

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 REPLY ON EXPEDITED OBJECTIONS

7 August 2017

ARNOLD & PORTER
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I. Introduction

1. In their 24 July 2017 Response (“**Response**”), Claimants Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. (“**Claimants**”) assert time and again that manifestly *different* things (treaty provisions,¹ legal concepts,² “Bridgestone” entities,³ types of expedited objection,⁴ and sovereign States⁵) are one and the same.⁶ Their motive is clear — they are trying to mask a jurisdictionally-defective case — but their justifications are weak,⁷ and their theory is misguided.

2. In investment arbitration, as elsewhere, distinctions make a difference. Different treaty provisions have different meanings;⁸ different objections are evaluated by reference to

¹ See **Response**, ¶ 52 (“Article 10.20.4 is In contrast, Article 10.20.5 is”).

² See **Response**, ¶ 101 (conceding that sales and commercial transactions are different from “investments”).

³ See **Response**, ¶ 152 (conceding that Bridgestone Americas and Bridgestone Licensing are different entities — “[t]he two companies are sister companies with a common parent”).

⁴ See **Response**, ¶¶ 3, 4, 5, 52, 59, 60, 61, 72, 178 (conceding that there are two different types of objection that a respondent may advance pursuant to Article 10.20.5 of the TPA).

⁵ See **Response**, ¶ 176 (distinguishing Panama from “neighboring countries”).

⁶ See **Response**, ¶ 74 (asserting that “the natural and ordinary meaning of Article 10.20 is that the terms of 10.20.4 apply to the 10.20.5 expedited procedure”), ¶¶ 107–30 (asserting that Claimant Bridgestone Americas has an “investment” in Panama because its Costa Rican subsidiary (A) has a contractual right to market and sell BRIDGESTONE and FIRESTONE brand tires there, and (B) has distribution contracts with unrelated Panamanian entities), ¶ 134 (asserting that Bridgestone *Americas* is entitled to assert claims in respect of injury allegedly suffered by Bridgestone *Licensing*), ¶ 135 (asserting that Bridgestone *Licensing* is an “investor of [the United States]” based on activities conducted by Bridgestone *Americas*), ¶ 60 (asserting that, “in practice, there is no difference” between the two types of expedited objection contemplated in TPA Article 10.20.5, and that their scope is the same), ¶¶ 134, 174 (asserting that Panama is liable for hypothetical policy decisions and court decisions in “neighboring countries”).

⁷ See, e.g., **Response**, ¶ 177 (asserting that Panama can be held liable for hypothetical decisions of other countries because “Latin American courts . . . reference rulings of peer courts . . . in the area of intellectual property”).

⁸ See **RLA-0045**, *Eureko B.V. v. Poland*, UNCITRAL (Partial Award, 19 August 2005), ¶ 248 (Fortier, Rajski, Schwebel) [*Eureko*] (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless”); **RLA-0046**, *The Renco Group v. Peru*, ICSID Case No. UNCT/13/1 (Decision on Scope of Preliminary Objections Under Article 10.20.4, 18 December 2014), ¶ 177 (Moser, Landau, Fortier) [*Renco (10.20.4 Decision)*] (noting

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different evidentiary standards;⁹ different entities have different rights and conduct different activities;¹⁰ different rights imply different injury; different investments give rise to different claims;¹¹ and different States typically are not responsible for each other's conduct.

Accordingly, one cannot simply conflate different treaty provisions, types of objection, entities, and/or States. The Republic of Panama (“**Panama**”) should not have to explain this basic point (much less foot the bill for Claimants’ failure to grasp it).¹² Nevertheless, the assumption that “different” means “fungible” plays such a large role in the Response that it needed to be mentioned at the outset. Panama returns to this issue, as relevant, below.

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“that the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that ‘every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or inutile)’”).

⁹ See, e.g., **CLA-0033**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Submission of the United States of America, 10 September 2014), ¶¶ 4, 9 (explaining that the evidentiary standard is different for objections “that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made” and objections “that a dispute is not within the tribunal’s competence”).

¹⁰ For example, “[Bridgestone Licensing] and [Bridgestone Corporation] . . . are not involved in using, selling, marketing or manufacturing tires with the BRIDGESTONE or FIRESTONE trademarks in Panama.” (see **Response**, ¶ 110). By contrast, Claimants contend that Bridgestone Americas “undertakes [the following] activities in Panama — the sale and distribution of tires bearing the BRIDGESTONE mark, and the marketing and training activities that it does in support of its investment.” (see **Response**, ¶ 113).

¹¹ See **RLA-0001**, Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge, 2009), p. 248 (“The claim must relate to the claimant’s investment and not someone else’s investment”).

¹² As the Tribunal will have seen, in paragraphs 60 and 61 of the Response, Claimants contend that Panama should be ordered to pay their legal fees because: (1) despite the nature of Panama’s objections, the section headings in Panama’s first submission (which had described the objections as “jurisdictional”), and the use of bold and italics therein to identify the portion of TPA Article 10.20.5 on which the objections were based (see **Expedited Objections**, note 31), Claimants for some reason could not determine whether Panama’s objections under Article 10.20.5 were “objection[s] that the dispute is not within the tribunal’s competence” or rather objections “that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made,” (2) Claimants therefore decided to address Panama’s objections under both “limbs” of Article 10.20.5, and (3) even though Claimants contend that the two limbs actually are identical, that the evidentiary standard under each limb is the same, and that the factual assertions in the Request for Arbitration and in Claimants’ Submission on Registration are all that the Tribunal need consider (see **Response**, ¶¶ 78, 89), Claimants decided to collect and submit additional factual evidence, which they consider “unlikely to be of assistance” (see **Response**, ¶ 5).

3. In addition, Panama responds to the many other flawed arguments advanced in the Response.¹³ **Section II** addresses Claimants’ procedural arguments, explaining that Claimants bear the burden of proving jurisdiction, and that the Tribunal cannot simply accept their factual allegations — much less their legal arguments — as true. **Section III** then addresses Claimants’ arguments on the five jurisdictional defects that Panama identified in its 30 May 2017 submission. **Section IV** contains a brief conclusion and Panama’s request for relief.

II. Claimants Misstate the Evidentiary Standards Applicable in This Proceeding

4. As the Tribunal will have seen, the TPA at issue in this case mentions three different types of objection. The *first* is an “objection under paragraph 4,” which as that paragraph (*i.e.*, Article 10.20.4 of the TPA) expressly states, is an “objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.”¹⁴ The *second* is an “objection that the dispute is not within the tribunal’s competence.”¹⁵ The *third* is any “other objection.”¹⁶ To date, Panama has advanced only the second type of objection.¹⁷ Article 10.20.5 establishes a mechanism for the expedited review of the first two types of objection:

¹³ Unless the present submission expressly states otherwise, Panama does not accept any allegation, argument, characterization, or claim advanced by Claimants. The fact that a particular allegation, argument, characterization, or claim is not addressed herein should not be construed as a tacit recognition or acceptance thereof.

¹⁴ **Ex. R-0001**, TPA, Art. 10.20.4.

¹⁵ **Ex. R-0001**, TPA, Art. 10.20.5.

¹⁶ *See* **Ex. R-0001**, TPA, Art. 10.20.4.

¹⁷ *See Expedited Objections*, note 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. . . .*’”) (emphasis in original); Section II (“Jurisdictional Bars Relating to Claimant Bridgestone Americas”), Section III (“Jurisdictional Bars Relating to Claimant Bridgestone Licensing”), Section IV (“Jurisdictional Bars Relating to Both Claimants”).

In the event 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 [type 1] and any objection that the dispute is not within the tribunal's competence [type 2]. 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.¹⁸

5. In their Response, Claimants contend that, no matter the type of objection advanced, every time Article 10.20.5 is invoked, the same rules apply.¹⁹ Their theory is based on three assertions, which are either inapposite, incorrect, or both.

6. Claimants' *first* assertion is that "it would not be sensible for objections as to competence brought on an expedited basis to have a broader scope than objections brought on an expedited basis under [paragraph 4]."²⁰ This is not an appropriate line of argument. As the *HICEE v. Slovak Republic* tribunal explained, "an investment tribunal . . . is not entitled to substitute its own extraneous opinion, arrived at after the event, as to whether th[e] policy [reflected in the treaty] was a sensible one or not. A tribunal takes a BIT as it is; its task is one of interpretation, not criticism."²¹

7. In any event, it is *entirely* "sensible" to conclude that "objections as to competence brought on an expedited basis . . . have a broader scope than objections brought on

¹⁸ **Ex. R-0001**, TPA, Art. 10.20.5 (emphasis added).

¹⁹ See **Response**, ¶ 60.

²⁰ **Response**, ¶ 60.

²¹ **RLA-0047**, *HICEE v. Slovak Republic*, UNCITRAL (Partial Award, 23 May 2011), ¶ 119 (Berman, Brower, Tomka).

an expedited basis under [paragraph 4].”²² The objections themselves have different scopes. An “objection that the dispute is not within the tribunal’s competence”²³ is an objection that a tribunal lacks authority to hear a claim. An objection “under paragraph 4” is an objection that, as a matter of law, there is not even a genuine claim to be heard.²⁴ The mere fact that both types of objection can be the subject of an expedited proceeding does not mean that they are the same. (By that logic, the mere fact that multiple substantive obligations can be the subject of investment arbitration would mean that all substantive obligations are the same.)

8. As Claimants themselves accept,²⁵ the fact that Article 10.20.5 of the TPA mentions *both* types of objection — and separates them with the word “and” — means necessarily that they are different.²⁶ Were their scope the same, the reference to both would be

²² **Response**, ¶ 60.

²³ **Ex. R-0001**, TPA, Art. 10.20.5.

²⁴ See **Ex. R-0001**, TPA, Art. 10.20.4; **Ex. C-0051**, USTR, Final Environmental Review, United States - Panama Trade Promotion Agreement (September 2011), p. 20 (“The TPA includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the [U.S.] Federal Rules of Civil Procedure, *i.e.*, the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections”); **Response**, ¶ 48 (asserting that, in the United States, “[a] defendant can file a motion under [Rule] 12(b)(6) requesting that the court dismiss the claim because a plaintiff did not state a claim upon which relief can be granted, whether due to lack of cause of action or lack of legal basis”), note 43 (indicating that, even under Rule 12(b) of the U.S. Federal Rules of Civil Procedure, “lack of subject-matter jurisdiction” and “lack of personal jurisdiction” are different from the notion of a “failure to state a claim upon which relief can be granted”).

²⁵ See **Response**, ¶ 72 (the “words ‘and any objection that the dispute is not within the tribunal’s competence’ are added to paragraph 5, making it clear that there are two sorts of expedited objection”).

²⁶ See **RLA-0046**, *Renco (10.20.4 Decision)*, ¶ 181 (“[T]he plain language of Article 10.20.4, interpreted in accordance with the ordinary meaning of the terms in their context, clearly shows that objections as to competence are not included within the scope of Article 10.20.4 objections”), ¶¶ 197–98 (explaining that the word “and” in Article 10.20.5 “provides additional and cogent confirmation that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections as to competence, and that the latter do not fall within the scope of the Article 10.20.4 objections”); see also **CLA-0033**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Submission of the United States of America, 10 September 2014), ¶ 7 (explaining that the words “*and* any objection that the dispute is not within the tribunal’s competence” signify “that objections asserted under paragraph 4 are *distinct* from objections to the tribunal’s competence”).

redundant. Yet it is a cardinal rule of treaty interpretation that treaty language be deemed *meaningful*, not *meaningless*.²⁷

9. Claimants' *second* assertion (which, like their first, is unaccompanied by citation) is that, because "issues of the Tribunal's competence are likely to be questions of law, . . . while there might be an interesting academic discussion to be had about the two limbs [of Article 10.20.5], in practice, there is no difference because they are both questions of law."²⁸ This assertion cannot be reconciled with the text of the TPA. As the Tribunal will have seen, the TPA (1) expressly uses the words "as a matter of law,"²⁹ but (2) only uses them to describe *one* type of objection (*viz.*, an objection under paragraph 4).³⁰ The former means that the words "as a matter of law" cannot be considered implicit in other treaty language, and the latter must be construed as a deliberate choice. Accordingly, it would be improper to conclude that an objection that the dispute is not within the tribunal's competence is solely a "matter of law."

10. Claimants' *third* assertion is that the text of Article 10.20.5³¹ indicates that the evidentiary standard applicable in the context of an objection under paragraph 4 always applies in the context of an Article 10.20.5 proceeding,³² irrespective of the type of objection raised.

²⁷ See **RLA-0045**, *Eureko*, ¶ 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless"); **RLA-0046**, *Renco (10.20.4 Decision)*, ¶ 177 (noting "that the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that 'every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or inutile)'").

²⁸ **Response**, ¶ 60.

²⁹ **Ex. R-0001**, TPA, Art. 10.20.4.

³⁰ See **Ex. R-0001**, TPA, Art. 10.20.4 ("[A] tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26").

³¹ See **Response**, ¶ 74.

³² See **Ex. R-0001**, TPA, Art. 10.20.4 (c) ("In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration

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This is not correct. To explain why, it seems useful to recall the text of the first sentence of Article 10.20.5:

In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.³³

11. In their Response, Claimants stress that “Article 10.20.5 refers directly to 10.20.4,”³⁴ and that “the words ‘the tribunal shall decide on an expedited basis an objection under paragraph 4’ can only mean that under 10.20.5 a respondent may require that an objection under 10.20.4 be expedited.”³⁵ Claimants then contend that, “under this procedure [*i.e.*, an expedited procedure involving an objection under paragraph 4] the provisions of 10.20.4 (including sub-paragraph (c)) apply, save to the extent 10.20.4 is inconsistent with the requirements of 10.20.5.”³⁶ Panama agrees with Claimants on these points. However, it is precisely because the words “the tribunal shall decide on an expedited basis an objection under

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(or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute”). As the *Pac Rim v. El Salvador* tribunal stated with respect to the similar provision in DR-CAFTA, “It is also only ‘factual allegations’ that are assumed to be true under this procedure. The phrase does not include any legal allegations. It could not therefore include a legal allegation clothed as a factual allegation. Nor could it include a mere conclusion unsupported by any relevant factual allegation without depriving the procedure of any practical application. In short, the Tribunal concludes, again, that substance must clearly prevail over form under this procedure.” **CLA-0019**, *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12 (Decision on Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010), ¶ 91 (Veeder, Santiago Tawil, Stern) [*“Pac Rim (Expedited Objections Decision)”*](emphasis added).

³³ **Ex. R-0001**, TPA, Art. 10.20.5 (emphasis added).

³⁴ **Response**, ¶ 70.

³⁵ **Response**, ¶ 71.

³⁶ **Response**, ¶ 71.

paragraph 4”³⁷ mean “that the provisions of 10.20.4 . . . apply”³⁸ that a *different* meaning necessarily attaches to the remainder of the sentence.

12. Moreover, as the United States explained with respect to the similarly-worded provision in the United States-Peru TPA, “[s]ubparagraph (c) [of Article 10.20.4] does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.”³⁹ Nor does it purport to. Article 10.20.4(c) states that, “[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s *factual allegations in support of any claim* in the notice of arbitration (or any amendment thereof). . . . The tribunal may also consider any relevant facts not in dispute.”⁴⁰ It says nothing of the two *other* types of objection contemplated in Article 10.20, or the treatment of factual allegations relating to competence.

13. In their Response, Claimants attempt to buttress their argument with a quotation from the decision in *Pac Rim v. El Salvador*,⁴¹ asserting that the *Pac Rim* “[t]ribunal stated that the Article 10.20.5 procedure was ‘twinned with the procedure under Article 10.20.4.’”⁴² However, Claimants omit the rest of the sentence, which, in its entirety, reads: “As regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 *with an additional ground of objection as to competence.*”⁴³

³⁷ **Ex. R-0001**, TPA, Art. 10.20.5.

³⁸ **Response**, ¶ 71.

³⁹ **CLA-0033**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Submission of the United States of America, 10 September 2014), ¶ 9.

⁴⁰ **Ex. R-0001**, TPA, Art. 10.20.4(c) (emphasis added).

