

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 POST-HEARING SUBMISSION

11 October 2017

ARNOLD & PORTER
| KAYE SCHOLER

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. Claimants Bear the Burden of Establishing Jurisdiction	1
III. Jurisdictional Defects Relating to Bridgestone Americas	2
A. BSAM Does Not Have A Qualifying “Investment”	3
B. Even if BSAM <i>Did</i> Have an Investment (<i>Quod Non</i>), the Present Dispute Does Not “Aris[e] Directly Out of” that Alleged Investment.....	7
IV. Jurisdictional Bars Relating to Bridgestone Licensing.....	8
A. Bridgestone Licensing Is Not Entitled to the Benefits of TPA Chapter Ten.....	9
B. Bridgestone Licensing’s Claim Amounts to an Abuse of Process	13
V. Jurisdictional Bars Relating to Both Claimants	17
VI. Conclusion and Request for Relief	19
Annex A.....	20

I. Introduction

1. The September 2017 hearing confirmed what Panama has said all along — that the Tribunal does not have jurisdiction over any of the claims asserted in this arbitration. The present submission explains once more why this is the case.

II. Claimants Bear the Burden of Establishing Jurisdiction

2. Although Panama understands from the Tribunal’s comments at the hearing that a lengthy discussion on burden of proof could have diminishing returns, it seems important, given the amount of time and space Claimants have devoted to this issue, to make two brief comments.

3. *First*, there is no support for Claimants’ rather remarkable assertion that jurisdiction exists unless a respondent can show otherwise.¹ The general rule under international law is the exact opposite — namely, that jurisdiction must be proven (and proven by the claimant),² irrespective of whether jurisdictional objections are raised.³ As the United States has explained, there is nothing in Article 10.20 of the TPA that alters this rule.⁴

4. *Second*, there is no excuse for Claimants’ failure to meet their burden of proof. Although Claimants have asserted that “there may not have been a proper opportunity for the Claimant to obtain and present all of the evidence that may be relevant,”⁵ that simply is not true. Claimants have conceded that this expedited proceeding afforded them sufficient time to gather evidence in connection with the “denial of benefits” objection,⁶ and they had even *more* time to gather evidence on the factual issues underlying the other objections.

5. As Panama has explained, the Bridgestone group announced publicly that it was contemplating TPA claims⁷ almost two *years* before the Request for Arbitration (“**RFA**”) was filed.⁸ Because the RFA needed to convince ICSID’s Secretary-General that the dispute was not “manifestly outside the jurisdiction of the Centre”⁹ — and that in turn would involve showing, *inter alia*, that there was an “investment,” a “dispute arising directly out of an investment,” and “consent” — Claimants had every incentive to use that time to gather evidence on those issues (which are the very same issues underlying Panama’s objections). And that in fact is what they did: in the period leading up to the RFA, the Bridgestone group (1) worked with international counsel¹⁰ who understood what was required to submit a claim to arbitration and identified areas

¹ See **Response**, ¶ 51 (asserting that “it is *not* for the Claimants to prove that the Tribunal *does* have jurisdiction, rather it is the Respondent that has the burden of proving it *does not*”) (emphasis added).

² See, e.g., **RLA-0048**, *Tulip*, ¶ 48; **RLA-0049**, *National Gas*, ¶ 118; **First U.S. Submission**, ¶ 12.

³ See, e.g., **RLA-0054**, *Emmis*, ¶ 171 (explaining that “[t]he Claimants b[ore] the burden of proof” on the jurisdictional question at issue in that case, and that “[i]f the Claimants’ burden of pro[of] [on that issue] [wa]s not met, the Respondent ha[d] no burden to establish the validity of its jurisdictional defences”).

⁴ **First U.S. Submission**, ¶ 12.

⁵ **Rejoinder**, ¶ 4; see also *id.*, ¶¶ 2, 23, 25; **Hearing (Day 1)**, Tr. 22:4–9; 57:3–20 (Claimants’ counsel). The transcript pincites herein refer to the revised versions of the transcript that the parties submitted jointly on 6 Oct. 2017.

