires as opposed to unbranded tires is substantial.
25. A further question was raised by Lord Phillips as to whether BSAM, as the owner of the asset, can take credit for activities of its subsidiaries when seeking to demonstrate that the asset has the characteristics of an investment.³⁹ First, it is important to note that the licensee (BSAM or BATO) remains the ultimate party responsible under the license agreements, regardless of its delegation of rights and responsibilities (such as manufacture of tires) to sub-licensees. Second, BSAM itself commits capital and other resources to its asset, as, for example, BSAM sets and funds the marketing strategy,⁴⁰ and employs Mr. Kingsbury, who spends much of his time working on the legal aspects of BSAM’s intellectual property rights.⁴¹ There is no evidence on the record regarding BATO’s activities (BATO is the licensee under the BRIDGESTONE Trademark License Agreement), and this is a further example of a new point raised by the Tribunal, in response to which the Claimants would wish to adduce evidence.

D. BSAM’s Investment is in the Form of “Intellectual Property Rights”

26. “*Intellectual property rights*” is not defined in the TPA, either in Chapter 10, or in Chapter 15, the chapter that deals exclusively with intellectual property rights. For the purposes of this case, a question has arisen as to whether “*intellectual property rights*” refers only to the trademarks themselves; or whether the term also encompasses license rights, such as the right to use the trademarks.
27. First and foremost, it must be noted that the language of Article 10.29 refers not to “*intellectual property*,” but “*intellectual property rights*.” This is an intentional and clear distinction.
28. Article 10.22.1 of the TPA further provides that “*the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*” So while there is no definition in Chapter 15 of “*intellectual property rights*”, there is useful context—such as other chapters of the TPA—which can assist the Tribunal. For example, Article 15.2.10, concerning trademark licenses, also notes the distinction between the intellectual property (*i.e.*, the trademark) and the intellectual property rights, and specifically contemplates that trademark licenses may confer some of the rights in a trademark: “*Neither Party may require recordal of trademark licenses to establish the*

³⁹ Transcript Day 2 at 285:1-6.

⁴⁰ Witness Statement of Erick Calderon ¶¶ 13, 14-16.

⁴¹ Witness Statement of Thomas Kingsbury dated 21 July 2017 ¶ 9.

validity of the license, to assert any rights in a trademark, or for other purposes.” In relation to enforcement of intellectual property rights, Article 15.11.6 also provides, “Each Party shall make available to right holders²⁰ civil judicial procedures concerning the enforcement of any intellectual property right.” Footnote 20 further referred to (i) intellectual property encompassing various “exclusive intellectual property rights”; (ii) one or more of such rights may be licensed to licensees; (iii) a “right holder” might include licensees of intellectual property rights; and (iv) a “right holder” might include “exclusive licensees and other duly authorized licensees” such as non-exclusive licensees.⁴²

29. However, it should also be noted that, in its Objections, the Respondent actually analyzed BSAM’s intellectual property rights under the “licenses” criteria at Article 10.29(g) of the TPA and did not consider whether they were “intellectual property rights” under Article 10.29(f). In their Reply, in the discussion around BSAM’s ownership of the rights, the Respondent further implied that the only intellectual property right that could be an asset or an investment was the trademark itself. The Respondent stated, “*The mere fact that Bridgestone Americas needed to license it from a third party demonstrates a lack of ownership*”⁴³ thus conflating the intellectual property rights with the intellectual property itself. As the Claimants have made clear, the assets BSAM owns and controls are the rights conferred by the trademark license agreements.
30. During the Hearing, when challenged by the Tribunal,⁴⁴ the Respondent conceded that, as contemplated by the language in the TPA, “*intellectual property rights*” extending beyond the intellectual property itself could “*in theory*”⁴⁵ form an investment: “*‘intellectual property’ rights can qualify as investments.*”⁴⁶ However, it went on to say that BSAM’s rights “*don’t pass muster*”⁴⁷ because BSAM does not own or control the trademark rights: “*it is a non-transferable right, that it’s subject to oversight at every single step of the way,*”⁴⁸ and does not “*own the goodwill*” associated with the trademark.⁴⁹ This argument is confusing, and shows a complete lack of understanding of intellectual property rights and how trademark licenses work. BSAM’s rights are, of course, transferable.⁵⁰ They are not freely transferable, as they may only be transferred with the consent of the trademark holder. Nonetheless, that does not take away from BSAM’s ownership and control of the rights of the trademark as granted by the trademark licensing agreements at issue. There simply is no basis for requiring unfettered transferability as an integral element of ownership or control of an IP right.