⁴¹ *See Response*, ¶ 75.

⁴² **Response**, ¶ 75.

⁴³ **CLA-0019**, *Pac Rim (Expedited Objections Decision)*, ¶ 106 (emphasis added).

14. Accordingly, there is simply no basis for Claimants’ assertion that, for purposes of the objections advanced herein, the impossible standard that Claimants say would apply in the context of an “objection under paragraph 4” — pursuant to which (1) Panama would bear the burden of proof,⁴⁴ but could not question any “facts pleaded by the Claimant[s],”⁴⁵ make any factual allegations (even if based on Claimants’ own exhibits),⁴⁶ or adduce its own evidence,⁴⁷ and (2) all factual “disputes”⁴⁸ would need to “be assumed for present purposes to be resolved in favor of the Claimant [sic]”⁴⁹ — actually applies. Instead, the applicable standard is the same one that always applies in the context of jurisdictional objections, under which the *claimant* bears the burden of proof,⁵⁰ there is no presumption of the veracity⁵¹ or acceptance *pro tem*⁵² of its factual allegations, and both parties are entitled to adduce evidence.

⁴⁴ See **Response**, ¶¶ 4, 51.

⁴⁵ **Response**, ¶ 82.

⁴⁶ See **Response**, ¶ 54(b).

⁴⁷ See **Response**, ¶ 14.

⁴⁸ In paragraph 54(b) of their Response, Claimants bizarrely cite the following as an example of a factual dispute:

-- In its Expedited Objections, Panama observed (based on Claimants’ own submissions and exhibits) that because the TPA requires that an investor “own or control” the alleged investment, and Bridgestone Americas does not own or control either the BRIDGESTONE or FIRESTONE trademarks, “the only ‘intellectual property’ rights that Bridgestone Americas could even attempt to style as an ‘investment’ would be those that were created by means of the three license agreements that Claimants appended to their 25 October 2016 Submission on Registration.”

-- In their Submission on Registration, Claimants asserted as follows: “BSAM is the parent company for various Bridgestone business units in North, Central and South America, including Panama. BSAM, including through its subsidiaries, is authorized to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas.”

⁴⁹ **Response**, ¶ 82.

⁵⁰ **RLA-0048**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB 11/28 (Decision on Bifurcated Jurisdictional Issues, 5 March 2013), ¶ 48 (Griffith, Jaffe, Knieper) (“As a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase”); **RLA-0049**, *National Gas S.A.E. v. Egypt*, ICSID Case No. ARB/11/7 (Award, 3 April 2014), ¶ 118 (Veeder, Fortier, Stern) (“Although it is the Respondent which has raised specific jurisdictional objections . . . it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims”).

15. Although Claimants contend that fact analysis is inherently at odds with an expedited procedure,⁵³ and that their factual assertions therefore should be accepted *pro tem*,⁵⁴ there is no reason why disputed facts cannot be determined with expedition⁵⁵ — especially in this case, wherein (1) most of the so-called “factual” issues simply involve examining Claimants’ own evidence, and (2) the one objection for which Panama introduced evidence relates to a matter that Claimants should have been able to establish with relative dispatch (*viz.*, whether or not Bridgestone Licensing conducts “substantial business activities” in the United States). Moreover, accepting a claimant’s jurisdiction-related factual allegations *pro tem* and waiting to examine them fully at a later date would entail *multiple* assessments of the exact same issues, which would defeat the very purpose of an expedited mechanism for review.⁵⁶

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⁵¹ See **RLA-0050**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29 (Decision on Jurisdiction, 12 February 2010), ¶ 58 (Alexandrov, Donovan, García Mexía) (“Claimant suggested at the hearing that the Tribunal should accept as true all factual assertions of the Claimant, both those that go to threshold questions of jurisdiction and those needed to make out its claims on the merits. But that cannot be the case, because it would require the Tribunal to forgo the very inquiry it is required to undertake, *i.e.*, determining whether or not the Tribunal has jurisdiction. As the *Pan American v. Argentina* tribunal noted in another jurisdictional context, ‘if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention”).

⁵² See **RLA-0054**, *Emmis International Holding, B.V. v. Hungary*, ICSID Case No. ARB/12/2 (Award, 16 April 2014), ¶ 151 (Lalonde, Thomas, McLachlan) [“*Emmis*”].

⁵³ See **Response**, ¶ 78.

⁵⁴ See **Response**, ¶¶ 5, 82, 89.

⁵⁵ See **RLA-0046**, *Renco (10.20.4 Decision)*, ¶ 220.

⁵⁶ Such a result would constitute the type of unforeseen event Panama mentioned when it reserved its right to seek bifurcation of jurisdictional objections following this expedited proceeding. See **First Session Transcript**, Tr. 71:4–71:17.

III. Claimants Have Failed to Establish Jurisdiction

16. As Panama explained in its Expedited Objections, there are at least five reasons why the Tribunal lacks jurisdiction in this case, all of which are discussed below. Before turning to this discussion however, it seems useful to recall once more the identity of the Claimants, the relevant background, and the nature of the claims.

17. **The Claimants.** Out of the many entities that appear to be part of the “Bridgestone group of companies”⁵⁷ (which Claimants refer to as “Bridgestone”⁵⁸) only two such entities are Claimants here: (1) Bridgestone Licensing Services, Inc. (“**Bridgestone Licensing**”), and (2) Bridgestone Americas, Inc. (“**Bridgestone Americas**”). Both are “wholly-owned subsidiaries of Bridgestone Corporation”⁵⁹ — “a Japanese incorporated company headquartered in Tokyo, Japan,”⁶⁰ which was involved in the Panamanian court proceedings that gave rise to this case, but due to its nationality cannot advance claims under the TPA.

18. Bridgestone Licensing is a Delaware-incorporated entity⁶¹ and “the owner of the FIRESTONE trademark in all countries outside of the United States.”⁶² Though it is “not involved in using, selling, marketing or manufacturing tires with the BRIDGESTONE or FIRESTONE trademarks in Panama,”⁶³ it (like Bridgestone Corporation) was a party to the Panamanian court proceedings. As the Tribunal will recall, it was “through” Bridgestone

⁵⁷ **Request for Arbitration**, ¶ 1.

⁵⁸ **Request for Arbitration**, ¶ 1 (“Together, [Bridgestone Licensing], [Bridgestone Americas] and [Bridgestone Japan] form part of the Bridgestone group of companies (collectively, ‘Bridgestone’) . . .”).

⁵⁹ **Request for Arbitration**, ¶ 1.

⁶⁰ **Request for Arbitration**, ¶ 1.

⁶¹ *See* **Request for Arbitration**, ¶ 4.

⁶² **Request for Arbitration**, ¶ 6.

⁶³ **Response**, ¶ 110.

Licensing that Bridgestone Corporation — almost a year after submitting the Notice of Intent⁶⁴ required by the TPA⁶⁵ — paid the judgment⁶⁶ for which “[Bridgestone Corporation] and [Bridgestone Licensing] were held jointly and severally liable”⁶⁷

19. Bridgestone Americas, for its part, is a Nevada-incorporated entity.⁶⁸ Though it was not involved in the Panamanian court proceedings — and Claimants have not asserted that it owns any trademarks in Panama — it *is* a party to certain intra-group license agreements that Claimants insist are relevant to jurisdiction.⁶⁹ These agreements (1) grant Bridgestone Americas the ““non-exclusive and non-transferable””⁷⁰ right “to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas,”⁷¹ and (2) authorize Bridgestone Americas to sublicense this right.⁷² As best Panama can discern, Bridgestone Americas does not exercise its contractual right “to sell, market, and distribute,” but rather sub-licenses the right to “subsidiaries, such as Bridgestone *Costa Rica*, [which] manufacture, sell, distribute and market BRIDGESTONE and FIRESTONE tires into different

⁶⁴ See **Ex. C-0043**, Notice of Intent, 30 September 2015.

⁶⁵ See **Ex. R-0001**, TPA, Art. 10.16.2.

⁶⁶ **Request for Arbitration**, ¶ 53 (“BSLS . . . paid the damages award to Muresa and [Tire Group] on August 19, 2016”).

⁶⁷ **Response**, ¶ 170; *see also* **Response**, ¶ 171; **Request for Arbitration**, ¶ 53.

⁶⁸ **Request for Arbitration**, ¶ 4.

⁶⁹ See **Response**, ¶ 9.

⁷⁰ **Response**, ¶ 113 (quoting **Ex. C-0052**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001)).

⁷¹ **Claimants’ Submission on Registration**, p. 4; *see also* **Ex. C-0048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 1; **Ex. C-0050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Art. 2-1.

⁷² See **Ex. C-0048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 1; **Ex. C-0050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. for the BRIDGESTONE mark (1 January 2002), Art. 2-1.

markets in the region.”⁷³ Bridgestone Americas itself simply “provides corporate services to the subsidiaries (such as legal and human resources).”⁷⁴

20. **The Background.**⁷⁵ In August 2002, an entity incorporated in Florida named L.V. International, Inc. (“**L.V. International**”) filed an application with the United States Patent and Trademark Office for registration of the RIVERSTONE trademark.⁷⁶ As Claimants explain, because the Bridgestone group of companies “has a general policy of opposing tire marks with . . . a ‘STONE’ suffix,”⁷⁷ an entity called “BFS Brands LLC”⁷⁸ — which Claimants describe as “Bridgestone’s” “subsidiary”⁷⁹ — filed an opposition action in December 2003.⁸⁰ L.V. International thereafter withdrew its application,⁸¹ and because BFS Brands LLC did not consent to the withdrawal,⁸² the application was “refused.”⁸³ On 3 November 2004, attorneys for

⁷³ **Request for Arbitration**, ¶ 7 (emphasis added).

⁷⁴ **Request for Arbitration**, ¶ 7.

⁷⁵ The discussion in this Section is drawn exclusively from the Request for Arbitration, Claimants’ Submission on Registration, the Response, and the exhibits that accompanied those three 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.

⁷⁶ *See* **Request for Arbitration**, ¶ 21.

⁷⁷ **Request for Arbitration**, ¶ 20.

⁷⁸ **Request for Arbitration**, ¶ 21.

⁷⁹ *See* **Request for Arbitration**, ¶ 21.

⁸⁰ **Request for Arbitration**, ¶ 21.

⁸¹ *See* **Request for Arbitration**, ¶ 22; *see also* **Ex. C-0011**, Notice of Voluntary Withdrawal of Riverstone U.S. Riverstone Trademark Application (20 August 2004).

⁸² **Ex. C-0012**, U.S. Trademark, Trial and Appeal Board Order re Riverstone Application (13 October 2004).

⁸³ **Ex. C-0012**, U.S. Trademark, Trial and Appeal Board Order re Riverstone Application (13 October 2004).

BFS Brands LLC wrote to the attorney who had submitted the trademark application on behalf of L.V. International,⁸⁴ threatening him as follows:

[Y]ou and your client should know that Bridgestone/Firestone objects to and does not condone the use or registration anywhere in the world of the mark RIVERSTONE for tires. Hence, L.V. International, Inc. is acting at its own peril if it chooses to use the mark RIVERSTONE in other countries.⁸⁵

21. On 4 February 2005, the Panamanian Trademark and Patent Office published a application by an entity called Muresa Intertrade, S.A. (“**Muresa**”) for the registration in Panama of the RIVERSTONE trademark.⁸⁶ The application itself had been submitted on 6 May 2002 — *i.e.*, two months before the U.S. application discussed above was submitted.⁸⁷ The two entities that owned the “FIRESTONE” and “BRIDGESTONE” trademarks in Panama (namely, Claimant Bridgestone Licensing and its Japanese parent company, Bridgestone Corporation) initiated a proceeding in the Panamanian courts, formally opposing registration of the RIVERSTONE trademark.⁸⁸

22. In the opposition proceeding that followed, Muresa defended its trademark registration application, and two other entities — L.V. International and Chinese company Tire Group of Factories Ltd. (“**Tire Group**”) — participated as third-party interveners.⁸⁹ On 21 July

⁸⁴ See **Request for Arbitration**, ¶ 23 (citing Ex. C-0013, Letter from Foley Hoag to Attorney for L.V. International (3 November 2004)); **Ex. C-0009**, Riverstone U.S. Trademark Application (13 August 2002).

⁸⁵ **Ex. C-0013**, Letter from Foley Hoag to Attorney for L.V. International (3 November 2004).

⁸⁶ **Request for Arbitration**, ¶ 24.

⁸⁷ See **Ex. C-0014**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 1.

⁸⁸ **Request for Arbitration**, ¶ 25; see also **Ex. C-0014**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 1.

⁸⁹ **Request for Arbitration**, ¶ 25; see also **Request for Arbitration**, ¶ 21 (explaining that L.V. International is “a company incorporated in Florida”).

2006, the opposition claim by Bridgestone Corporation and Bridgestone Licensing was denied,⁹⁰ and they filed an appeal “immediately.”⁹¹ Even though Claimants contend that there is a direct correlation between the ability to police a trademark and the value of a trademark,⁹² that a “reduction in trademark protections”⁹³ potentially could lead to “a reduction in sales and market share”⁹⁴ and/or an increase in trademark applications by competitors,⁹⁵ and that the Bridgestone group therefore has a “robust approach to maintaining and defending its intellectual property rights,”⁹⁶ Bridgestone Corporation and Bridgestone Licensing chose to withdraw their appeal.⁹⁷

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 caused them to cease sales of RIVERSTONE tires . . . out of fear that their inventory . . . would be seized if they lost the opposition proceedings,”⁹⁸ thereby resulting in a “loss of revenue in excess of USD 5,000,000.”⁹⁹ L.V. International made a submission in support of the claim, “arguing that Muresa[‘s] and [Tire Group]’s fears were justified on the basis of the [3 November 2004] Letter” quoted above.¹⁰⁰

⁹⁰ **Request for Arbitration**, ¶ 26; *see Ex. C-0014*, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006).

⁹¹ **Request for Arbitration**, ¶ 27.

⁹² *See Request for Arbitration*, ¶ 66; **Response**, ¶ 134.

⁹³ **Response**, ¶ 134.

⁹⁴ **Response**, ¶ 134.

⁹⁵ *See Response*, ¶ 134.

⁹⁶ **Request for Arbitration**, ¶ 5.

⁹⁷ *See Request for Arbitration*, ¶ 27.

⁹⁸ **Request for Arbitration**, ¶ 29.

⁹⁹ **Request for Arbitration**, ¶ 29.

¹⁰⁰ **Request for Arbitration**, ¶ 29.

24. Although this claim was rejected at the first instance and appellate court levels,¹⁰¹ it eventually was upheld (by 2-1 vote) by the First Civil Chamber of the Panamanian Supreme Court, which in a 28 May 2014 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.¹⁰²

25. In their submissions, Claimants assert repeatedly that the First Civil Chamber concluded that Bridgestone Corporation and Bridgestone Licensing “should pay millions of dollars in damages to a Panamanian company *for doing no more than invoking — in good faith — Panama’s own trademark opposition procedure.*”¹⁰³ However, the decision itself states expressly that the mere initiation of an opposition procedure does *not* automatically injure the moving party.¹⁰⁴ Rather, as Claimants themselves accept,¹⁰⁵ the issue was one of “recklessness and procedural malice.”¹⁰⁶ On that point, the First Civil Chamber thought it notable that Bridgestone Corporation and Bridgestone Licensing had waited until the last minute to oppose

¹⁰¹ **Request for Arbitration**, ¶¶ 31, 36; *see also* **Ex. C-0021**, Judgment No. 70, 11th Circuit Civil Court of the Republic of Panama (17 December 2010); **Ex. C-0024**, Decision, First Superior Court of the Republic of Panama (23 May 2013).

¹⁰² **Request for Arbitration**, ¶ 43; *see also* **Ex. C-0027**, Judgment of the First Civil Chamber of the Panamanian Supreme Court (28 May 2014).

¹⁰³ **Request for Arbitration**, ¶ 3 (emphasis added); *see also* **Request for Arbitration**, ¶ 58; **Response**, ¶ 26.