⁶ **Pre-Hearing Call** (18 Aug. 2017), Audio 00:20:48-00:21:12 (Claimants’ counsel).

⁷ See **Ex. C-0032**, Special 301 Public Hearing Statement (24 Feb. 2015), p. 3.

⁸ Compare **Ex. C-0032**, Special 301 Public Hearing Statement (24 Feb. 2015), p. 3 with **RFA** (7 Oct. 2016), ¶¶ 2–3.

⁹ **ICSID Convention**, Art. 36(3).

¹⁰ See, e.g., **Ex. C-0034**, Email from Akin Gump to Panamanian Embassy (12 Sept. 2016), p. 1 (indicating that Akin Gump met with the Panamanian ambassador in March 2015 on behalf of the Bridgestone group); **Ex. C-0002**, BSAM Power of Attorney/Authorization to Pursue Arbitration, p. 2 (explaining that BSAM, Bridgestone Corporation, and

for which evidence was lacking,¹¹ and (2) went to extreme lengths — like having one member of the group lend USD 6 million to another¹² — to try to address jurisdictional defects.

6. Claimants also could have used the time following the RFA to gather evidence on jurisdiction. (This would have been prudent, given that Claimants were advised, by both ICSID¹³ and Panama,¹⁴ that their jurisdictional case was lacking.) But even if this expedited proceeding were in fact Claimants' only opportunity to gather evidence on jurisdiction, Claimants cannot reasonably claim that they were denied due process. Claimants knew that they needed to "protect themselves by submitting evidence in relation to all of the numerous factual matters raised [in Panama's 30 May 2017] Objections,"¹⁵ and had months to try to do so. Any relevant evidence (if it existed) would have been within their reach or control. There were no requests for document production, and Claimants never once argued Panama had access to evidence that Claimants themselves lacked. Moreover, when Claimants "consent[ed] to arbitration in accordance with the procedures set out in the [TPA],"¹⁶ they consented to the expedited resolution of objections under Article 10.20.5. They accordingly cannot complain about the brevity of this expedited proceeding.

III. Jurisdictional Defects Relating to Bridgestone Americas

7. Bridgestone Americas ("BSAM") — which was incorporated in the U.S. state of Nevada¹⁷ — is a wholly-owned subsidiary of Bridgestone Corporation,¹⁸ a sister company to Bridgestone Licensing,¹⁹ and "the parent company for all of the Bridgestone business units in North, Central, and South America."²⁰ When pressed to explain what specifically BSAM does,²¹ Claimants stated that "BSAM controls things like marketing and sales strategies which it then sends down to its subsidiaries and tells them what to do with those. So, BSAM is the Company that devises how it would market Bridgestone tires all over the world. And Bridgestone Americas tells Bridgestone Costa Rica or whoever, which subsidiaries, how to do that in the different jurisdictions in which it sells the tires."²² BSAM does these things from Nashville, Tennessee.²³

Bridgestone Licensing consulted with Akin Gump in connection with the September 2015 Notice of Intent); **Hearing (Day 3)**, Tr. 442:21–449:6 (Kingsbury) (confirming that the Bridgestone group consulted with Akin Gump about a potential investor-State claim prior to 6 February 2015).

¹¹ See **Hearing (Day 3)**, Tr. 484:1–6 (Kingsbury) (stating that counsel told the Bridgestone group that if Bridgestone Corporation paid the 2014 damages award, Bridgestone Licensing would not have a case under the TPA).

¹² See **Hearing (Day 3)**, Tr. 482:15–20 (Kingsbury).

¹³ See **Letter from ICSID to Claimants** (19 Oct. 2016), p. 1 (informing Claimants that additional information was needed before the RFA could be registered).

¹⁴ See **Hearing (Day 4)**, Tr. 583:21–584:04 (Panama's counsel).

¹⁵ **Response**, ¶ 61.

¹⁶ **RFA**, ¶ 75.

¹⁷ **RFA**, ¶ 1.

¹⁸ **RFA**, ¶ 1.

¹⁹ **Response**, ¶ 152.

²⁰ **RFA**, ¶ 7.

²¹ See **Hearing (Day 2)**, Tr. 280:1–2 (Phillips).