⁴² Footnote 20 to Article 15.11.6 provides: “*For the purpose of this Article, the term “right holder” shall include federations and associations as well as exclusive licensees and other duly authorized licensees, as appropriate, having the legal standing and authority to assert such rights. The term “licensee” shall include the licensee of any one or more of the exclusive intellectual property rights encompassed in a given intellectual property.*”

⁴³ Reply ¶ 37.

⁴⁴ See, for example, Transcript Day 4 at 523:10-15.

⁴⁵ Transcript Day 4 at 526:7-8.

⁴⁶ Transcript Day 4 at 527:4-5.

⁴⁷ Transcript Day 4 at 526:9

⁴⁸ Transcript Day 4 at 525:18-20.

⁴⁹ Transcript Day 4 at 526:6.

⁵⁰ Exhibit C-0048, § 27; Exhibit C-0052, Art. 12.

31. It may be useful at this point to consider the nature of intellectual property, and the rights that are conferred by intellectual property. Trademarks are source identifiers. The purpose of a trademark is thus to inform consumers of the source of a particular good or service, and to distinguish those goods or services in the marketplace from those of another. When someone sees the Apple logo on a smartphone, they know Apple is the source of that phone and they have a certain expectation of the quality of that phone. That is because the Apple mark creates brand recognition. The more recognizable the trademark the more valuable it is. Apple is extremely valuable because everyone knows Apple's trademarks and expects a certain level of quality from goods and services branded with this mark.
32. To build this brand recognition companies often invest heavily in promotion and marketing of the trademark. The more a company invests in marketing and promotion, the more consumer recognition it builds, and the more valuable the trademark becomes. That is also why, as discussed at the Hearing, BSLS is willing to have non-revenue generating license agreements with toy and game suppliers: it is another way to invest in brand promotion and marketing.⁵¹
33. It is also not enough to just promote and market a trademark. It is important to also control how the trademark is used. If a consumer buys something with the Apple logo on it, the consumer will expect the product is authentic and authorized by Apple. If the product quality is not up to expectation, this will damage Apple's brand and over time reduce the value of the trademark. The same is true for BRIDGESTONE and FIRESTONE branded products. The original trademark owners must ensure that products manufactured and sold using their trademarks are of a certain quality, and they do so by retaining a certain level of control over licensees through the trademark license agreements, which will often contain provisions ensuring quality control and non-assignment of the license without approval. The licensees themselves have the same commercial interest in ensuring the value of the trademark and the quality of the goods, so as to obtain the full benefit of the licensing agreement.
34. The Respondent stated in its closing arguments that "*the purpose of a trademark license is so that the Licensee can use some of the goodwill associated with the brand,*"⁵² and that since BSAM does not have any rights to the goodwill, it does not own any intellectual property rights.⁵³ These statements are confusing and further confirm the Respondent's lack of understanding of intellectual property rights. The purpose of a trademark license is so that the licensee can use the trademark. The licensee pays for this right to use, it owns and controls this right to use, and it reaps the benefits of this right to use through manufacturing and sale of the branded goods.
35. The Respondent further stated in its closing arguments, "*We pointed out all of the restrictions that showed that there was no control. We pointed out all of the language that showed that there was no ownership. And their answer was, "Yes, the rights are*

⁵¹ Transcript Day 2 at 324:17-19.

⁵² Transcript Day 4 at 525:22-526:3.

⁵³ Transcript Day 4 at 526:3-6.

*restricted”, they said, but that was just a reality that needed to be taken into account. It said one has to be real about it. The rights are subject to the owner’s control. That’s just the way they are.”*⁵⁴ Here again the Respondent conflates ownership and control of the trademark with ownership and control of the trademark rights, which have been licensed to the licensee.

36. The above discussion regarding ownership and control is relatively specific to intellectual property rights as investments, and is a novel issue in treaty arbitration. In light of that, it may be useful to consider further the parallels between intellectual property licenses and oil exploration and production licenses—the latter being something that has frequently been held to be an investment by tribunals.⁵⁵ The licensee under an oil exploration and production situation does not, of course, own or control the oil field, and would only be able to assign a license with the licensor state’s consent. The reason why the licensor under both an intellectual property and an oil exploration and production license retains the right to consent or not to consent to an assignment is likely to be the same, namely, to ensure that the identity of a prospective assignee is consistent with the licensor’s economic interests. Whilst the owner of an oil exploration and production license does not own the underlying concession area, nevertheless it does own the right to explore for and produce oil in that area in accordance with the terms of the license. As noted above, such rights are the primary assets of oil companies and a primary driver of their value.
37. In the context of trademarks, BSAM could produce and manufacture unbranded tires without a license, but it could not produce and manufacture BRIDGESTONE or FIRESTONE tires without a license to do so. Being able to use the BRIDGESTONE and FIRESTONE trademarks on the tires means that BSAM’s tires can be sold for a much higher price than an unbranded tire. That is the value of the intellectual rights granted pursuant to the trademark license agreements.