¹⁰⁴ **Ex. C-0027**, Judgment of the First Civil Chamber of the Panamanian Supreme Court (28 May 2014), p. 21 (“[E]sta Sala *no* pretende, *bajo ninguna circunstancia*, señalar que el hecho de ejercer una iniciativa judicial para la reclamación de algún derecho, pueda interpretarse como sinónimo de que los perjuicios que pueda ocasionar la misma a los demandantes, resultando esto un elemento de coerción para quien se considera con derecho a una reclamación y en aras de utilizar los medio que la ley le provea para hacerlo”) (emphasis added). Panama disputes Claimants’ English translation of this text, which should read as follows: “[U]nder no circumstance is it the Court’s intention to state that the pursuit of a judicial action to claim a right could be interpreted as synonymous with damages that said judicial action may cause the claimants, thus resulting in a coercive element against anyone who may consider himself entitled to make a claim and to use the means provided by law to do so.”

¹⁰⁵ *See* **Request for Arbitration**, ¶¶ 39, 41.

¹⁰⁶ **Ex. C-0027**, Judgment of the First Civil Chamber of the Panamanian Supreme Court (28 May 2014), p. 20.

registration of a trademark for a commercially competitive product and withdrawn their appeal,¹⁰⁷ and that their legal counsel had sent an “intimidating” letter,¹⁰⁸ asserting “without legal basis, at least within Panamanian law, that the plaintiffs should refrain from commercially selling [a] product”¹⁰⁹

26. **The Claims.** As Claimants indicated in their Request for Arbitration,¹¹⁰ confirmed in their Submission on Registration,¹¹¹ and reaffirmed in their Response,¹¹² all of the claims in this case are based on the 28 May 2014 Supreme Court decision,¹¹³ which Claimants contend amounted to a violation of Articles 10.3, 10.5, and 10.7 of the TPA.¹¹⁴ The most fulsome description of the claims appears in paragraphs 64 to 67 of the Request for Arbitration, under the heading “Panama has Violated its Obligations to [Bridgestone Americas] and

¹⁰⁷ **Ex. C-0027**, Judgment of the First Civil Chamber of the Panamanian Supreme Court (28 May 2014), p. 20; *see also* **Request for Arbitration**, ¶ 41.

¹⁰⁸ **Ex. C-0027**, Judgment of the First Civil Chamber of the Panamanian Supreme Court (28 May 2014), p. 19.

¹⁰⁹ **Ex. C-0027**, Judgment of the First Civil Chamber of the Panamanian Supreme Court (28 May 2014), pp. 19–20.

¹¹⁰ *See* **Request for Arbitration**, ¶ 3 (“The claims herein concern an extraordinary decision by the Supreme Court of Panama”); *see also* **Request for Arbitration**, § IV.C. (setting out their full theory as to how “Panama . . . violated its obligations . . . under the [TPA],” and neglecting to identify any government act other than the Supreme Court decision).

¹¹¹ *See* **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”).

¹¹² *See* **Response**, ¶ 26 (“This arbitration concerns an extraordinary and unprecedented decision by the Supreme Court of Panama to order [Bridgestone Licensing] and [Bridgestone Corporation] to pay damages to a Panamanian company”).

¹¹³ *See* **Request for Arbitration**, ¶ 3 (“The claims herein concern an extraordinary decision by the Supreme Court of Panama”); *see also* **Request for Arbitration**, § IV.C. (setting out their full theory as to how “Panama . . . violated its obligations . . . under the [TPA],” and neglecting to identify any government act other than the Supreme Court decision).

¹¹⁴ *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.

[Bridgestone Licensing] under the [TPA].”¹¹⁵ For the Tribunal’s convenience, those four paragraphs are quoted in full below:

64. It is a basic tenet of public international law that the actions of national courts are attributable to the state. As set out in paragraphs 61-63 above, Panama, through its judicial system, has violated its obligations under the FTA to U.S. investors BSLS and BSAM. In particular, *the Supreme Court decision* was arbitrary and unreasonable, and violated the most basic principles of due process. It was thereby discriminatory to U.S. investors in order to benefit a Panamanian entity.

65. Further, *the Supreme Court decision* involved a flagrant breach of the obligation to accord fair and equitable treatment to foreign investors, namely BSLS and BSAM, and constituted a denial of justice by Panama. In order to ensure the protections under the FTA, Panama has an obligation to maintain a judicial system that allows the effective exercise of the substantive rights granted to its foreign investors. In the manifest injustice of the *Supreme Court decision*, Panama violated that obligation.

66. BSLS and BSAM have been deprived of the full enjoyment of their investments in Panama. In particular, *the Supreme Court decision has effectively deprived BSLS and BSAM the ability to oppose confusingly similar trademark applications*, which *in turn* has resulted in the *diminution of value of the FIRESTONE and BRIDGESTONE trademarks*. The Supreme Court decision has been challenged by BSLS and BSAM but has been upheld, and Panama has failed to take any step to review that decision, restore the rights of BSLS and BSAM, or compensate BSLS and BSAM for the expropriation of their rights.

67. Bridgestone’s losses arising from the Supreme Court are USD 5,471,000. The diminution in value of BSLS and BSAM’s trademarks and its business losses in the region has been estimated at no less than USD 10,000,000. BSLS and BSAM are accordingly entitled to compensation to restore them to the position they would have been in had the wrong not occurred.¹¹⁶

¹¹⁵ Request for Arbitration, § IV.C.

¹¹⁶ Request for Arbitration, ¶¶ 64–67 (emphasis added).

27. As the foregoing makes clear, the government act at issue is the Supreme Court decision,¹¹⁷ and the claims are predicated on the notion that such decision “deprived [Bridgestone Licensing] and [Bridgestone Americas] [of] the ability to oppose confusingly similar trademark applications,”¹¹⁸ and that this “in turn has resulted in the diminution of value of the FIRESTONE and BRIDGESTONE trademarks.”¹¹⁹

A. Jurisdictional Bars Relating to Bridgestone Americas

28. As Panama explained in its Expedited Objections, there are two jurisdictional bars to the claims of Bridgestone Americas. *First*, Bridgestone Americas does not have a qualifying “investment.” *Second*, even assuming *arguendo* that the activities and private contractual rights that Claimants attempt to pass off as an “investment” *did* so qualify, the present dispute could not be said to “aris[e] directly out of” that alleged investment, as required by Article 25(1) of the ICSID Convention.¹²⁰ As discussed below, Claimants have failed to prove otherwise in their Response.

1. Bridgestone Americas Does Not Have a Qualifying Investment

29. The Response marks the third time that Claimants have attempted, but failed, to establish that Bridgestone Americas (which does not have any subsidiary based in Panama, does not have offices in Panama, does not purport to own any real property in Panama, does not claim

¹¹⁷ Claimants confirm this in their Response. *See Response*, ¶ 26 (“This arbitration concerns an extraordinary and unprecedented decision by the Supreme Court of Panama . . .”).

¹¹⁸ *Request for Arbitration*, ¶ 66.

¹¹⁹ *Request for Arbitration*, ¶ 66.

¹²⁰ ICSID Convention, Art. 25(1) (“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”).

to own any trademarks in Panama, and does not have any employees in Panama¹²¹) has a qualifying investment under both the ICSID Convention and the TPA. This time, the discussion is much longer than it previously has been. Substantively, however, not much has changed. The thrust of Claimants' argument continues to be that the sale of tires into Panama by the Costa Rican subsidiary of Bridgestone Americas, the rights thereto, and the activities associated therewith amount to a qualifying investment. This argument continues to fail, for six simple reasons.

30. *First*, “sales” are not “investments.” The TPA’s definition of “investment,”¹²² the drafting history of the ICSID Convention,¹²³ and the case law on the objective meaning of the term “investment”¹²⁴ all make this clear. Even Claimants themselves concede the point.¹²⁵

¹²¹ One of the exhibits appended to the Reply (**Ex. C-0062**) is titled “Employment Contract for Sales Services in Panama. However, that exhibit is *not* an employment agreement, as Section Nine thereof expressly states: [T]his agreement is a commercial and *not* an employment agreement.” (emphasis added). Moreover, the agreement is from May 2017, and therefore post-dates the alleged treaty violations.

¹²² **Ex. R-0001**, 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”).

¹²³ **RLA-0002**, Christoph H. Schreuer, *et al.*, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009), Art. 25, ¶ 122 [“Schreuer, COMMENTARY”] (“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”).

¹²⁴ See **RLA-0007**, *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 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-0008**, *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-0009**, *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-0010**, *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);

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31. **Second**, Claimants cannot overcome this obstacle by the mere stroke of a pen. A commercial transaction is still a commercial transaction even if cloaked in “investment” jargon. Rights, activities, commitments of capital and resources, expectations of gain and profit, assumption of risk, and duration do not add up to an “investment” when they are simply the rights,¹²⁶ activities,¹²⁷ commitments,¹²⁸ expectations,¹²⁹ and risks¹³⁰ associated with, and the duration of,¹³¹ cross-border sales. “[I]nternational law does not tend to permit formalities to triumph over fundamental realities,”¹³² and as Panama observed in its first submission, the TPA here places substance over form.¹³³

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RLA-0011, *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-0012**, *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3 (Decision on Jurisdiction, 11 July 1997), ¶ 28 (Orrego Vicuña, Heth, Owen).

¹²⁵ See **Response**, ¶ 101; **Claimants’ Submission on Registration**, p. 3.

¹²⁶ See **Response**, ¶ 107 (“In [Bridgestone Americas’] case, the ‘basis of the investment’ is its intellectual property rights”), ¶ 116 (describing these “intellectual property rights” as “the right to use, sell, distribute and market”).

¹²⁷ See **Response**, ¶ 113 (describing “all of [Bridgestone Americas] activities in Panama” as “the sale and distribution of tires bearing the BRIDGESTONE mark, and the marketing and training activities that it does in support of its investment”).

¹²⁸ **Response**, ¶ 125 (“As described above *in relation to the marketing and sale-related activity* at paragraphs 109–112, [Bridgestone Americas] has committed a substantial amount of capital to its investment in Panama, as well as ‘other [non-monetary] resources’”) (emphasis added; brackets in original).

¹²⁹ **Response**, ¶ 127 (“It goes without saying that [Bridgestone Americas’] investments in Panama were made with the expectation of gain or profit. [Bridgestone Corporation] and [Bridgestone Licensing] licensed the use of their trademarks to [Bridgestone Americas] (and [Bridgestone Americas’] subsidiary) so that [Bridgestone Americas] *could make money in Panama by selling tires*”) (emphasis added).

¹³⁰ **Response**, ¶ 128 (“[Bridgestone Americas] faces risk in its activities including payment risk — it ships tires to Panamanian customers and distributors before being paid for them”).

¹³¹ See **Response**, ¶ 129 (asserting that Bridgestone Americas “has sold into Panama for decades,” that its subsidiary “has been in charge of the Panama market since 1997,” and that its subsidiary has had a tire distribution agreements with an unrelated Panamanian entities since 1979).

¹³² **RLA-0051**, *Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/6 (Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014), ¶ 522 (Tomka, Kaplan, Thomas).

¹³³ See **Ex. R-0001**, TPA, Art. 10.29(c) and notes 7 and 8 (stating that “bonds, debentures, other debt instruments, and loans” are among the “[f]orms that an investment may take,” but explaining that “[s]ome

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32. **Third**, the witness statements of Erick Calderón (a Costa Rica-based “marketing manager”¹³⁴) and Roger Hidalgo (a Costa Rica-based “sales director”¹³⁵), which discuss “marketing” and “sales” activities, are entirely inapposite. As Claimants acknowledge, “activities” are only relevant to the extent they relate to an “investment.”¹³⁶ In other words, “there must be a core investment, around which these other activities revolve.”¹³⁷ Absent such an investment, it does not matter whether the claimant “maintains a strong relationship” with Panamanian entities,¹³⁸ makes frequent trips to Panama,¹³⁹ or even spends (uncorroborated sums of) money on sales and marketing.¹⁴⁰ Expenditures alone do not amount to “investments.”¹⁴¹

33. **Fourth**, Claimants appear to believe that, because “the TPA refers to ‘intellectual property rights’ at Article 10.29(f),”¹⁴² all they must do is establish that Bridgestone Americas

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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” and 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”), Art. 10.29(g) and note 9 (stating that “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law” are among the “[f]orms that an investment may take,” but explaining 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”).

¹³⁴ **Witness Statement of E. Calderón**, ¶ 2.

¹³⁵ **Witness Statement of R. Hidalgo**, ¶ 2.

¹³⁶ *See Response*, ¶ 107.

¹³⁷ **Response**, ¶ 107.

¹³⁸ *See Response*, ¶ 118.

¹³⁹ **Response**, ¶ 119.

¹⁴⁰ *See Response*, ¶ 118.

¹⁴¹ *See, e.g., RLA-0022, Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2 (Award, 15 March 2002), ¶ 51 (Sucharitkul, Rogers, Suratgar) [“Mihaly”]; **RLA-0052, Malicorp Limited v. Egypt**, ICSID Case No. ARB/08/18 (Award, 7 February 2011), ¶ 110 (Tercier, Baptista, Tschanz).

¹⁴² **Response**, ¶ 116.

has “intellectual property rights.”¹⁴³ That is not true. Demonstrating that there is a qualifying “investment” is not simply a matter of pointing to an item that appears on the TPA’s list of “[f]orms that an investment may take.”¹⁴⁴ Rather, the exercise involves identifying an “asset,”¹⁴⁵ in the territory of the host State,¹⁴⁶ “that an investor owns or controls, directly or indirectly,”¹⁴⁷ at the time of the alleged treaty violation,¹⁴⁸ “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.”¹⁴⁹

¹⁴³ See **Response**, ¶ 109 (“Claimants appended certain trademark licenses to their letter to ICSID of 25 October 2016. Those were provided as an illustration of the intellectual property rights held by [Bridgestone Americas]. . . . Claimants do not consider that any further evidence is required at this stage, because they have made a factual assertion about [Bridgestone Americas’] intellectual property rights investment, and included documents that evidence the assertion”); see also **Response**, ¶¶ 105–06.

¹⁴⁴ **Ex. R-0001**, TPA, Art. 10.29.

¹⁴⁵ **Ex. R-0001**, TPA, Art. 10.29; see also **Response**, ¶ 94 (“[T]here are two elements to a potential investment under Article 10.29 of the TPA. First, the investment must be ‘an asset’”).

¹⁴⁶ **Ex. R-0001**, TPA, Art. 10.1.1 (“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 **Ex. R-0001**, 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).

¹⁴⁷ **Ex. R-0001**, TPA, Art. 10.29.

¹⁴⁸ See **RLA-0021**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013), ¶ 300 (Stern, Klein, Thomas) [*“ST-AD”*](“It is an uncontested principle that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country”); **RLA-0020**, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Award, 15 April 2009), ¶ 67 (Stern, Bucher, Fernández-Armesto) [*“Phoenix”*](“It does not need extended explanation to assert that the Tribunal has no jurisdiction *ratione temporis* to consider Phoenix’s claims arising prior to December 26, 2002, the date of Phoenix’s alleged investment, because the BIT did not become applicable to Phoenix for acts committed by the Czech Republic until Phoenix ‘invested’ in the Czech Republic”); **RLA-0053**, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16 (Award, 31 March 2011), ¶ 170 (van den Berg, Stern, Landau) [*“GEA Group”*](“[I]n order for the Tribunal to hear the Claimant’s claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed”).

¹⁴⁹ **Ex. R-0001**, TPA, Art. 10.29 (emphasis added). Claimants’ assertion that the “natural and ordinary meaning” of this definition is that not all of the “characteristics of an investment” listed are required

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34. *Fifth*, while “[a] right conferred by contract . . . *may* . . . constitute an asset,”¹⁵⁰ not all contractual rights are “assets,”¹⁵¹ and when an instrument simply confers rights in respect of an asset — like the private agreements here — the instrument must be analyzed on its own merits, separately from the asset to which it relates.¹⁵² In conducting this analysis, the Tribunal should pay careful attention to the nature and situs of the alleged rights, since the TPA is clear that (1) only “assets that an investor owns or controls, directly or indirectly” qualify as “investments,”¹⁵³ and (2) only investments “in the territory” of the host State are covered by Chapter Ten.¹⁵⁴

35. *Sixth*, and finally, despite having had three opportunities to do so, Claimants have failed to identify any “asset” in Panama that Bridgestone Americas “owned or controlled” at the time of the 28 May 2014 Supreme Court decision. As discussed below, the so-called “intellectual property” and “revenue sharing” rights described in the five agreements that Claimants champion in their Response (namely, Exhibits C-48, C-49, C-50, C-52, and C-64) cannot be considered “investments.”