²² **Hearing (Day 2)**, Tr. 282:8–13 (Claimants' counsel).

²³ See **Calderon Statement**, ¶ 5 ("BSAM's corporate office in Nashville, Tennessee develops marketing initiatives for the BRIDGESTONE and FIRESTONE brands in the entire Latin America region [which, in Latin America, are owned by Bridgestone Corporation and Bridgestone Licensing, respectively]. These initiatives include promotions and marketing campaigns designed to promote sales of the three main brands sold by Bridgestone in Latin America BSAM's marketing team in Nashville sets the regional marketing strategy for Bridgestone Brands, which

8. As discussed below, there are two jurisdictional defects relating to BSAM: (1) it has no “investment” in Panama; and (2) even if the rights Claimants contend are an “investment” actually qualified as such, the dispute does not “aris[e] directly out of” that alleged “investment.”

A. BSAM Does Not Have A Qualifying “Investment”

9. Claimants have asserted that BSAM’s “investment” consists of “intellectual property rights.”²⁴ By “intellectual property rights,” Claimants mean: the right set forth in Exhibits C-48 and C-52²⁵ (which is a non-exclusive, highly-conditioned right to use Panamanian trademarks owned by other entities²⁶ for the purpose of conducting sales).²⁷

10. Throughout this proceeding, Claimants have attempted to link this right (*i.e.*, the right to use the Panamanian versions of the BRIDGESTONE and FIRESTONE trademarks) to the various sales activities that Bridgestone Costa Rica (“BSCR”) conducts — claiming that it is only the former that enables the latter.²⁸ The only document in the record that authorizes BSCR to manufacture and sell tires using a trademark that BSAM or one of its subsidiaries has licensed, however, is Exhibit C-49. That document is a January 2015 “trademark sublicense agreement” that post-dates the alleged TPA violations,²⁹ and authorizes BSCR to use “all *Costa Rican* trademark registrations and applications and unregistered trademarks owned by *BSJ* [*i.e.*, Bridgestone Corporation] relating to Tire Products and all future pending, issued or common law BSJ owned trademarks *in Costa Rica* relating to Tire Products.”³⁰ There is no evidence that BSCR has been using (or even had the right to use) Panamanian trademarks on tires.³¹ Nor is there any evidence that any other BSAM subsidiary (or BSAM itself) is selling tires into Panama.

11. The reason that Claimants are attempting to style the right to use Panamanian trademarks on tires as BSAM’s “investment” is because it is one of BSAM’s few connections to

includes direct marketing through distributors in Latin America, event sponsorships, advertising campaigns, the creation of digital tools for product marketing, and the use of marketing research and analytics . . . BSAM also establishes the regional marketing budgets to fund these activities”).

²⁴ **Rejoinder**, ¶ 7.

²⁵ See **Hearing (Day 1)**, Tr. 28:7–14 (Claimants’ counsel) (“C-48 and C-52 — which are the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement, and the Claimants say that these ‘intellectual property’ rights are BSAM’s investment in Panama”); **Response**, ¶¶ 111, 116, 117; **Rejoinder**, ¶¶ 34, 42.

²⁶ See **Ex. C-0048**, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), §§ 1, 5, 11, 14, 27; **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Arts. 2-1, 4, 5, 6-3; **Expedited Objections**, ¶ 16; **Reply**, ¶¶ 36–37, 40; **RD-0002**, Panama’s Opening Statement Presentation, Slides 31–39; **RD-0003**, Panama’s Closing Statement Presentation, Slides 19–22.

²⁷ **Response**, ¶ 127 (“BSJ and BSLS licensed the use of their trademarks to BSAM (and BSAM’s subsidiary) so that BSAM could make money in Panama by selling tires”).