E. BSAM Owns or Controls an Asset in Panama

38. Finally, because an “*investor*” under the TPA must have an investment in the territory of the other state party, BSAM’s investment must be in Panama. BSAM’s intellectual property rights are in Panama because they are rights deriving from trademarks registered in Panama.⁵⁶ Under the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement, BSAM controls, directly and indirectly, how the trademarks are used in marketing and promotional materials to advertise BRIDGESTONE and FIRESTONE tires in Panama. BSAM authorizes dealers and distributors to use the marks in the marketing and promotion of BRIDGESTONE and FIRESTONE tires and on store signage in Panama

VI. PANAMA’S SECOND OBJECTION: BSAM’S DISPUTE DOES NOT ARISE OUT OF ITS INVESTMENT

⁵⁴ Transcript Day 4 at 528:1-9.

⁵⁵ See, for example, CLA-0001.

⁵⁶ Rejoinder ¶ 37.

39. BSAM's dispute is not that it was found liable to pay damages by the Supreme Court, but rather that the Supreme Court decision has adversely affected BSAM's investment in Panama and in other countries in the region.⁵⁷ The ways in which BSAM's investment has been (and will continue to be) affected by the Supreme Court decision are set out in paragraphs 54 to 58 of the Request, and at paragraphs 134 to 136 of the Response. Those are factual allegations of causation and loss.
40. On the first day of the Hearing, the Respondent conceded that for the purposes of this Objection (and Objection 5), its approach was that it "*would assume for the sake of argument that the causation arguments are correct.*"⁵⁸ If the facts pleaded in the Request are assumed to be true, then it is to be assumed that BSAM has a dispute, and the only issue for the Tribunal to decide is whether the dispute arises directly out of the investment.
41. BSAM's investment is the trademark licensing agreements, and the intellectual property rights derived from the trademarks originally owned and registered in Panama by BSLs and BSJ. If BSAM does have an investment, as the Claimants contend, then because that investment is contingent on BSLs's and BSJ's trademarks, it is also affected by the Supreme Court decision, and consequently its loss does arise directly out of its investment.
42. The Respondent argues that because BSAM's investment is contingent on BSLs's and BSJ's trademark, its dispute is said to be necessarily indirect, because there is an intermediary. But this conflates two different ideas. BSAM's investment in Panama can only exist because of BSLs's and BSJ's trademarks in Panama. BSAM is the entity which actually uses the trademarks in Panama, and its dispute arises directly out of its own investment of the trademark rights it has obtained licenses for. The Supreme Court judgment has caused BSAM's assets to lose value.
43. The authorities are clear that the requirements of Article 25(1) of the ICSID Convention are not to be interpreted narrowly.⁵⁹ It is also clear that the measure at issue in this dispute—that is, the Supreme Court decision—does not have to have been directed specifically towards BSAM's investment. Article 25(1) of the ICSID Convention simply requires that the dispute arise out of the investment.⁶⁰ At this stage of the proceedings, all the Claimants are required to do is to make out a *prima facie* case that BSAM's investment has been adversely affected by the Supreme Court decision.⁶¹ Having done so, the matter must be determined at a full hearing of the evidence.

VII. PANAMA'S THIRD OBJECTION: PANAMA PURPORTS TO DENY THE BENEFITS OF THE TPA TO BSLs

⁵⁷ Response ¶¶ 133-136.

⁵⁸ Transcript Day 1 at 133:15-16.

⁵⁹ CLA-0044 ¶ 60.

⁶⁰ CLA-0045 ¶ 71.

⁶¹ CLA-0046 ¶ 35.