36. **Exhibit C-48**, for example, is a 2001 “agreement to license trademarks” between Bridgestone Licensing, and an entity called “Bridgestone/Firestone Americas Holding, Inc.” (a

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(**Response**, ¶ 95) is nonsensical, as it would require the Tribunal to interpret the word “including” to mean “sometimes not including.”

¹⁵⁰ **RLA-0054**, *Emmis*, ¶ 164.

¹⁵¹ **RLA-0054**, *Emmis*, ¶ 161 (explaining that the Oxford English Dictionary defines the term “asset” as “an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies”).

¹⁵² See **Ex. R-0001**, TPA, Art. 10.29, note 9 (indicating that, for purposes of determining whether an investment exists, a different analysis must be (1) licenses, authorizations, permits, or similar instruments, and (2) “any asset associated with the license, authorization, permit, or similar instrument”).

¹⁵³ **Ex. R-0001**, TPA, Art. 10.29.

¹⁵⁴ **Ex. R-0001**, TPA, Arts. 2.1, 10.1.1, 10.29.

predecessor of Bridgestone Americas, the relevant Claimant here). This agreement grants Bridgestone/Firestone Americas Holding, Inc. a “non-exclusive license to use”¹⁵⁵ certain FIRESTONE trademarks, including some registered in Panama. In their Response, Claimants contend that this agreement qualifies as an “investment” in Panama on the part of Bridgestone Americas because (1) the agreement gives Bridgestone Americas the right to use a Panamanian trademark,¹⁵⁶ (2) the right to use a trademark is an “intellectual property right,”¹⁵⁷ and (3) “the TPA refers to ‘intellectual property rights.’”¹⁵⁸ However, even if all of that were true, it still would not add up to an “investment.”

37. As noted above, it is only an “asset that an investor owns or controls, directly or indirectly,” that qualifies as an investment.¹⁵⁹ A limited and non-exclusive right to *use* a Panamanian trademark, conferred by means of a contract between two U.S.-incorporated entities, that was created under, is governed by, and is performed under U.S. law,¹⁶⁰ is not an “asset” in Panama. And even if it could be so construed, Claimants still would need to demonstrate that Bridgestone Americas “owned or controlled” it. This they cannot do. The mere fact that

¹⁵⁵ **Ex. C-0048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 1.

¹⁵⁶ See **Response**, ¶¶ 114–16.

¹⁵⁷ See **Response**, ¶ 116.

¹⁵⁸ **Response**, ¶ 116 (emphasis in original).

¹⁵⁹ **Ex. R-0001**, TPA, Art. 10.29; see also **Response**, ¶ 94.

¹⁶⁰ **Ex. C-0048**, 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).

Bridgestone Americas needed to license it from a third party demonstrates a lack of ownership, and the terms of the agreement demonstrate a lack of control.¹⁶¹

38. **Exhibit C-49**, for its part, is a 2015 “trademark sublicense agreement” that purports to authorize Bridgestone Costa Rica to use the *Costa Rican* trademarks owned by Bridgestone Corporation¹⁶² “to manufacture Tire Products in Costa Rica,”¹⁶³ and to sell them worldwide.¹⁶⁴ In their Response, Claimants fail to explain how this inter-group agreement — which is governed by U.S. law,¹⁶⁵ and does not discuss Panamanian intellectual property — could be considered an investment in *Panama*, as the TPA requires.¹⁶⁶ They also fail to explain how this agreement is even relevant, considering that it post-dates the May 2014 Supreme Court decision. As noted above, Claimants must demonstrate that Bridgestone Americas had an investment *at the time* of the alleged TPA violation.¹⁶⁷

39. **Exhibit C-50** — a 2002 “trademark license agreement” between Bridgestone Corporation (*i.e.*, the Japanese parent company of Bridgestone Americas) and

¹⁶¹ See **Ex. C-0048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), Art. 5 (“[Bridgestone/Firestone Americas Holding, Inc.] may use Marks only on Licensed Products after receiving the written approval of [Bridgestone Licensing] and only after [Bridgestone Licensing] has seen, inspected, and approved a sample of the use of each of the Marks as well as a sample of each of the Licensed Products provided by [Bridgestone/Firestone Americas Holding, Inc.], at its expense, displaying the proposed usage of the Marks. Thereafter until expiration of this Agreement, the Marks must only be used in the style, font, color, and manner as required by [Bridgestone Licensing]”), Art. 11 (“[Bridgestone/Firestone Americas Holding, Inc.] agrees that [Bridgestone Licensing] owns of the Marks and all the goodwill associated therewith. [Bridgestone Licensing] shall retain all right, title and interest in and to the Marks, the goodwill associated therewith, and all registrations granted thereon. *Any and all uses of the Marks by [Bridgestone/Firestone Americas Holding, Inc.] shall inure to the benefit of [Bridgestone Licensing]*”) (emphasis added).

¹⁶² See **Ex. C-0049**, Trademark Sublicense Agreement (1 January 2015), Arts. 1.2, 2.

¹⁶³ **Ex. C-0049**, Trademark Sublicense Agreement (1 January 2015), Art. 2.

¹⁶⁴ See **Ex. C-0049**, Trademark Sublicense Agreement (1 January 2015), Art. 2.

¹⁶⁵ **Ex. C-0049**, Trademark Sublicense Agreement (1 January 2015), Art. 12.7.

¹⁶⁶ **Ex. R-0001**, TPA, Arts. 2.1, 10.1.1, 10.29.

¹⁶⁷ See **RLA-0021**, *ST-AD*, ¶ 300; **RLA-0020**, *Phoenix*, ¶ 67; **RLA-0053**, *GEA Group*, ¶ 170.

Bridgestone/Firestone Americas Holding, Inc. (*i.e.*, Bridgestone Americas’ predecessor) — is similarly irrelevant. This agreement, which is to “be construed and interpreted in accordance with *the laws of Japan*,”¹⁶⁸ does not confer *any* right to conduct activities in Panama, and the right that it *does* confer (“the non-exclusive and non-transferable right and license, with the limited right to sublicense as identified [herein] to use . . . (i) [Bridgestone Corporation] Trademarks in relation to all Tire Products *within the United States of America* provided that the designs, including trade dress, construction and quality of such Tire Products are approved by [Bridgestone Corporation]; and (ii) the term ‘Bridgestone’ as part of a corporate name or trade name”¹⁶⁹) is not an “asset.” Even if it were, it is clear from both the nature of the agreement and its terms that Bridgestone Americas does not “own or control” it.¹⁷⁰

40. **Exhibit C-52**, an exhibit submitted for the first time with the Response, is a December 2001 agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (“the predecessor of an entity . . . [that] is a wholly-owned subsidiary of

¹⁶⁸ **Ex. C-0050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Art. 12-7 (emphasis added).

¹⁶⁹ **Ex. C-0050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Art. 2-1 (emphasis added).

¹⁷⁰ *See Ex. C-0050*, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. (1 January 2002), Preamble (“WHEREAS, [Bridgestone Corporation] is the owner of certain trademark registrations and applications and common law and user rights to certain trademarks in numerous jurisdictions throughout the world; and WHEREAS [Bridgestone/Firestone Americas Holding, Inc.] desires to use [Bridgestone Corporation] trademarks and the goodwill associated therewith; and WHEREAS [Bridgestone Corporation] is willing to grant the right and license to use the said trademarks and the goodwill associated therewith”); *see also id.* at Art. 2-1 (explaining that the “right to use” conferred therein is “non-exclusive and non-transferrable,” and subject to approval by Bridgestone Corporation); Art. 6-1 (“[Bridgestone/Firestone Americas Holding, Inc.] acknowledges that [Bridgestone Corporation] Trademarks are part of the goodwill of [Bridgestone Corporation]’s respective business and that [Bridgestone/Firestone Americas Holding, Inc.] shall not at any time do or suffer to be done any act or thing which will in any way impair [Bridgestone Corporation]’s proprietary rights in and to [Bridgestone Corporation] Trademarks. It is understood that, except for the right to use [Bridgestone Corporation] Trademarks to identify Tire Products, [Bridgestone/Firestone Americas Holding, Inc.] 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”).

[Bridgestone Americas]”),¹⁷¹ which grants the latter “the non-exclusive and non-transferable right and license, with the limited right to sublicense as identified in this Article, to use . . . (i) [Bridgestone Corporation] Trademarks in relation to all Tire Products within the United States of America and elsewhere . . . provided that the designs, including trade dress, construction and quality of such Tire Products, are approved by [Bridgestone Corporation] and (ii) the term ‘Bridgestone’ as part of a corporate trade name.”¹⁷² This right suffers from the same problem as above — namely, that even assuming *arguendo* that it somehow could be construed as an “asset in Panama,” it would not be an asset that Bridgestone Americas owns or controls.¹⁷³

41. **Exhibit C-64**, for its part, is a 1965 agreement between (1) a Panamanian entity named “Rodelag, S.A.” (which later transferred its rights to a Panamanian entity named “Bandag de Panamá, S.A.”),¹⁷⁴ and (2) an Iowa corporation named “Bandag Incorporated” that was purchased by Bridgestone Americas in 2007¹⁷⁵ and is now called “Bridgestone Bandag, LLC.”¹⁷⁶

¹⁷¹ **Response**, ¶ 112.

¹⁷² **Ex. C-0052**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001), Art. 2-1.

¹⁷³ *See* **Ex. C-0052**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001), Art. 2-1 (quoted above), Art. 2-2 (“BSJ Trademarks and the term ‘Bridgestone’ as part of a corporate name or trade name may only be sublicensed by BFNT to the parties listed in Exhibit A”), Art. 4-2 (“The parties shall cooperate with each other . . . to ensure that use of [Bridgestone Corporation] Trademarks by [Bridgestone/Firestone North American Tire, LLC] hereunder inures to the benefit of [Bridgestone Corporation]”), Art. 6-1 (“BFNT acknowledges that BSJ Trademarks are part of the goodwill of BSJ’s respective business and that BFNT shall not at any time do or suffer to be done any act or thing which will in any way impair BSA proprietary rights in and to BSJ Trademarks. It is understood that, except for the right to use BSJ Trademarks to identify Tire Products, BFNT 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”).

¹⁷⁴ *See* **Ex. C-0065**, Agreement between Rodelag, S.A., Bandag Incorporated, and Bandag de Panamá, S.A. (16 May 2972). In his witness statement, Mr. Hidalgo describes “Bandag de Panamá” as “Bridgestone’s” “franchise,” thereby suggesting that the former belongs to the latter. *See* **Witness Statement of R. Hidalgo**, ¶ 21. However, Ex. C-0064 expressly states that “[I]licensee is and shall remain an independent contractor, not an employee, agent, or representative of Licensor.” **Ex. C-0064**, Bandag System Franchise Agreement, § IX.

¹⁷⁵ *See* **Ex. R-0016**, *Bridgestone Americas Completed Acquisition of Bandag* (1 June 2007).

On its face, the agreement authorizes Rodelag, S.A. to use a U.S. patented tire-retreading method¹⁷⁷ in exchange for royalty payments.¹⁷⁸ However, it is not clear what rights the agreement confers at present, as the underlying patent — and therefore, the right to royalty payments — appear to have expired.¹⁷⁹ (Nor is it clear how those patent rights are in any way relevant here.)

42. In their Response, Claimants appear to contend that this agreement qualifies as an investment under categories (e) and (g) of the TPA’s list of the forms that an investment may take.¹⁸⁰ However, category (e) is for “turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts,”¹⁸¹ — not *any* contract wherein royalty payments are made. And category (g) is for “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.”¹⁸² A private contract, governed by U.S. law, conferring the right to use U.S. intellectual property, does not qualify as such a license.

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¹⁷⁶ See **Ex. C-0066**, Bandag Incorporated Articles of Conversion (1 June 2007).

¹⁷⁷ See **Response**, ¶ 122; **Ex. C-0064**, Bandag System Franchise Agreement, p. 1.

¹⁷⁸ See **Response**, ¶ 122.

¹⁷⁹ See **Ex. RLA-0057**, Patent Act, 46 Stat. 376 (1930), § 4884 (explaining that U.S. patents registered during the time period that this law was in force (which would seem to include the 1961 patent contemplated in the agreement) would expire after 17 years). Under U.S. law, once the underlying patent expired, Bandag, Inc. would not be able to collect royalties under this agreement under U.S. law. See **RLA-0056**, *Brulotte v. Thys Co.*, 379 U.S. 29, 30-33 (1964).

¹⁸⁰ Compare **Response**, ¶¶ 122–23 with **Ex. R-0001**, TPA, Art. 10.29(e) and (g).

¹⁸¹ **Ex. R-0001**, TPA, Art. 10.29(e).

¹⁸² **Ex. R-0001**, TPA, Art. 10.29(g).

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

43. As Article 25(1) of the ICSID Convention makes clear, even if Claimants could demonstrate that Bridgestone Americas has an “investment” (which, as discussed above, they cannot), they then would need to prove that the present dispute “aris[es] directly out of [Bridgestone Americas’] investment.”¹⁸³ In practical terms, this requires demonstrating an “immediate” relationship¹⁸⁴ between (1) the government conduct at issue (in this case, the Supreme Court decision),¹⁸⁵ and (2) the alleged effects on the supposed investment (here, Bridgestone Americas’ “intellectual property rights — its licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama”).¹⁸⁶

44. In its first submission, Panama explained that Claimants could not make this showing, since Bridgestone Americas was not a party to the Panamanian court proceedings, did not pay (or have any obligation to pay) the amount contemplated in the decision, did not own the BRIDGESTONE or FIRESTONE trademarks,¹⁸⁷ and did not have any authority to police such

¹⁸³ ICSID Convention, Art. 25(1).

¹⁸⁴ **RLA-0013**, *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”*] (explaining that the relevant standard is whether or not there is an “immediate ‘cause and effect’ between the actions of the host State and the effects of such actions on the protected investments.” 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”) (unofficial translation from Spanish).

¹⁸⁵ See **Request for Arbitration**, ¶ 3 (“The claims herein concern an extraordinary decision by the Supreme Court of Panama”); see also **Request for Arbitration**, ¶¶ 64–67 (asserting that “Panama . . . violated its obligations . . . under the [TPA]” by means of the Supreme Court decision); **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”); **Response**, ¶ 26 (“This arbitration concerns an extraordinary and unprecedented decision by the Supreme Court of Panama to order [Bridgestone Licensing] and [Bridgestone Corporation] to pay damages to a Panamanian company . . .”).

¹⁸⁶ **Response**, ¶ 134 (describing such rights as “[Bridgestone Americas’] core investment”).

¹⁸⁷ See **Request for Arbitration**, ¶ 6.

trademarks.¹⁸⁸ Panama also explained that, at most, Bridgestone Americas had the non-exclusive right “to sell, market, and distribute products under the BRIDGESTONE and FIRESTONE trademarks in Panama and the Americas,”¹⁸⁹ and that the Supreme Court decision did not prevent the sale, marketing, or distribution of such products. (In fact, Bridgestone Costa Rica thereafter continued to make sales to Panamanian distributors.)¹⁹⁰ In their Response, Claimants attempt to call this objection “misconceived.”¹⁹¹ However, their discussion on the subject only proves Panama’s point, by showing just how tenuous the link between the dispute and alleged “investment” truly is.

45. Claimants’ argument appears to consist of four different theories. The *first* theory alleges that there is a “direct” link between the Supreme Court decision and the injury that Bridgestone Americas’ “investment” is said to have suffered, because “the Supreme Court decision has effectively deprived BSLs [*i.e.*, Bridgestone *Licensing*] . . . [of] the ability to

¹⁸⁸ See **Ex. C-0048**, 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-0050**, 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”).