²⁸ See, e.g., **Rejoinder**, ¶ 36(a) (“[S]ales under the subject marks are only made possible, and indeed are legally protected by, the Claimants’ investment in Panamanian-registered trademark rights”); **Hearing (Day 4)**, Tr. 611:1–3 (Claimants’ counsel) (“BSAM can do what it does because it holds the ‘intellectual property’ rights that we’ve been looking at”), Tr. 610:8–13 (Claimants’ counsel) (“[I]f BSAM did not have its ‘intellectual property’ rights to use the mark, it couldn’t manufacture, it couldn’t distribute, and it could not sell tires with the BRIDGESTONE mark or permit its subsidiaries to do so, and that’s how sales of branded goods always work”); see also **Hearing (Day 2)**, Tr. 270:2–10; 295:4–13 (Claimants’ counsel); **Hearing (Day 4)**, Tr. 611:17–20 (Claimants’ counsel).

²⁹ Claimants agree that, as many tribunals have held, the investment must exist at the time of the alleged treaty breach. See **Rejoinder**, ¶ 36(d); **RLA-0021**, *ST-AD*, ¶ 300; **RLA-0020**, *Phoenix*, ¶ 67.

³⁰ **Ex. C-0049**, Trademark Sublicense Agreement between BATO and BSCR (1 January 2015), Art. 1.2 (emphasis added); see also **Expedited Objections**, ¶¶ 15, 20; **Reply**, ¶ 38 (raising these points).

³¹ See **Hidalgo Statement**, ¶ 6 (indicating that tires sold in Panama are manufactured in Costa Rica).

Panama. For example, there is no evidence that BSAM has a subsidiary in Panama; has factories, warehouses, offices, or stores in Panama; pays taxes in Panama; has employees in Panama;³² or has tangible assets in Panama. Nor is there any evidence that it owns *any* Panamanian trademark.³³ The BRIDGESTONE and FIRESTONE trademarks,³⁴ and the goodwill associated therewith,³⁵ are owned by other entities. BSAM does not, as Claimants contended at the hearing, have an “investment . . . in the brand” or “in th[e] recognition of the mark.”³⁶

12. BSAM does have *some* connections to Panama beyond the right to use Panamanian trademarks. However, those connections — of which there are only two — cannot be characterized as “investments,” much less investments giving rise to the present dispute (as discussed further below in Section II.B). The *first* consists of the fact that BSAM has a U.S. sub-subsidiary (Bridgestone Bandag, LLC)³⁷ that, in 1965, in exchange for royalty payments, authorized a Panamanian entity to use a tire-retreading method that had been patented in the United States.³⁸ Among the problems with this are the facts that (1) the U.S. tire-retreading patent appears to have expired in the 1970s,³⁹ and continuing to collect royalty payments for use of the patent therefore may not be legal,⁴⁰ and (2) there is no evidence that the agreement with the Panamanian entity is still in force, or that royalty payments are being made. The *second* consists of the fact that BSAM’s Costa Rican subsidiary (BSCR) sells foreign-manufactured tires to third party dealers and distributors in Panama,⁴¹ and conducts certain activities in connection with those sales.⁴² The problem with this is that, as Claimants concede, ordinary commercial transactions such as these⁴³ do not qualify as “investments” in Panama.⁴⁴

³² Claimants have submitted witness statements from Thomas Kingsbury (an employee of BSAM, based in the U.S.), Roger Hidalgo (an employee of Bridgestone Costa Rica, based in Costa Rica), and Erick Calderon (an employee of BSAM, based in Mexico). In their Response, Claimants asserted that, “since May 2017, BSCR has employed a new sales representative who lives and works in Panama and has exclusive oversight of the Panama market across all three product lines.” **Response**, ¶ 119. However, the professional services agreement Claimants submitted to support this assertion states expressly that “this agreement is a commercial and *not* an employment agreement.” **Ex. C-0062**, Professional Services Agreement, 15 May 2017, § 9 (emphasis added); *see also* **Hearing (Day 3)**, Tr. 406:4–9 (Kingsbury) (conceding that BSCR did not engage a full-time sales representative in Panama until May 2017, and that the representative is not an employee).

³³ **Hearing (Day 4)**, Tr. 600:17 (Claimants’ counsel) (explaining that “BSAM does not own any trademarks itself”); **Hearing (Day 3)**, Tr. 388:20–22 (A. Williams) (conceding that a licensee could never own the trademark).