44. We do not intend to reprise here the activities performed by BSLS, as the Tribunal has a full picture of what BSLS does, from the pleadings,⁶² the summary table provided on Day 2 of the Hearing,⁶³ the evidence of Mr. Kingsbury,⁶⁴ and the oral submissions.⁶⁵ Instead, we set out below discussion arising out of the additional matters raised at the Hearing.
45. This crux of this Objection is whether BSLS is a “free rider” – whether it is essentially a sham or shell company riding on the coattails of its American sister companies and should not benefit from the TPA. The Tribunal must ascertain whether BSLS has “substantial business activities” in the United States, and during the Hearing the Respondent attempted to suggest various tests for that standard and import various meaning into the wording of Article 10.21 of the TPA, hoping something would stick. Such fishing exercises are without any basis either in authority or reality. They are also contradictory. Moreover, both Parties⁶⁶ (and the United States) accept that there is no bright line standard and it must be determined on a case-by-case basis.
46. The submission by the United States makes clear that the threshold for “substantial business activities” is not high. The United States notes, as have various commentators,⁶⁷ that the purpose of the provision in the TPA was to “safeguard against the problem of “free rider investors”, and 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.”
47. Prior to the Hearing, the Respondent’s main complaint about BSLS was that its activities in the United States were not “substantial”.⁶⁸ It acknowledged that certain activities were carried out in relation to FIRESTONE trademarks, but it alleged that these did not count because they were either insufficient in volume,⁶⁹ or were actually carried out by people hired by BSLS rather than BSLS employees, a distinction without a difference.⁷⁰ Then on Day 4 of the Hearing, the Respondent suggested for the first time that the test for “substantial” is necessarily subjective in light of the fact that BSLS is not a “mom and pop” business: “of course, we have to recognise that it has to be substantial in context. And in the context of Bridgestone Corporation, this is not substantial.”⁷¹ No authority was offered to support this proposition (and there is none), and indeed this contradicts the Respondent’s other requirement that the activities of other Bridgestone companies not be taken into account when assessing BSLS’s activities.

⁶² Response ¶¶ 154-162; Rejoinder ¶¶ 49-59.

⁶³ CD-0002.

⁶⁴ Witness Statement of Thomas Kingsbury dated 21 July 2017; Second Witness Statement of Thomas Kingsbury dated 14 August 2017; Transcript Day 3 at 396-498.

⁶⁵ Transcript Day 2 at 307:11-334:16; Transcript Day 4 at 616:13-627:3.

⁶⁶ Objections ¶ 32; Response ¶ 150.

⁶⁷ CLA-0034 ¶¶ 378, 385.

⁶⁸ Objections ¶ 32.

⁶⁹ Reply ¶ 76.

⁷⁰ Reply ¶ 74.

⁷¹ Transcript Day 4 at 551:3-6.

48. In its pleadings⁷² and opening submissions, the Respondent asserted that BSLS was a shell company, and said, “*Should the work of outside lawyers and consultants qualify as ‘business activities’ by Bridgestone Licensing itself as Claimants contend? No, because most shell companies hire lawyers and accountants in the State of Incorporation, a finding to that effect would mean that a denial-of-benefits objection could never succeed.*”⁷³ But the Respondent ignores the fact that BSLS does not just hire lawyers and accountants to perform corporate filings and file tax returns. BSLS hires trademark lawyers and pays them around US \$600,000 a year to do the work of the company – trademark filings and protection work. Shell companies do not carry out such activities.
49. As the Hearing progressed, the Respondent seemed to have abandoned its original position that BSLS is merely a shell company. Instead, it subsequently argued that the activities carried out by BSLS were not “*business*” activities. It offered a definition of “*business activities*” on Day 2 of the Hearing: “*linked to buying or selling of goods or services.*”⁷⁴ On Day 4 of the Hearing, the test was further narrowed to mean “*dealing with third parties, not just intra-group activity.*”⁷⁵ Again, no authorities were offered for either these submissions. The Claimants submit that a plain English reading of the words “*business activities*” does not support the definitions argued for by the Respondent. Indeed, the word “*activities*” broadens the scope – Article 10.12 does not say “*if the enterprise does not conduct business in the territory of the other Party*”. It refers instead to “*business activities*” – that is, activities connected with business. The activities that BSLS undertakes, even if they do not all involve buying or selling goods or services with third parties, are certainly connected with that of business, *e.g.*, they enable other companies to sell goods to third parties.
50. Even if these narrowly drawn tests were accepted by the Tribunal, BSLS would meet them, because through its license agreements with third parties it provides the right to use the FIRESTONE trademark and receives payment for such provision. The rights to use the FIRESTONE trademark, which have been licensed to the Bridgestone group companies (for which revenue of around US \$5 million is generated each year) cannot be disregarded. BSLS is not simply licensing those rights to itself, and to say this would be to ignore corporate reality and identity.
51. That said, as an initial matter the Claimants simply do not accept that the Respondent’s tests are right. During the hearing, Lord Phillips asked the Respondent to consider whether a subsidiary of a large oil company that is solely devoted to anti-pollution measures around the world would be considered to have “*substantial business activities.*”⁷⁶ The Claimants submit that it would, because its activities are clearly related to the business of the oil company, even if it itself does not generate revenue, or buy or sell goods or services. But arguably an entity devoted to anti-pollution measures is not perfectly analogous to BSLS, because perhaps such anti-pollution measures are not strictly necessary to allow the oil company to carry out its functions and generate