¹⁸⁹ **Claimants’ Submission on Registration**, p. 4; see also **Ex. C-0048**, Agreement to License Trademarks between Bridgestone Licensing and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001); **Ex. C-0050**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone Americas Holding, Inc. for the BRIDGESTONE mark (1 January 2002)).

¹⁹⁰ See **Witness Statement of R. Hidalgo**, Appendix C.

¹⁹¹ See **Response**, ¶¶ 132, 136.

oppose confusingly similar trademark applications, which in turn has resulted in the diminution of value of the FIRESTONE and BRIDGESTONE trademarks,”¹⁹² which in turn *could* affect Bridgestone Americas and its subsidiaries, because they “license the BRIDGESTONE and FIRESTONE trademarks”¹⁹³ and therefore “ultimately stand to lose if the trademarks that are at the center of their investment are devalued.”¹⁹⁴

46. The *second* theory posits that there is a “direct” link, because “the Supreme Court decision may be followed in other countries,”¹⁹⁵ either as a matter of policy or precedent,¹⁹⁶ this would “lead[] to a reduction in trademark protections”;¹⁹⁷ that in turn could cause “cheap tires to flood the market,”¹⁹⁸ which would lead “ultimately [to] a reduction in sales and market share,”¹⁹⁹ which supposedly would dilute the value of Bridgestone Americas’ “licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama.”²⁰⁰

47. The *third* theory claims that there is a “direct” link between the dispute and the “investment,” because, as a result of the Supreme Court decision, “it is likely that there will be more trademark applications that are similar and confusingly similar to the BRIDGESTONE and FIRESTONE marks, by Muresa’s group of companies and by unrelated competitors,”²⁰¹ and —

¹⁹² **Request for Arbitration**, ¶ 66. Claimants also asserted in this paragraph that “the Supreme Court decision . . . deprived . . . [Bridgestone *Americas*] [of] the ability to oppose confusingly similar trademark applications” However, as noted above, Bridgestone Americas does not have the right to police the BRIDGESTONE and FIRESTONE trademarks.

¹⁹³ **Response**, ¶ 135.

¹⁹⁴ **Response**, ¶ 135.

¹⁹⁵ **Response**, ¶ 134.

¹⁹⁶ *See Response*, ¶ 134.

¹⁹⁷ **Response**, ¶ 134.

¹⁹⁸ **Response**, ¶ 135.

¹⁹⁹ **Response**, ¶ 134.

²⁰⁰ **Response**, ¶ 134.

²⁰¹ **Response**, ¶ 134.

even though Bridgestone Americas only has the right to *use* the marks, and Bridgestone Corporation and Bridgestone Licensing (which have the right to *police* the marks) have claimed that the mere initiation of a trademark protection action does not prevent a competitor from using its mark²⁰² — this somehow “has made it much more costly for [Bridgestone Americas] to maintain its investment in Panama and other countries in the region.”²⁰³

48. The *fourth* theory is that there is a “direct” link, because the Supreme Court decision imposed a penalty on Bridgestone Licensing and Bridgestone Corporation,²⁰⁴ and the “payment of the damages [by Bridgestone *Licensing*]”²⁰⁵ (which is “*not* a subsidiary of [Bridgestone Americas]”²⁰⁶ but rather a “sister compan[y] with a common parent”²⁰⁷) somehow affected “the ability of [*both*] of the U.S. Bridgestone entities to reinvest in their business.”²⁰⁸

49. All four of these theories suffer from the same problem: they fail to establish an “immediate ‘cause and effect’ between the actions of the host State and the effects of such actions on the protected investments,”²⁰⁹ and thereby fail to demonstrate the requisite link between the dispute and alleged investment.

50. In their Response, Claimants contend that this conclusion does not comport with “the realities of international businesses and the ways in which entities within a group are interrelated”²¹⁰ But even if that were true, it would not be relevant to this investment

²⁰² See **Request for Arbitration**, ¶ 30.

²⁰³ **Response**, ¶ 11.

²⁰⁴ See **Response**, ¶ 134.

²⁰⁵ **Response**, ¶ 134.

²⁰⁶ **Response**, ¶ 152 (emphasis added).

²⁰⁷ **Response**, ¶ 152.

²⁰⁸ **Response**, ¶ 134.

²⁰⁹ **RLA-0013, Metalpar**, ¶ 95 (unofficial translation from Spanish).

²¹⁰ **Response**, ¶ 136.

arbitration, as neither the rules of international business nor inter-group relations governs here. It is the ICSID Convention and the TPA which govern. The Convention requires that a dispute arise directly out of an investment,²¹¹ and the TPA requires that such investment belong to the claimant.²¹² Bridgestone Americas has not satisfied either requirement. This failure may leave Bridgestone Americas exposed to “the realities of international business” — including the risk that “cheap tires [will] flood the market,”²¹³ but investment treaties are not an insurance policy against normal business risks.²¹⁴

B. Jurisdictional Bars Relating to Bridgestone Americas

51. The claims by Bridgestone Licensing likewise suffer from two jurisdictional defects. *First*, Bridgestone Licensing is not entitled to the benefits of TPA Chapter Ten. *Second*, even if it were, its claims amount to an abuse of process.

1. Bridgestone Licensing Is Not Entitled to the Benefits of TPA Chapter Ten

52. As Panama explained in its first submission, the TPA’s offer of protection to “investors” and “investments” is subject to one important caveat — namely, that, subject to Articles 18.3 and 20.4, “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.”²¹⁵ In their Response, Claimants do

²¹¹ ICSID Convention, Art. 25(1).

²¹² See **Ex. R-0001**, TPA, Art. 10.29.

²¹³ **Response**, ¶ 135.

²¹⁴ **RLA-0055**, *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No ARB/01/7 (Award, 25 May 2004), ¶ 178 (Rigo Sureda, Lalonde, Oreamuno Blanco).

²¹⁵ **Ex. R-0001**, TPA, Art. 10.12.2 (emphasis added).

not contest that the right to “deny benefits” exists. However, they claim that the right could not be, and was not properly, exercised here.

53. In support of this argument, consistent with their general (*i.e.*, “different” means “same”) approach, Claimants distort the applicable legal standards and deliberately blur the line between the two Claimants. Below, Panama unweaves Claimants’ web, explaining once more why Bridgestone Licensing is not entitled to the benefits of TPA Chapter Ten.

a. Panama Provided Notice to the United States in Accordance with the TPA

54. As noted above, a denial of benefits is “subject to” Articles 18.3 and 20.4 of the TPA, which in relevant part state as follows:

Article 18.3

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.²¹⁶

Article 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.²¹⁷

55. As Panama explained in its first submission, Article 10.12, read in conjunction with Article 18.3, requires that the denying Party provide advance notice to the other Party to the TPA to the maximum extent possible. The State is *not* required to provide advance notice to the claimant.²¹⁸ Nor is it required to carry out a denial of benefits before the arbitration begins.²¹⁹ In

²¹⁶ Ex. R-0001, TPA, Art. 18.3.1.

²¹⁷ Ex. R-0001, TPA, Art. 20.4.1.

²¹⁸ See **RLA-0016**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, (Non-Disputing Party Submission of the United States, 20 May 2011), ¶¶ 9–10 [“United States’ Non-Disputing Party Submission in Pac Rim”].

the present case, Panama gave notice to the United States on 22 May 2017 — *i.e.*, 25 days after the arbitration commenced²²⁰ — of its intention to deny Bridgestone Licensing the benefits of Chapter Ten.²²¹ In their Response, Claimants contend that this was not fast enough.

56. Claimants’ argument is twofold: that the TPA required Panama “notify the United States as promptly as it could have done,”²²² and that “Panama’s delay in notifying the United States effectively deprive[d] the United States of the opportunity to respond to Panama and engage in consultations.”²²³ Both prongs of this argument are unfounded.

57. As to the *first*, Claimants appear to be re-writing the text of Article 18.3. As noted above, Article 18.3.1 states that notice must be given “to the maximum extent possible”²²⁴ not “as soon as possible,” as Claimants essentially contend.²²⁵ Claimants do not offer any interpretative basis for their transformation of this text, which plainly means that notice should

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

²¹⁹ See, e.g., **RLA-0017**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (Decision on Jurisdiction, 1 June 2012), ¶ 4.85 (Veeder, Santiago Tawil, Stern) [*“Pac Rim (Decision on Jurisdiction)”*]; **RLA-0018**, *Empresa Eléctrica del Ecuador, Inc. v. Ecuador*, ICSID Case No. ARB/05/9, (Award, 2 June 2009), ¶ 71 (Sepúlveda, Rooney, Reisman); **RLA-0019**, *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, PCA Case No. 2011-17 (Award, 31 January 2014), ¶ 377 (Júdice, Conthe, Vinuesa); **RLA-0015**, *Ulysseas, Inc. v. Republic of Ecuador*, PCA Case No. 2009-19 (Interim Award, 28 September 2010), ¶ 172 (Bernardini, Pryles, Stern)[*“Ulysseas”*]; **RLA-0016**, United States’ Non-Disputing Party Submission in *Pac Rim*, ¶ 7.

²²⁰ See Arbitration Rule 6(1) (“The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment”); Letter from ICSID to the Parties (27 April 2017) (confirming the constitution of the Tribunal).

²²¹ See **Ex. R-0013**, 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-0014**, Proof of Delivery to United States State Department (22 May 2017).

²²² **Response**, ¶ 141.

²²³ **Response**, ¶ 142.

²²⁴ **Ex. R-0001**, TPA, Art. 18.3.1.

²²⁵ See **Response**, ¶ 141.

be made before invoking the denial of benefits clause, unless it is not possible to do so.²²⁶ The TPA does not establish a specific deadline for the invocation of the denial of benefits clause, and it would be improper to require notice on either of the deadlines Claimants attempt to impose here (*viz.*, the date of the notice of intent, or the date the request for arbitration was registered).²²⁷ As the *Pac Rim* tribunal observed with respect to a similarly-worded denial of benefits provision — and the United States has affirmed²²⁸ — the only time limit for invoking such a provision is the one set forth in ICSID Arbitration Rule 41,²²⁹ which requires that objections as to competence be made “no later than the expiration of the time limit fixed for the filing of the counter-memorial.”²³⁰

58. As to the *second*, the argument that the timing of Panama’s notice prevented the United States from making a (discretionary) non-disputing party submission or deprived it of any meaningful opportunity to engage in (equally discretionary) consultations²³¹ is not Claimants’ to make. If the United States wanted to make that argument, it would of course be free to do so. Yet Claimants, by their own admission, do not have a right that has been prejudiced,²³² and fail

²²⁶ See **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.42 (summarizing the claimant’s argument as follows: “[T]his plain language means only what it says: *i.e.*, that failure to provide notice will not result in a breach of CAFTA in circumstances where it is actually impossible”).

²²⁷ **Response**, ¶ 142.

²²⁸ **RLA-0016**, United States’ Non-Disputing Party Submission in *Pac Rim*, ¶ 5 (stating that the similarly-worded DR-CAFTA denial of benefits provision “does not impose any requirement . . . with respect to *when* a respondent may invoke the denial of benefits provision”).

²²⁹ **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.85 (concluding that the only time-limit is imposed by ICSID Arbitration Rule 41).

²³⁰ ICSID Arbitration Rule 41(1).

²³¹ See **Response**, ¶ 142.

²³² See **Response**, ¶ 142 (invoking the alleged deprivation of opportunities “for the United States”).

to explain how consultations could work in their favor.²³³ In any event, the timetable *has* allowed both for consultations,²³⁴ and for non-disputing party submissions.²³⁵

b. Claimants Mischaracterize the Burden and Standard of Proof under Article 10.12.2

59. In their Response, Claimants contend simultaneously that (1) Panama bears the burden of proof on the denial of benefits issue,²³⁶ (2) Panama “is not entitled to introduce new facts for determination by the Tribunal,”²³⁷ (3) the factual allegations in the Request provide sufficient basis for rejecting the denial of benefits objection,²³⁸ and (4) if the Tribunal were to find that “the evidence submitted by Claimants . . . is insufficient for these purposes,”²³⁹ it would be “unable to determine the Respondent’s objection.”²⁴⁰ Heads, Claimants win; tails, Panama loses.

²³³ See **RLA-0016**, United States’ Non-Disputing Party Submission in Pac Rim, note 10 (“Given that a request for consultations pursuant to Article 20.4.1 if discretionary . . . there is no basis in the Agreement to draw any inference from a Party’s decision not to request consultations”); **RLA-0067**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (Non-Disputing Party Submission of Costa Rica, 20 May 2011), ¶ 4 (“exercise of [the possibility to request consultations] by the State affected, or lack thereof, does not in and of itself affect the denial of benefits made by the denying State”).

²³⁴ The United States has consulted with Panama and Panama understands that the United States will be consulting with Claimants shortly, if it has not done so already.

²³⁵ See Letter from ICSID to the Parties (1 August 2017) (proposing a deadline for a written submission by the United States); Letter from Panama to the Tribunal (3 August 2017); Letter from Claimants to the Tribunal (4 August 2017).

²³⁶ **Response**, ¶ 153.

²³⁷ **Response**, ¶ 147.

²³⁸ **Response**, ¶ 147.

²³⁹ **Response**, ¶ 147.

²⁴⁰ **Response**, ¶ 147.

60. In light of these arguments, it seems useful to recall the rules on the *burden* of proof (*i.e.*, the question of which party has the obligation to prove its case), and the *standard* of proof required discharge that burden.²⁴¹

61. The burden of proving a fact rests with the party asserting that fact (*onus probandi incumbit actori*).²⁴² At the jurisdictional phase, this means that “the [c]laimant has to prove that the Tribunal has jurisdiction” whereas the respondent bears the burden of proving any affirmative arguments.²⁴³ In general, as the parties seem to agree, Claimants bear the burden of proving that the requisite elements of jurisdiction are met (which they have not done), and Panama would bear the burden of proving its positive objections (such as this one).²⁴⁴ However, the invocation of a denial of benefits clause creates a unique situation in which a respondent is required to prove a negative — that the claimant does not have substantial business activities — using evidence in the possession of the claimant alone. For this reason, and because it is Claimants’ duty to satisfy the Tribunal of its jurisdiction, once Panama submitted “cogent evidence” that the denial of benefits provision applies²⁴⁵ (as it did here by submitting documents showing that Bridgestone Licensing has no presence, no employees, no separate physical

²⁴¹ **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 2.2.

²⁴² See *e.g.*, **RLA-0065**, *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12 (Decision on Annulment 1 September 2009), ¶ 215 (Griffith, Ajibola, Hwang); **RLA-0066**, *The Case Concerning Pulp Mills on the River Uruguay*, ICJ (20 April 2010), ¶ 162.

²⁴³ See **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 2.11; **CLA-0034**, Andrew Sinclair, SUBSTANCE OF NATIONALITY PLANNING IN INVESTOR-STATE ARBITRATION, pp. 380–81.

²⁴⁴ **CLA-0034**, Andrew Sinclair, SUBSTANCE OF NATIONALITY PLANNING IN INVESTOR-STATE ARBITRATION, pp. 380-81 (referring specifically to the invocation of a denial of benefits clause).

²⁴⁵ **CLA-0034**, Andrew Sinclair, SUBSTANCE OF NATIONALITY PLANNING IN INVESTOR-STATE ARBITRATION, p. 381.

address,²⁴⁶ no presence in Bridgestone Corporation’s publicly-available corporate documents,²⁴⁷ and no presence in major public databases),²⁴⁸ the burden shifted²⁴⁹ back to Claimants.

62. With respect to the standard of proof, Claimants essentially contend that there is *not* one — that the Tribunal for present purposes must accept as true any factual assertions that Claimants made in the Request.²⁵⁰ This is not an appropriate approach to a jurisdictional issue in a jurisdictional phase. Though tribunals *do* apply a this type of *prima facie* test to the *merits* of the case at the jurisdictional phase,²⁵¹ a different approach is required for factual issues on which the tribunal’s jurisdiction depends, such as this one. In the words of the *Pac Rim* tribunal, “it is *impermissible* for the Tribunal to found its jurisdiction on any of the Claimant’s [treaty] claims on the basis of an assumed fact (*i.e.* alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent).”²⁵²

²⁴⁶ See **Expedited Objections**, ¶ 36.