³⁴ **RFA**, ¶ 6; *see also* **Notice of Intent**, ¶ 2; **Claimants’ Submission on Registration**, p. 3; **Response**, ¶ 110.

³⁵ *See* **Ex. C-0048**, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 11 (“LICENSEE agrees that LICENSOR owns of [sic] the Marks and all the goodwill associated therewith. LICENSOR 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 LICENSEE shall inure to the benefit of LICENSOR”); **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 6-1 (“BFNT acknowledges that BSJ Trademarks are part of the goodwill of BSJ’s respective business . . .”).

³⁶ **Hearing (Day 4)**, Tr. 604:13 (Claimants’ counsel).

³⁷ *See* **Ex. C-0066**, Articles of Conversion of Bandag (1 June 2007), p. 1 (converting the name of an Iowa-incorporated entity from “Bandag, Incorporated” to “Bridgestone Bandag, LLC”).

³⁸ *See* **Ex. C-0064**, Bandag System Franchise Agreement (27 Sept. 1965), p. 1. There is no evidence that the so-called “Bandag” method was patented in Panama. Nor is there any evidence of a “Bandag” trademark in Panama.

³⁹ *See* **Reply**, ¶ 41.

⁴⁰ *See* **Reply**, ¶ 41, fn. 179.

⁴¹ *See* **Claimants’ Submission on Registration**, p. 4; **Response**, ¶ 119.

⁴² *See, e.g.*, **Hidalgo Statement**, ¶ 20 (“BSCR provides all necessary support to Tambor [an independent Panamanian distributor] to enable them to sell Bridgestone and Firestone products through their retail stores, dealerships and sub-

13. This leaves only the right to use Panamanian trademarks on tires (which, as noted above, neither BSAM nor its subsidiaries appear to be exercising). There are two core problems with Claimants’ argument that this right amounts to an “investment.”

14. **First**, a right that *enables* BSAM to conduct sales,⁴⁵ and supposedly is *exercised* by conducting sales,⁴⁶ is simply a right to conduct sales. Even Claimants themselves have described the right accordingly.⁴⁷ And, as Panama has explained, if sales themselves are not “investments” (which, as noted above, Claimants concede), it follows that the *right to conduct sales* is not an “investment.” The jurisprudence confirms this point. For example, in *Global Trading v. Ukraine*, the tribunal declined jurisdiction on the basis that there was no investment⁴⁸ even though the claimant had “poultry sales and purchase contracts” with the government of the respondent State⁴⁹ that authorized the claimant to conduct poultry sales.

15. **Second**, Claimants have asserted that BSAM’s situation differs from an ordinary commercial exercise because the rights that enable it to conduct sales qualify as “intellectual property rights” that can be used to generate revenue.⁵⁰ But, as Claimants concede, more is required to establish an “investment” than the mere existence of an “intellectual property right.”⁵¹ The TPA states that “investment means every *asset that an investor owns or controls, directly or*

dealers in Panama, including advertising support, point of purchase advertising materials, and sales and warranty training of Tambor’s representatives. . . . BSCR personnel make frequent trips to Panama to meet with Tambor. During these trips BSCR and Tambor discuss sales and sales strategies, sales targets, and ways to reach those targets”); **Hearing (Day 3)**, Tr. 408:18–409:3 (Kingsbury) (conceding that marketing initiatives — including promotions, free merchandise and services, and volume discounts — were expenses incurred in connection with sales); **Ex. C-0063**, Sole Distributorship Agreement between Bridgestone Tire Co., Ltd. and Tambor, S.A. (1 July 1979), Arts. 2-1, 21 (confirming, even though the agreement is no longer in force (*see Hidalgo Statement*, ¶ 16), that manufacturing, distribution, and advertising are all part of sales).