⁷² Objections ¶ 34; Reply ¶ 79.

⁷³ Transcript Day 2 at 257:11-17.

⁷⁴ Transcript Day 2 at 250:9-10.

⁷⁵ Transcript Day 4 at 560:17-18.

⁷⁶ Transcript Day 4 at 546:8-18.

revenue. A better analogy might be a subsidiary of a power company that is devoted to maintenance of the power station. That entity does not actually perform the operational functions of the power station and so that entity does not generate any profit. It does not buy or sell goods or services from third parties for the purposes of generating revenue. Instead, it performs costly maintenance activities in order to enable the power station to keep working and to generate revenue. Its activities are directly related to “*business*”, to commerce and to generating revenue – they enable the power station to function.

52. This is akin to the role that BSLS plays within the Bridgestone group. Its role is to license the FIRESTONE trademark to all the other Bridgestone group companies that need it in order to manufacture and sell FIRESTONE tires, and also to protect the FIRESTONE trademark by filing opposition actions against competing trademark applications, litigating competing trademarks, and registering and maintaining its own trademarks around the world. It does not generate large revenue for itself from these activities (although it does generate some revenue from third parties as well as intra-group parties), but its work allows other companies in the Bridgestone group to generate revenue. Understanding the role BSLS plays within the Bridgestone group of companies is not the same as attributing the work done by other companies to BSLS, which the Parties are agreed is not appropriate in the context of a denial of benefits analysis, although the Respondent argues that it is the same.⁷⁷ On the contrary, the Claimants do not ask that activities performed by other group companies be attributed to BSLS, but simply that the Tribunal understand the significant role that BSLS plays within the corporate structure.
53. The United States’ submission also referred to a “*real and continuous link with, the country where they are established.*” The *Pac Rim* tribunal likewise considered this important – the claimant in that case had previously been incorporated in the Cayman Islands, and nothing about the claimant’s activities changed when it changed its place of incorporation.⁷⁸ BSLS’s predecessor was one of the subsidiaries of the Firestone Tire & Rubber Company, a corporation founded in Ohio, USA, in 1900. It held the FIRESTONE trademarks then for the Firestone group, which produced FIRESTONE brand tires and rubber products.⁷⁹ Following the acquisition of the Firestone group by BSJ in 1988, the company made the decision to continue to run the FIRESTONE brand out of the United States, where it had always been and where it was a market leader.⁸⁰ This included maintaining the working relationships that the Firestone Tire and Rubber Company had with its trademark lawyers, Ladas & Parry LLP, the New York law firm which has acted for BSLS since it was formed in 2001 and for years before that.⁸¹ Before BSLS held the FIRESTONE trademarks, they were held by BSAM. BSLS took out a US \$31 million loan to purchase the trademarks from BSAM in 2001,⁸² and then BSLS immediately licensed the use of the intellectual property back to BSAM.⁸³

⁷⁷ Transcript Day 4 at 546:2-7.

⁷⁸ CLA-0018 ¶ 4.73

⁷⁹ Request ¶ 10.

⁸⁰ Transcript Day 3 at 453:16-21.

⁸¹ Witness Statement of Thomas Kingsbury dated 21 July 2017 ¶ 11.

⁸² Transcript Day 4 at 623:14-16.

⁸³ Exhibit C-0048.