²⁴⁷ See **Ex. R-0007**, Annual Report 2015: Operational Overview, Bridgestone Corporation (May 2016); **Ex. R-0008**, Our Headquarters, Bridgestone Americas Inc. Website (last visited 10 May 2017); **Ex. R-0009**, Business Report for the 98th Fiscal Period for 2016, Bridgestone Corporation (March 2017) (listing Bridgestone Americas as a subsidiary but not Bridgestone Licensing); **Ex. R-0010**, LexisNexis Corporate Affiliations Report, Bridgestone Corporation (10 April 2017); **Ex. R-0011**, Standard & Poors Capital IQ Corporate Structure Tree, Bridgestone Corporation (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-0006**, Subsidiaries and Business Units, Bridgestone Americas Inc. Website (last visited 10 May 2017).

²⁴⁸ See **Expedited Objections**, Annex A.

²⁴⁹ See, e.g., **RLA-0060**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Award, 26 July 2007), ¶ 14 (Price, Bernardini, Mustill) (“For this purpose the Tribunal must in practice form an idea, necessarily based on secondary and circumstantial evidence since direct evidence is out of reach”); **RLA-0061**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16 (Award, 8 November 2010), ¶ 236 (Robinson, Alexandrov, Turbowicz); see also **RLA-0062**, *The Case Concerning Ahmadou Sadio Diallo v. Democratic Republic of the Congo*, Judgment (20 November 2010), ¶ 55.

²⁵⁰ Claimants base this assertion in part on their erroneous interpretation of Article 10.20.5, an argument which is addressed in Section II, above.

²⁵¹ **RLA-0002**, Schreuer, COMMENTARY, Art. 41, ¶¶ 86–89.

²⁵² **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 2.8 (emphasis added).

c. Bridgestone Licensing Does Not Have Substantial Business Activities in the Territory of the United States

63. The parties agree that there is no bright-line standard for determining whether an enterprise has “substantial business activities” in the territory of the United States.²⁵³ In their Response, Claimants contend (citing an Energy Charter Treaty case) that the inquiry simply involves determining whether or not there are activities “of substance,”²⁵⁴ and that the magnitude of the activities is not important.²⁵⁵ But as the *Pac Rim* tribunal observed, the “wording, context, and effect” of the denial of benefits provision in the Energy Charter Treaty is different from the denial of benefits clauses in the U.S. treaties like the one at issue here.²⁵⁶ The *Pac Rim* tribunal concluded that the “level” of activities *is* important,²⁵⁷ which is consistent with the ordinary meaning of the word “substantial.”²⁵⁸

64. In deciding whether an entity’s activities reach the requisite level, previous tribunals have considered a range of factors, including, *inter alia*: (1) the existence of a physical office, as demonstrated through a lease or other overhead costs associated with the maintenance of a physical office space;²⁵⁹ (2) the number of employees working at the enterprise’s place of

²⁵³ See **Expedited Objections**, ¶ 32; **Response**, ¶ 150.

²⁵⁴ See **Response**, ¶ 151.

²⁵⁵ See **Response**, ¶ 151.

²⁵⁶ **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.3.

²⁵⁷ See **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.66 (requiring the claimant’s *own* activities to “reach the *level* stipulated by CAFTA Article 10.12.2) (emphasis added); ¶ 4.67 (observing that the claimant was involved in certain activities, noting that those activities were lawful, but stating that “the question remains whether such activities were ‘substantial’”); ¶¶ 4.68–4.71 (considering which and how many activities the claimant was involved in).

²⁵⁸ See **Ex. R-0015**, *Substantial*, Oxford English Dictionary: Third Edition, Oxford University Press (June 2012) (defining “substantial” as “[r]elating to size [or] quantity” and “[o]f ample or considerable amount or size; sizeable”).

²⁵⁹ See **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.69; **RLA-0041**, *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL (Award (redacted version), 5 March 2011), ¶ 217 (Crivellaro, Kelin, Stuber) [*“Alps Finance”*] (requiring proof of certain elements for assessing the “business seat” of an

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business;²⁶⁰ (3) whether “an address with phone and fax numbers are offered to third parties;”²⁶¹ (4) whether the source of any capital expended by the enterprise is actually a parent company;²⁶² (5) the location of annual meetings of the board of directors and shareholders;²⁶³ and (6) the existence of records (i.e. minutes) of annual meetings.²⁶⁴

65. Importantly, in examining these factors, the Tribunal may only consider the activities of Bridgestone Licensing itself. As the *Pac Rim* tribunal stated:

[T]his first condition under CAFTA Article 10.12.2 [requiring “substantial business activities”] 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 10.12.2.²⁶⁵

66. As Panama explained in its first submission, the relevant date for assessing Bridgestone Licensing’s business activities is the date of the Request for Arbitration,²⁶⁶ which was submitted on 7 October 2016. Claimants do not contest this in their Response; they simply ignore the point altogether, submitting “evidence” related to “activities” after the date of the

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entity); **RLA-0011**, *Tenaris*, ¶ 224(h) (taking into account the existence of a sub-lease in determining an entity’s corporate seat).

²⁶⁰ **RLA-0041**, *Alps Finance*, ¶ 219 (drawing a negative inference from an admission that a company has no employees in assessing the “real economic activities” of an entity).

²⁶¹ **RLA-0041**, *Alps Finance*, ¶ 217 (requiring proof of certain elements for assessing the “business seat” of an entity).

²⁶² See **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.76.

²⁶³ See **RLA-0041**, *Alps Finance*, ¶ 217.

²⁶⁴ See **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.69.

²⁶⁵ **RLA-0017**, *Pac Rim (Decision on Jurisdiction)*, ¶ 4.66 (emphasis added).

²⁶⁶ See **RLA-0015**, *Ulysseas*, ¶ 174.

Request for Arbitration.²⁶⁷ As discussed below, however, that evidence only further supports the conclusion that Bridgestone Licensing does not have “substantial business activities” in the United States.

67. **Situs of Incorporation.** In their pleadings, Claimants emphasize repeatedly that Bridgestone Licensing is a duly registered U.S. corporation with a U.S. address.²⁶⁸ However, incorporation alone does not demonstrate the existence of any business activities — especially in circumstances where Claimants admit that all work associated with maintaining Bridgestone Licensing’s corporate status has always been conducted by external legal counsel²⁶⁹ and corporate services firms.²⁷⁰

68. **Address.** Claimants also emphasize that Bridgestone Licensing has an official business address in Nashville.²⁷¹ However (1) the address they provide is the headquarters of another company (Bridgestone Americas) that conducts all management matters for Bridgestone Licensing,²⁷² (2) Bridgestone Licensing does not appear to have a separate phone number or office suite,²⁷³ and (3) Bridgestone Licensing does not appear to lease any office space, either in

²⁶⁷ See, e.g., **Ex. C-0093**, JP Morgan Chase Bank Statement.

²⁶⁸ See, e.g., **Request for Arbitration**, ¶¶ 1, 4; **Response**, ¶¶ 116, 154.

²⁶⁹ See **Response**, ¶ 162(5); **Witness Statement of T. Kingsbury**, ¶ 7. The invoices are dated 19 December 2016 - 8 March 2017, after the date of the Request for Arbitration.

²⁷⁰ See **Ex. C-0093**, JP Morgan Chase Bank Statement (including a bank statement for June 2017, *after the date of the Request for Arbitration*, showing a payment to the “Corporation Service Company”); **Ex. C-0095**, Delaware Annual Franchise Tax Report (providing “The Corporation Trust Company” as the registered agent); **Ex. C-0096**, Tennessee Corporation Annual Report Form for 2016 (providing “CT Corporation System” as the registered agent).

²⁷¹ See **Request for Arbitration**, ¶ 4; **Response**, ¶¶ 154, 162(9).

²⁷² See **Ex. C-0077**, Support Services Agreement between BSLs and BFAH (1 December 2001), p. 2 (providing a long list of financial, tax, and legal services provided by BFAH (now Bridgestone Americas) to Bridgestone Licensing).

²⁷³ See **RLA-0041**, *Alps Finance*, ¶¶ 217–18 (considering whether the entity provides a phone and fax number to third parties in assessing the “business seat” of an entity). Compare **Ex. C-0045**, Waiver for BSAM (21 October 2016) (including an official letterhead, in color, with an individual’s name, address,

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that building or elsewhere.²⁷⁴ Given that Bridgestone Licensing does not have any full-time employees,²⁷⁵ this is not surprising.

69. **Corporate governance.** Although Claimants contend that the fact that Bridgestone Licensing has a Board of Directors works in their favor, it only adds more to the mystery surrounding Bridgestone Licensing. The Board of Directors, which consists of three members, all of whom are Japanese citizens,²⁷⁶ does not meet in the United States. Conference calls apparently stand in lieu of annual Board meetings,²⁷⁷ no minutes are kept,²⁷⁸ and the

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phone number, and email address) with **Ex. C-0044**, Waiver for BSLs (21 October 2016) (including a black and white letterhead with the general Nashville address).

²⁷⁴ The lease or sub-lease of actual office space has been taken into account by previous tribunals. *See, e.g., RLA-0011, Tenaris*, ¶ 224(h) (taking into account the existence of a sub-lease in determining an entity’s corporate seat); **RLA-0017, Pac Rim (Decision on Jurisdiction)**, ¶ 4.69; **RLA-0041, Alps Finance**, ¶ 218. Claimants failed to provide a lease or evidence of ownership specific to Bridgestone Licensing. Instead, Claimants provide a misleading reference to their Support Services Agreement (and the associated “handling fee”) by comparing this arrangement to the lease of office space by the claimant in *AMTO v. Ukraine*. *See Response*, ¶ 162(9). The incomplete portion of the Support Services Agreement submitted by Claimants, however, does not mention office space or a lease fee. Furthermore, there is no evidence of money being spent on office space in the financial statements submitted by Claimants. *See Ex. C-0092*, BSLs Financial Statements for 2014 to 2016.

²⁷⁵ *See RLA-0041, Alps Finance*, ¶ 219 (drawing a negative inference from an admission that a company has no employees in assessing the “real economic activities” of an entity). Mr. Akiyama and Mr. Crothers are housed in the Nashville headquarters building of Bridgestone Americas, but require no separate space for the limited portion of their time spend on Bridgestone Licensing matters as opposed to matters for Bridgestone Corporation or other Bridgestone affiliates. *See Response*, ¶¶ 155, 159 (“BSLS also operates out of the same office in Nashville as BSAM, where Mr. Akiyama and Mr. Crothers are based”). Claimants did not respond to Panama’s statement in its Expedited Objections that “[i]t is not clear whether Bridgestone Licensing . . . has any employees who actually work at this address.” **Expedited Objections**, ¶ 36. It is to be recalled that Mr. Kingsbury spends 7-10% of his time on Bridgestone Licensing matters, is a Chief Counsel of another Bridgestone entity, and works in Akron, Ohio. *See Witness Statement of T. Kingsbury*, ¶¶ 1, 5, 9.

²⁷⁶ **Witness Statement of T. Kingsbury**, ¶¶ 4–5.

²⁷⁷ *See Response*, ¶ 155; **Witness Statement of T. Kingsbury**, ¶ 4; *but see RLA-0041, Alps Finance*, ¶ 217 (taking into account the place of the board of directors’ meetings for the purpose of proving an entity’s business seat).

²⁷⁸ *See RLA-0017, Pac Rim (Decision on Jurisdiction)*, ¶ 4.69 (considering whether minutes of meetings were kept in assessing “substantial business activities”). It is not clear whether the outside counsel who prepared the “resolutions” even participated in the conference calls.

“resolutions” that “the Board” therein approves are prepared²⁷⁹ and “filed”²⁸⁰ by outside counsel. Only one member of the Board, Mr. Tomoki Akiyama, is allegedly “based at BSLs’s headquarters in Nashville,”²⁸¹ which means that Claimants rely entirely on Mr. Akiyama for evidence of any business conducted in the United States by Bridgestone Licensing’s Board. According to Mr. Akiyama’s Facebook profile, he is employed by Bridgestone *Americas*.²⁸²

70. The officers of Bridgestone Licensing (Assistant Treasurer James Crothers and Assistant Secretary Thomas Kingsbury) likewise appear to be Bridgestone Americas employees,²⁸³ to whom Bridgestone Licensing has contracted out work.²⁸⁴ Claimants concede that neither is an employee of Bridgestone Licensing,²⁸⁵ Mr. Kingsbury, who is the only individual related to Bridgestone Licensing about whom Claimants provide any detailed

²⁷⁹ See **Ex. C-0085**, Invoices from Pillsbury Winthrop Shaw Pittman LLP, p. 2 (including legal bills for the preparation and revision of board resolutions).

²⁸⁰ **Witness Statement of T. Kingsbury**, ¶ 7.

²⁸¹ Claimants have failed to provide any evidence that he in fact works out of a separate BSLs office. See **Response**, ¶ 155. Interestingly, outside counsel to Bridgestone Licensing had to conduct research into the directors’ locations in November 2016 (less than two months after the Request for Arbitration was filed) and corresponding legal research, perhaps to ensure that Bridgestone Licensing could at least maintain the appearance of a presence in the United States. See **Ex. C-0085**, Invoices from Pillsbury Winthrop Shaw Pittman LLP, p. 2.

²⁸² See **Ex. R-0017**, Facebook Profile of Tomoki Akiyama (last visited 3 August 2017).

²⁸³ Mr. Kingsbury is the Chief Counsel for Intellectual Property of Bridgestone Americas. See **Witness Statement of T. Kingsbury**, ¶ 1. According to his LinkedIn profile, Mr. Crothers is also employed by Bridgestone Americas. See **Ex. R-0018**, LinkedIn Profile of Jim Crothers (last visited 3 August 2017) (listing “Bridgestone” as his employer, with a hyperlink to the “Bridgestone Americas” web page).

²⁸⁴ See generally **Ex. C-0077**, Support Services Agreement between BSLs and BFAH.

²⁸⁵ Claimants explicitly state that “even though Mr. Kingsbury is employed by BSAM, ever since he joined the company, part of his duties have involved work for BSLs.” **Response**, ¶ 157; see also *id.*, ¶ 162(4) (“BSLs does . . . legal work itself, through Bridgestone personnel who, *although not officially employed by BSLs* . . .”) (emphasis added). With respect to his previous duties for Bridgestone Licensing, Mr. Kingsbury provided legal services to Bridgestone Licensing under the terms of the Support Services Agreement until 2014, which explicitly states that Bridgestone America’s services were to be provided as “an independent contractor” rather than as an agent or representative of Bridgestone Licensing. **Ex. C-0077**, Support Services Agreement, p. 2. No information is provided about Mr. Crothers’ employment, but his position as Assistant Treasurer suggests that like Mr. Kingsbury, the Assistant Secretary, he is also double-hatted and spends virtually no time on Bridgestone Licensing matters.

information, is a Chief Counsel of Bridgestone Americas, and works in the Bridgestone Americas Legal Department in Akron, Ohio. In his witness statement, he concedes that he spends only 7-10% of his time on Bridgestone Licensing matters.²⁸⁶ This work apparently involves supervising work done by outside counsel and collaborating with Bridgestone Americas employees.²⁸⁷

71. **Financial activities.** The evidence provided by Claimants concerning Bridgestone Licensing's financial activities is equally problematic. Apart from the fact that the bank statement submitted by Claimants is dated June 2017,²⁸⁸ and thus provides no insight into the state of affairs at the time of the Request for Arbitration in 2016,²⁸⁹ the financial statements submitted by Claimants appear to be internal spreadsheets, which do not indicate who prepared them, when they were prepared, or for what purpose. Similarly, for tax filings, Claimants provided a Form 8453-C²⁹⁰ (which merely attests that a return was filed) instead of a completed Form 1120 (which is an actual tax return).²⁹¹ A Form 8453-C provides no specific information about the nature of Bridgestone Licensing's tax liability or its alleged business activities. In any

²⁸⁶ **Witness Statement of T. Kingsbury**, ¶ 9.

²⁸⁷ See **Witness Statement of T. Kingsbury**, ¶¶ 5, 9–11 (explaining that he oversees work by outside counsel and Bridgestone Americas employees Messrs. Crothers and Akiyama).

²⁸⁸ See **Ex. C-0093**, JP Morgan Chase Bank Statement.

²⁸⁹ See **RLA-0041**, *Alps Finance*, ¶ 223 (noting that the submission of bank account documents from a time other than the critical date (there, the time of the events giving rise to the dispute) did not assist the claimant in proving the existence of “real economic activities”).

²⁹⁰ See **Ex. C-0094**, BSLs Corporate Tax Declaration (Form 8453-C).

²⁹¹ Claimants acknowledge that the form provides merely “serves as a declaration of electronic filing of corporate taxes.” **Witness Statement of T. Kingsbury**, note 21. In other words, as acknowledged by Claimants, these forms demonstrate only that Bridgestone Licensing files a U.S. tax return; they do not constitute tax returns, which would be done on Form 1120. Accordingly Exhibit C-94 does not provide any specific information about Bridgestone Licensing's tax liability.

event, the fact that a company pays taxes in accordance with the law of the State in which it is incorporated does not reveal the existence of substantial business activities.²⁹²

72. Furthermore, Claimants make a number of misleading statements about the financial activities of Bridgestone Licensing:

Claimants' Allegation	Evidence
Mr. Crothers and Mr. Akiyama manage Bridgestone Licensing's tax filings internally. ²⁹³	According to the (incomplete version of) the Support Services Agreement submitted by Claimants, Bridgestone <i>Americas</i> supplies all "general tax management" services, including "[t]he administration of federal, state & local tax compliance including returns and estimated payments." ²⁹⁴ The cover emails of the IRS forms submitted by Claimants show that the forms were prepared by "Corptax" and were sent to Darryl Young, the Section Manager of Bridgestone <i>Americas</i> . ²⁹⁵
Mr. Akiyama manages the payment of Bridgestone Licensing's "handling fee" to Bridgestone Americas. ²⁹⁶	Bridgestone <i>Americas</i> provides "general financial management" services and is authorized to directly debit Bridgestone Licensing's account for the handling fee. ²⁹⁷
Mr. Akiyama manages the payment of Bridgestone Licensing's corporate fees to Bridgestone Americas. ²⁹⁸	All corporate legal matters and filings are "entrusted" to outside counsel in the New York office of Pillsbury Winthrop Shaw Pittman LLP. ²⁹⁹

²⁹² As discussed above, the fact that an entity maintains its lawful status and conducts some activities in accordance with the laws of the jurisdiction is not sufficient. See **RLA-017**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, (Decision on Jurisdiction, 1 June 2012), ¶ 4.67 (Veeder, Santiago Tawil, Stern); **RLA-0041**, *Alps Finance*, ¶ 224.

²⁹³ **Response**, ¶¶ 159–60.

²⁹⁴ **Ex. C-0077**, Support Services Agreement between BSLS and BFAH, p. 7.

²⁹⁵ **Ex. C-0094**, BSLS Corporate Tax Declaration (Form 8453-C).

²⁹⁶ **Witness Statement of T. Kingsbury**, ¶ 19.

²⁹⁷ **Ex. C-0077**, Support Services Agreement between BSLS and BFAH, pp. 6–7.

²⁹⁸ **Witness Statement of T. Kingsbury**, ¶ 19.

²⁹⁹ **Witness Statement of T. Kingsbury**, ¶ 7.

73. **Trademark management.** Claimants repeatedly assert that Bridgestone Licensing is the owner of the FIRESTONE and related trademarks in countries outside of the United States, and that it “manage[s] these trademarks,” including by “register[ing] trademarks,” “monitor[ing] its trademarks,” “[monitoring] the registration of competing trademarks,” and “protect[ing] its trademarks by engaging in court processes in various jurisdictions, such as the one in Panama.”³⁰⁰

74. What the evidence *actually* shows, however, is that none of these tasks is performed by Bridgestone Licensing. In reality: the filing and renewal of trademark registrations, monitoring of trademarks and the registration of competing marks is performed by “Watch Services” at the direction of Ladas & Perry LLP;³⁰¹ trademark opposition proceedings are conducted by local counsel (such as Benedetti & Benedetti in Panama),³⁰² who are supervised and *instructed* by Ladas & Perry LLP;³⁰³ and other “intellectual property matters” allegedly are handled by lawyer Mallory Smith³⁰⁴ (though Claimants have only provided an unsigned 2013 fixed-term agreement without any evidence that it is still in force). The letter is addressed to a director of *Bridgestone Corporation* in Japan, who approved the agreement, signing in his dual capacity as Director of the Intellectual Property Division of Bridgestone

³⁰⁰ **Response**, ¶ 154.

³⁰¹ *See Response*, ¶ 157; **Witness Statement of T. Kingsbury**, ¶ 12; **Ex. C-0088**, Ladas & Parry Payment Documentation. Notably, the invoices are dated 10 April 2017 - 19 May 2017, months *after* the submission of the Request for Arbitration.

³⁰² *See Witness Statement of T. Kingsbury*, ¶ 13; **Ex. C-0014**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006) (listing Benedetti & Benedetti as counsel for Bridgestone Corporation and Bridgestone Licensing).

³⁰³ *See Response*, ¶ 157.

³⁰⁴ **Response**, ¶ 162(5).

Corporation and President of Bridgestone Licensing.³⁰⁵ All other “intellectual property matters” are thus conducted by the Japanese parent company through outside counsel.

75. In other words, the objective evidence shows that *all* of the activities associated with management of the FIRESTONE trademark are conducted by outside entities. To the extent that Mr. Kingsbury “oversee[s]” these activities in the extremely limited amount of time he spends on Bridgestone Licensing matters,³⁰⁶ he is not an employee and does not work out of the alleged office in Nashville. Bridgestone Licensing therefore does not *itself* manage its trademarks around the world, and is subject to the supervision of Bridgestone Corporation in this realm.³⁰⁷

76. Claimants’ only other evidence consists of licensing agreements, which were attached *en masse* to their Response. These agreements range in date of conclusion from 2001 to 2017 and many are not revenue-generating,³⁰⁸ such that most do not assist Claimants in demonstrating the existence of business activity at the date of the Request.³⁰⁹ Moreover, the mere existence of licensing agreements between Bridgestone Licensing and other entities does not alone constitute evidence of substantial business activities. Just as a holding company may

³⁰⁵ See **Ex. C-0086**, Legal Representation Agreements for Mallory Smith.

³⁰⁶ Mr. Kingsbury alleges that he “oversee[s] the services of Ms. Smith,” despite the fact that the unsigned agreement concerning Ms. Smith’s services is out of date. **Witness Statement of T. Kingsbury**, ¶ 10.

³⁰⁷ According to the legal representation agreement submitted as Ex. C-0086, the work of Ms. Smith is also to be supervised by Mr. Kingsbury “acting as the local agent for BSLS” and Mr. Kingsbury in turn is to be supervised by a Bridgestone official *in Tokyo*.

³⁰⁸ See **Ex. C-0089**, Licensing Agreements; **Witness Statement of T. Kingsbury**, Appendix A.

³⁰⁹ See **RLA-0015**, *Ulysseas*, ¶ 174.

hold shares *and* be considered a shell company,³¹⁰ so too can a licensing company be a party to licensing agreements *and* exist only on paper.

77. It is not surprising that these agreements exist, as the purpose of Bridgestone Licensing is to hold passively the FIRESTONE trademark outside the United States and license the right to use it. The licensing activities described in Mr. Kingsbury’s statement hardly qualify as the “substantial business activities” that the TPA requires. Further evidence of the passive nature of Bridgestone Licensing is the fact that the key license for the FIRESTONE mark was granted to Bridgestone Americas in 2001, and no substantial revenue generating licensing business has occurred since.

78. What *is* surprising is that Claimants are attempting to characterize these agreements as evidence of business activities in the *United States*, given their argument (discussed above) that agreements of this nature are so tied to *Panama* that they amount to investments therein. It is not possible for both points to be true, and in reality, both are false. The licensing “rights” and “activities” addressed in these agreements merely exist on paper, and have no real territorial nexus. They therefore do not help Claimants in either scenario.

* * *

79. As the foregoing makes amply clear, while Bridgestone Licensing is incorporated in the United States, it is little more than a passive holder of the FIRESTONE trademark outside of the United States, used by its Japanese parent company for trademark licensing outside the United States. It exists on paper, but Claimants cannot point to substantial business activities (or even activities of substance) that Bridgestone Licensing itself conducts in the United States.

³¹⁰ See **RLA-0017**, Pac Rim (Decision on Jurisdiction), ¶¶ 4.69–4.73.

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

80. As Panama explained in its first submission, in addition to considering *whether* Claimants have established jurisdiction in respect of Bridgestone Licensing, the Tribunal also must consider *how*.³¹¹ If the answer is that the Bridgestone group of companies took steps after the present dispute was foreseeable³¹² to manufacture jurisdiction — for example, by manipulating the nationality of the claim³¹³ — the claims by Bridgestone Licensing automatically would constitute an abuse of process,³¹⁴ and would need to be dismissed.³¹⁵

81. In their Response, Claimants attempt to deal with this point by conflating it with the “denial of benefits” issue discussed immediately above.³¹⁶ But the issue here is different, and would operate to bar Bridgestone Licensing’s claims even if it met the technical standards for jurisdiction under Chapter Ten of the TPA.

³¹¹ **RLA-0025**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17 (Award, 9 January 2015), ¶ 182 (Kaufmann-Kohler, Zuleta, Vinuesa) (explaining that even if a claimant has established jurisdiction under the ICSID Convention and the applicable treaty, if this was achieved through abusive methods, the tribunal should decline jurisdiction).

³¹² See **RLA-0020**, *Phoenix*, ¶ 144; **RLA-0024**, *Lao Holdings N.V. v. Laos People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (Decision on Jurisdiction, 21 February 2014), ¶ 70 (Binnie, Hanotiau, Stern) [“*Lao Holdings*”]; see also **Response**, ¶ 167 (quoting **CLA-0022**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12 (Award on Jurisdiction and Admissibility, 17 December 2015), ¶ 554 (Böckstiegel, Kaufmann-Kohler, McRae) [“*Philip Morris v. Australia*”]).

³¹³ See, e.g., **RLA-0022**, *Mihaly*, ¶ 24; **RLA-0023**, *Vito G. Gallo v. Canada*, PCA Case No. 55798 (Award, 15 September 2011), ¶ 336 (Fernández-Armesto, Castel, Lévy); **CLA-0022**, *Philip Morris v. Australia*, ¶ 588.

³¹⁴ As the *Philip Morris v. Australia* tribunal explained in a passage quoted expressly in Claimants’ Response, “the notion of abuse of process does not imply a showing of bad faith. Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.” **Response**, ¶ 166 (quoting **CLA-0022**, *Philip Morris v. Australia*, ¶ 539).

³¹⁵ See **RLA-0020**, *Phoenix*, ¶ 144; **RLA-0024**, *Lao Holdings*, ¶ 70; see also **Response**, ¶ 167 (quoting **CLA-0022**, *Philip Morris v. Australia*, ¶ 554).

³¹⁶ See **Response**, ¶ 170 (asserting, incorrectly, that the abuse of process object is “entirely reliant on the success of [Panama’s] denial of benefits argument”).

82. As Panama has explained, and Claimants have not contested, the dispute in this case arose some time in 2015. The record shows that, in February of that year, “the Bridgestone family of companies”³¹⁷ was contemplating an investment treaty claim against Panama based on the May 2014 Supreme Court decision³¹⁸ and then, on 30 September 2015, Claimants filed a formal Notice of Intent to bring an investment claim against Panama based on that decision.³¹⁹ At that time, however, no clear jurisdictional path to assert that claim was available to them. Bridgestone Americas (which was not even a party to the Supreme Court proceeding) had no “investment” in Panama. Bridgestone Corporation, a Japanese entity, had no rights under the TPA to invoke.³²⁰ Bridgestone Licensing, although nominally a U.S. national, had not paid the judgment and therefore could not demonstrate that it had “incurred loss or damage,” as required by the express terms of the TPA.³²¹ In fact, Bridgestone Licensing did not make the alleged payment until nearly a year later, just seven weeks before filing the Request for Arbitration in which it seeks to recover for that alleged loss.

83. In their Response, Claimants contend that “it does not matter when [Bridgestone Licensing] paid the damages” because it is the timing of Panama’s alleged breach, rather than the timing of Bridgestone Licensing’s alleged loss, which determines when Bridgestone Licensing is

³¹⁷ **Ex. C-0032**, Special 301 Public Hearing Oral and Written Statement (24 February 2015), p. 1 (defining this group as “Bridgestone”).

³¹⁸ *See* **Ex. C-0032**, Special 301 Public Hearing Oral and Written Statement (24 February 2015), p. 3 (discussing the claims that “Bridgestone” planned to raise).

³¹⁹ *See* **Ex. C-0043**, Notice of Intent to Arbitrate (30 September 2015).

³²⁰ There is no investment treaty between Panama and Japan. *See* **RLA-0026**, List of International Investment Agreements for the Republic of Panama, UNCTAD, Investment Policy Hub Website (last visited 10 May 2017).

³²¹ *See* **Ex. R-0001**, TPA, Art. 10.17 (“Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement”), Art. 10.16 (“Submission of a Claim to Arbitration”), Art. 10.16.1(a) (“[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, . . . and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach”).

eligible to assert a TPA claim.³²² However, the TPA states otherwise,³²³ and not even the Energy Charter Treaty award that Claimants cite³²⁴ supports their position. (In fact, the award directly contradicts their position, stating that loss can be assessed only from the moment “actual and permanent damages c[an] be identified for the investment,”³²⁵ and citing a date nearly six months *after* the alleged breach began as the date on which the claimants’ investment first suffered loss.³²⁶)

84. Claimants also contend that the date on which “the Supreme Court ordered BSLS [*i.e.*, Bridgestone Licensing] to pay damages . . . is the date on which BSLS incurred the loss to BSLS [*sic*].”³²⁷ But that argument ignores the facts that (1) Bridgestone Licensing did not pay the damages the day they were awarded, and instead “Bridgestone” spent more than two years seeking to avoid payment,³²⁸ during which time the judgment creditors took no formal action to enforce the judgment in their favor, and (2) *both* Bridgestone Corporation and Bridgestone Licensing were jointly and severally liable for payment throughout this time. In light of this, neither entity could claim loss unless and until it actually made payment to Muresa and Tire Group — and, even then, could recover only the sum it had paid itself.³²⁹

³²² **Response**, ¶ 169.

³²³ *See Ex. R-0001*, TPA, Art. 10.16.1(a).

³²⁴ *See Response*, ¶ 169 (citing **CLA-0001**, *Anatolie Stati et. al. v. Kazakhstan*, SCC Case No. V1116/2010 (Award, 19 December 2013) (Bockstiegel, Lebedev, Haigh) [“*Stati*”]).

³²⁵ **CLA-0001**, *Stati*, ¶ 1497.

³²⁶ **CLA-0001**, *Stati*, ¶ 1497.

³²⁷ **Response**, ¶ 169.

³²⁸ *See Request for Arbitration*, ¶¶ 48–53.

³²⁹ *See e.g.*, **RLA-0058**, *Saluka Investments BV v. Czech Republic*, UNCITRAL (Partial Award, 17 March 2006), ¶ 244 (Watts, Fortier, Behrens) (limiting jurisdiction to “claims brought by the [Dutch] Claimant, Saluka, in respect of damage suffered by itself”).

85. Claimants have contended that payment was made by Bridgestone Licensing on 19 August 2016.³³⁰ The timing of this payment alone — more than a year after the dispute arose — would be sufficient to demonstrate an abuse of process.³³¹ Under the “objective” standard that Claimants encourage the Tribunal to adopt, the Tribunal does not need to consider the reason *why* Bridgestone Licensing (and not Bridgestone Corporation) chose to pay.³³² But if in fact it considered that issue, it would find that the only plausible explanation is that Bridgestone Licensing was attempting to bring itself into compliance with the TPA’s requirements.