VIII. PANAMA'S FOURTH OBJECTION: BSLS'S ALLEGED ABUSE OF PROCESS

54. The abuse of process Objection, which was vaguely pleaded from the outset, did not improve in oral submissions. During the Hearing, there was much discussion of an “*objective test*” that the Tribunal should apply, but the Respondent could not articulate what that test should be.⁸⁴ Eventually, the Respondent decided that the “*objective test*” that the Tribunal should apply is just to look at “*the timeline*”⁸⁵: “*When did the dispute arise, and when did the action take place that allowed the claim to happen? There is no ascription of motive. It's simply timing.*”⁸⁶ And the timeline “*problem*” identified by the Respondent is that after the Supreme Court judgment, and before BSLS paid the US \$5.4 million, it was contemplating bringing these proceedings, and payment was only made by BSLS in order to “*ensure*” that BSLS had suffered loss and could therefore make its claim in this proceeding.
55. As the Tribunal itself noted,⁸⁷ the major flaw in the Respondent's argument is that BSLS, since it was jointly and severally liable with BSJ for the US \$5.4 million, incurred loss on the day of the Supreme Court judgment.⁸⁸ The Respondent however argued instead that since BSLS and BSJ were held jointly and severally liable, only once one party had paid would it become clear which party had incurred loss.⁸⁹ No authority has been² provided for this nonsensical proposition. When parties are held jointly and severally liable, the consequence is not that neither party incurs loss, but that both do, as the Tribunal noted.⁹⁰
56. Indeed, the Tribunal stated that on these facts, timing alone could not suffice to make out a case on abuse of process, that instead “*I think that you need to show--if you can, you have to show that essentially--and I don't see how it can be done on joint and several liability, but I can be persuaded otherwise--but you have to show that somehow it's the Bridgestone Japan which is calling the shots in this, and which effectively is using Licensing in order to manufacture jurisdiction.*”⁹¹
57. The Respondent cannot demonstrate this. Rather, Mr Kingsbury's evidence shows that BSLS obtained financing to pay some of the damages award, and not from BSJ but from BSAM – a hugely profitable company in its own right. To suggest that the loan from BSAM is really just a loan from BSJ, merely because BSJ is the parent, completely ignores corporate identity and the reality of BSAM, which itself is a large, successful American company.⁹²
58. Additionally, although the Respondent spent a great deal of time taking the Tribunal through the “*timeline*”, including slides showing the various events between 2014 and

⁸⁴ Transcript Day 2 at 215:8, 216:18-217:4.

⁸⁵ Transcript Day 2 at 238:19-20.

⁸⁶ Transcript Day 2 at 241:15-18.

⁸⁷ Transcript Day 2 at 242:18-243:2.

⁸⁸ CLA-0038 ¶ 469-470 (“*[D]amages are incurred and compensation is due when there is a firm obligation to make a payment.*”)

⁸⁹ Transcript Day 2 at 222:4-7.

⁹⁰ Transcript Day 2 at 227:19-22.

⁹¹ Transcript Day 3 at 243:18 – 244:1-3.

⁹² Transcript Day 3 at 482:12-22 – 483:1-19.

2016 which related to this dispute,⁹³ the slides did not show, and the Respondent continues to ignore the obvious reason why BSLS paid when it paid, namely, the dismissal of BSLS and BSJ's final appeal motion by the Supreme Court in March 2016. Before that, BSLS and BSJ were in discussions on what to do in case they were not successful in overturning the Supreme Court judgment.⁹⁴

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

59. This Objection should be dismissed because there is nothing for the Tribunal to decide at this point. The Claimants do not claim for loss arising out of measures adopted by other states, and agree that the Tribunal would not have jurisdiction to hear such claims.⁹⁵
60. The Claimants have provided authority for the proposition that loss can be recovered outside of the host state, as long as it is linked causally to the measure in the host state,⁹⁶ and the Respondent does not appear to argue with this. The Claimants accept that if the measures of another state caused loss to the Claimants, then that would not be recoverable by the Claimants in these proceedings. But it is a question of fact as to what has caused the loss and to what extent the measures result in loss.
61. Further, the Tribunal should dismiss this Objection because the heads of loss set out in the Request to which the Respondent does not object remain.⁹⁷

X. CONCLUSION

62. For the reasons explained above and in their written and oral submissions, the Claimants submit that the Objections should be dismissed in their entirety. The Claimants respectfully submit that the Tribunal should make an order requiring the Respondent to pay the costs of its extensive Objections to the Claimants.

⁹³ RD-003, slides 59-60.

⁹⁴ Transcript Day 3 at 443:15- 444:3.

⁹⁵ Response ¶¶ 176-178; Rejoinder ¶ 71; Transcript Day 2 at 353:20-22-354:1-7.

⁹⁶ CLA-0031 ¶ 118.

⁹⁷ Request ¶¶ 55, 58.