86. Interestingly, Claimants’ evidence that payment was made consists of an inexplicably mistranslated letter from 19 August 2016, which, when properly translated, states simply that “Bridgestone Corporation and Bridgestone Licensing Services, Inc. . . . *will proceed to make* payment”³³³ without specifying which entity would make the payment.³³⁴ In fact, Claimants have yet to submit any proof of payment (by Bridgestone Licensing or otherwise), on 19 August 2016 or any other date.

87. The reality may be just as Claimants have said — namely, that “*Bridgestone*, through its subsidiary BSLS, which was jointly and severally liable for the judgment, *paid the*

³³⁰ **Request for Arbitration**, ¶ 53.

³³¹ See **Ex. C-0043**, Notice of Intent to Arbitrate (30 September 2015). **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 August 2016).

³³² See **Response**, ¶ 166, (quoting **CLA-0022**, *Philip Morris v. Australia*, ¶ 539).

³³³ **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 August 2016), p. 1 (translation from Spanish; the original Spanish text reads as follows: “procederán a efectuar el pago”). Claimants mistranslate the future tense (“will proceed to make payment” to the present perfect tense (“have made payment”) in their English language exhibit.

³³⁴ **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 August 2016), p. 1 (stating that Bridgestone Corporation and Bridgestone Licensing will proceed to make payment using the plural form of the verb (in Spanish)).

damages award to Muresa and [Tire Group] on August 19, 2016.”³³⁵ However, if that is true, it constitutes an abuse of process. Even though Bridgestone Corporation apparently considers itself entitled to bring a claim under the TPA,³³⁶ its Japanese nationality precludes it from doing so. It cannot cure this defect by having Bridgestone Licensing prosecute the claim on its behalf.

88. In any event, the fact that Bridgestone Licensing insists that it made the payment raises more questions than it answers. Bridgestone Licensing had no discernible assets with which to pay such a judgment,³³⁷ whereas Bridgestone Corporation, the parent entity of the Bridgestone group, clearly did. In addition, by Claimants’ own account, Bridgestone Corporation’s decision to make payment “through” Bridgestone Licensing had a negative impact on Bridgestone Licensing’s financial situation.³³⁸ In their Response, Claimants assert that “payment of the damages [pursuant to the Supreme Court Judgment] has had a direct impact on the ability of the US Bridgestone entities [of which Bridgestone Licensing is one] to reinvest in their business.”³³⁹ These adverse consequences for Bridgestone Licensing could have been avoided if Bridgestone Corporation had made payment itself instead of “through its subsidiary,” but then Bridgestone Licensing would have been left without a TPA claim.

³³⁵ **Request for Arbitration**, ¶ 53. It may be that the Bridgestone Corporation treasury arranged for Bridgestone Americas, which handled treasury functions for Bridgestone Licensing (*see* **Ex. C-0077**, Support Services Agreement between Bridgestone Licensing Services, Inc. and BFAH), to loan Bridgestone Licensing the funds necessary to make the payment.

³³⁶ *See* **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group, p. 2 (“Bridgestone Corporation and Bridgestone Licensing reserve *their* rights under International law, including the Trade Promotion Agreement between the [U.S.] and Panama”) (emphasis added).

³³⁷ *See* **Ex. C-0092**, Bridgestone Licensing Financial Statements for 2014 to 2016 (showing that the damages Bridgestone Licensing allegedly paid exceed its total revenue for 2016).

³³⁸ *See* **Ex. C-0092**, Bridgestone Licensing Financial Statements for 2014 to 2016 (showing a loss for 2016).

³³⁹ **Response**, ¶ 174.

89. Claimants fail to explain how Bridgestone’s choice to have Bridgestone Licensing incur a loss is “logical,” unless it was aimed at securing access to the protections of the TPA. Instead, Claimants deny they had any “choice” at all. To this end, they assert “BSLS did not force itself to incur loss — Panama did that with its Supreme Court decision.”³⁴⁰ This is not true. As Claimants themselves repeatedly emphasize in their Response, the Supreme Court held both Bridgestone Licensing and Bridgestone Corporation jointly and severally liable for the damages to Muresa and Tire Group.³⁴¹ It was up to those two entities to decide which of them would make payment, and when.³⁴²

90. The facts that (1) Bridgestone Corporation decided to make payment of the full amount “through” Bridgestone Licensing, despite the alleged financial impact on the company, and through this payment enabled Bridgestone Licensing to assert a claim under the TPA it could not have asserted previously, and (2) the payment came more than a year *after* the dispute with Panama had arisen, further demonstrate that Bridgestone Licensing engaged in abuse of process to gain access to the TPA.

³⁴⁰ **Response**, ¶ 164.

³⁴¹ *See* **Response**, ¶¶ 16, 134, 164, 171; *see also* **Request for Arbitration**, ¶ 53.

³⁴² For this reason, Claimants’ ancillary argument that payment by Bridgestone Licensing was necessary to avoid an enforcement action is also unavailing. **Response**, ¶¶ 37, 171. Payment by Bridgestone Corporation could have eliminated the risk of an enforcement action just as easily.

C. Jurisdictional Bars Relating to Both Claimants

91. In this arbitration, Claimants are seeking from the Tribunal “an award . . . [o]rdering Panama to pay an amount in excess of USD 16,000,000 in damages.”³⁴³ The entirety of this request can and should be dismissed for the reasons set out above — for, if the Tribunal lacks jurisdiction over both Claimants (which it does), there would be no basis on which to entertain *any* aspect of their damages claim. But, even if the Tribunal theoretically could exercise jurisdiction over both Claimants, a considerable portion of their damages claim — almost two-thirds of it — would still exceed the Tribunal’s sphere of authority.

92. As the Tribunal will recall, out of the USD 16,000,000 sought in the Request for Arbitration, USD 5,431,000 corresponded to the amount of “damages and fees that were ordered by the Supreme Court.”³⁴⁴ The remaining USD 10,569,000, Claimants had claimed, was based on “a number of inter-related factors, including”³⁴⁵ (1) the possibility that “the decision of the Panamanian Supreme Court may be followed in other Latin American countries as a matter of government policy,”³⁴⁶ and (2) the notion that “the decision of the Panamanian Supreme Court establishes a precedent that is likely to be followed in other Latin American legal systems.”³⁴⁷

93. As Panama explained in its first submission, this was manifestly improper. The parties’ consent to arbitration in this case, which is “the cornerstone of the jurisdiction of the

³⁴³ **Request for Arbitration**, ¶ 90.

³⁴⁴ **Request for Arbitration**, ¶ 54. In their Response, Claimants — who previously had characterized this as a “loss suffered by Bridgestone” (*see Request for Arbitration*, § III.L) — explain that it is only Bridgestone Licensing that “claims the return of that sum.” **Response**, ¶ 134.

³⁴⁵ **Request for Arbitration**, ¶ 54.

³⁴⁶ **Request for Arbitration**, ¶ 56.

³⁴⁷ **Request for Arbitration**, ¶ 57; *but see Request for Arbitration*, ¶ 14 (conceding that “trademark law is not globally uniform”), ¶ 20 (conceding that “different jurisdictions take different approaches to the protection of intellectual property rights”).

Centre,”³⁴⁸ is limited to claims that “the respondent has (A) breached an obligation under Section A [of Chapter Ten],”³⁴⁹ and those obligations only “appl[y] to measures adopted or maintained *by a Party*”³⁵⁰ Although Article 10.1.2 states that “[a] Party’s obligations . . . shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party,”³⁵¹ it says nothing of extending responsibility to the conduct of *other* States, and it is a basic principle of international law “that each State is responsible for its *own* conduct in respect of its *own* international obligations.”³⁵² This, coupled with the fact that a tribunal cannot adjudicate any claim where “the vital issue to be settled concerns the international responsibility of a *third* State,”³⁵³ constitutes an additional basis for dismissing the USD 10 million claim.

94. In their Response, Claimants attempt to defeat this objection by means of tricks and distractions — denying the undeniable,³⁵⁴ moving the target,³⁵⁵ labeling an issue of third

³⁴⁸ Report of the Executive Directors of the ICSID Convention, ¶ 23.

³⁴⁹ **Ex. R-0001**, TPA, Art. 10.16.1; Claimants’ Submission on Registration, p. 1 (“We confirm that each of BSLS and BSAM is submitting the claim to arbitration on its own behalf under Article 10.16.1(a)(i)(A) of the US-Panama FTA”).

³⁵⁰ **Ex. R-0001**, TPA, Art. 10.1.1 (emphasis added).

³⁵¹ **Ex. R-0001**, TPA, Art. 10.1.2.

³⁵² See **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Cambridge University Press (17 January 2002), Art. 1, comment 6 (emphasis added).

³⁵³ **RLA-0029**, *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. 33. As Panama has explained, this principle has since been repeatedly reaffirmed by the International Court of Justice, and applied in investor-State arbitrations. See, e.g., **RLA-0031**, *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), ¶ 49; **RLA-035**, *Case Concerning East Timor (Portugal v. Australia)*, I.C.J. Reports 90, Judgment (30 June 1995), ¶ 28; **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).

³⁵⁴ For example, in one paragraph, they assert that “Claimants do not contend that the Respondent is responsible for measures (such as court decisions or government policies) adopted by any neighboring

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State conduct a simple “matter[] of causation, foreseeability, and loss,”³⁵⁶ and (bizarrely, given how adamantly Claimants insist that this proceeding is limited to questions of law³⁵⁷) protesting that the “objection is *not* directed to the facts”³⁵⁸ These tactics appear intended to sow confusion, and in case they have achieved their purpose, it seems useful to recall two important points.

95. **First**, the issue here is not simply a matter of causation, but rather an important question of consent. Panama has explained that, in this case,³⁵⁹ consent is limited to claims for breaches of obligations set forth in Articles 10.1 to 10.14 of the TPA, and those obligations only apply in respect of “measures adopted or maintained by a Party”³⁶⁰ They do not apply in respect of (hypothetical) measures that other States (might) thereafter adopt in reaction thereto. Claimants do not argue otherwise.

96. **Second**, because Panama’s objection was about this issue of consent, it did not address all four of “inter-related factors”³⁶¹ underlying the USD 10 million claim. Nor could it have, given the nature of the objection. Nor did it need to. Because the assertion in the Request for Arbitration was that the **combination** of the factors yielded a loss of USD 10 million (as

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countries,” apparently forgetting that, just two paragraphs earlier, they had reaffirmed their assertion that Panama must compensate them for hypothetical future policy and court decisions by other countries. *See Response*, ¶¶ 174, 176.

³⁵⁵ *See Response*, ¶¶ 174–75 (deeming what they previously had argued were four “inter-related factors” contributing to their claim for USD 10 million (Request for Arbitration, ¶ 54) to be four independent bases for the claim, and insisting that Panama’s objection should be rejected on the basis that it only addresses two of the four factors).

³⁵⁶ *Response*, ¶ 173.

³⁵⁷ *See, e.g., Response*, ¶ 60.

³⁵⁸ *Response*, ¶¶ 19, 178 (emphasis added).

³⁵⁹ Although the TPA also allows for the submission of claims based on investment authorizations and investment agreements, Claimants do not allege that the present case involves either.

³⁶⁰ **Ex. R-0001**, TPA, Art. 10.1.1.

³⁶¹ **Request for Arbitration**, ¶ 54.

indicated not only by Claimants’ use of the words “inter-related” but also their comment after listing all four factors that “[a]ccordingly,” their alleged losses were due to “the risk that similar decisions may be issued in other countries”³⁶²), a problem with two of the four factors was sufficient to defeat the whole claim — assuming, of course, that it survived the objections articulated in Sections II and III above.

97. If there ever came a time when the Tribunal needed to consider³⁶³ whether or not the two other “factors” Claimants cite have any merit to them,³⁶⁴ it would find that those factors suffer from a host of conceptual flaws, including that (1) Claimants are asserting that Bridgestone Americas’ *non*-payment of the Supreme Court judgment somehow prevented it from being able to “reinvest” in the sale, marketing, and distribution of BRIDGESTONE and FIRESTONE products,³⁶⁵ (2) Claimants are requesting damages based on the hypothetical future actions³⁶⁶ of private actors,³⁶⁷ and (3) Claimants are asking the Tribunal to accept that

³⁶² **Request for Arbitration**, ¶ 59.

³⁶³ See **CLA-0006**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (Award, 31 May 2016), ¶ 249 (Dupuy, Mantilla-Serrano, Thomas) (stating, with respect to the expedited objections mechanism in DR-CAFTA, which is similar to the one in the TPA, that even though the respondent’s objection was based on the claimant’s failure to observe the DR-CAFTA limitations period, the “expedited procedure does not preclude a tribunal from considering an issue going to the substance of a case if the tribunal finds that it is appropriate to consider such an issue based on the facts as pleaded by the Claimant”).

³⁶⁴ See **Response**, ¶ 174 (describing the other two factors as follows: (1) “payment of the damages has had a direct impact on the ability of the U.S. Bridgestone entities to reinvest in their business,” and (2) “it is likely that there will be more trademark applications that are similar and confusingly similar to the BRIDGESTONE and FIRESTONE marks, by Muresa’s group of companies and by unrelated competitors”).

³⁶⁵ See **Response**, ¶ 174 (asserting that “payment of the damages has had a direct impact on the ability of the U.S. Bridgestone entities to reinvest in their business”), ¶ 134 (asserting that “[Bridgestone *Licensing*] ultimately paid the whole sum” contemplated in the Supreme Court judgment, but confirming that Bridgestone Americas nevertheless is asserting this claim).

³⁶⁶ See **RLA-0059**, *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12 (Award on Jurisdiction and Admissibility, 20 May 2014), ¶ 251 (Lévy, Beechey, Dupuy) (explaining that investment tribunals do not have jurisdiction to evaluate claims based on hypothetical future conduct).

“Bridgestone’s” trademark policing efforts did not cause injury to competitors,³⁶⁸ but that trademark applications by competitors caused injury to them.³⁶⁹

98. But, for present purposes, those other factors do not matter. The issue here is that Claimants are asserting claims based on the conduct of other States,³⁷⁰ but the TPA does not impose any obligations on Panama in respect of their conduct, and international law in any event precludes the Tribunal from evaluating such conduct without the consent of those other States. Claimants do not provide any real response on this issue.

IV. Conclusion and Request for Relief

99. For all of the reasons articulated above, and in its first submission, Panama respectfully requests that, at the end of this 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

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³⁶⁷ See **RLA-0063**, *Arif v. Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶¶ 419 (Cremades, Hanotiau, Knieper) (“The Tribunal cannot accept Claimant’s argument which would inevitably imply that Moldova can be liable at an international level for the correct application by the Moldovan courts of Moldovan law in lawsuits filed by a private competitor”); **RLA-0064**, *Unglaube v. Costa Rica*, ICSID Case No. ARB/08/1 (Award, 16 May 2012), ¶¶ 259, 285–86 (Kessler, Berman, Cremades) (finding no violation based on the intervention of private parties in judicial proceedings because the proceedings “were conducted in accordance with Costa Rican law”).

³⁶⁸ **Request for Arbitration**, ¶ 19 (describing letters sent by “Bridgestone” when policing its marks).

³⁶⁹ See **Request for Arbitration**, ¶ 43; **Response**, ¶ 174.

³⁷⁰ These claims also have conceptual problems, in addition to those discussed above. For example, Claimants fail to explain how or why a decision that they believe is so blatantly “unjust” as to constitute a violation of international law automatically will be adopted by other States and legal systems, especially when (1) Panama and its neighbors are civil law countries in which the doctrine of *stare decisis* does not apply, and (2) Claimants themselves concede that “trademark law is not globally uniform” and that “different jurisdictions take different approaches to the protection of intellectual property rights.” See **RLA-0068**, Teresa M. Miguel-Stearns, *Judicial Power in Latin America: A Short Survey*, 15 LEGAL INFORMATION MANAGEMENT 100, 101 (2015) (listing Panama as a country in which the doctrine of *stare decisis* does not apply; “[c]onstitutional jurisprudence . . . serves only to orient other judges”); **Request for Arbitration**, ¶¶ 14, 20.

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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