⁴³ *See, e.g., Hidalgo Statement*, ¶ 17 (explaining that “Tambor places orders for tires by submitting a product order to BSCR. Depending on the size of the order, BSCR will either fill the order from its stock on hand, or may procure the tires from another subsidiary in the region or from Bridgestone Corporation. BSCR then creates an invoice requesting payment on agreed credit terms. The tires are then shipped to Panama, in accordance with the 2010 Incoterms published by the International Chamber of Commerce. Tambor is then required to remit payment to BSCR within 120 days”); *see also id.*, ¶ 16 (explaining that, historically, it had been Bridgestone *Corporation* (*i.e.*, the Japanese parent company) that had the relationship with Tambor; that, from 1979 to 1996, Bridgestone Corporation had a formal distribution agreement with Tambor (**Ex. C-0063**); that when the distribution agreement expired by its terms in 1996, it “was not renewed or replaced by a further written agreement;” and that, following a “restructuring” that took place in October 2015 (*see Hidalgo Statement*, ¶ 3), “BSAM and its subsidiaries” took over the relationship with Tambor).

⁴⁴ *See Claimants’ Submission on Registration*, p. 3 (conceding that commercial transactions, such as cross-border sales, do not constitute an “investment”); **Rejoinder**, ¶ 8 (same).

⁴⁵ *See, e.g., Response*, ¶ 127 (“BSJ and BSLs licensed the use of their trademarks to BSAM (and BSAM’s subsidiary) so that BSAM could make money in Panama by selling tires”).

⁴⁶ *See Hidalgo Statement*, ¶ 10 (“BSAM and its subsidiaries also work with dealers in Panama to grow market share, increase sales, and provide sales and warranty training”), ¶ 20 (“BSCR provides all necessary support to Tambor to enable them to sell Bridgestone and Firestone products . . .”), ¶ 22 (“BSCR sells tires . . .”), fn. 7 (“This [licensing] agreement grants BSCR the right to use and sell tire products . . .”) (all emphasis added).

⁴⁷ **Notice of Intent**, ¶ 2 (“*BSAM is a Nevada corporation licensed by Bridgestone Corporation and BSLs to conduct sales and marketing activities related to BRIDGESTONE and FIRESTONE branded tires in Latin America, including in Panama*”) (emphasis added).

⁴⁸ *See RLA-0004, Global Trading*, ¶¶ 56–57.

⁴⁹ **RLA-0004, Global Trading**, ¶¶ 37–39.

⁵⁰ *See Hearing (Day 2)*, Tr. 278:21–280:3 (Claimants’ counsel).

⁵¹ *See Hearing (Day 4)*, Tr. 590:6–12 (Claimants’ counsel).

indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”⁵² It is this standard which governs,⁵³ and has not been satisfied. The right contemplated in Exhibits C-48 and C-52 is not an “asset” that BSAM owns or controls, either directly or indirectly.

16. Panama accepts that the right to use a trademark may enable the right-holder to sell its product at a higher price, and in that sense may be considered “valuable.”⁵⁴ But in the context of an investment treaty, the ordinary meaning of the term “asset” is not “anything of value.” Rather, it is “an item of *property* owned by a person or company, regarded as *having value and available to meet debts, commitments or legacies.*”⁵⁵ The question of whether a right qualifies as “property” is a matter of host State law. However, nothing in the record indicates that the right that BSAM has (*i.e.*, a limited, non-exclusive right to use a Panamanian trademark) qualifies as “property” under Panamanian law. Moreover, the evidence that *is* in the record shows that that right is not available to meet debts: absent express approval from the licensor, neither BSAM nor its subsidiary has the right to assign its license for any purpose.⁵⁶

17. In their Rejoinder, Claimants attempted to get around these problems by arguing that the term “asset” should be defined by reference to Panamanian law,⁵⁷ and that “under Panamanian law[,] . . . the right to use a trademark granted by a license is . . . an asset owned by the holder of that right”⁵⁸ To support the latter point, Claimants cited the “witness” statement of Ms. Audrey Williams — a Panamanian attorney who previously had represented Bridgestone Corporation and Bridgestone Licensing.⁵⁹ On cross-examination, Ms. Williams disclaimed Claimants’ characterization of her testimony, and stated that she was not aware of any Panamanian law stating that the rights granted to a trademark licensee are valuable assets.⁶⁰

18. In any event, even assuming *arguendo* that the right to use the Panamanian versions of the BRIDGESTONE and FIRESTONE trademarks qualified as an “asset,” neither BSAM nor its subsidiary *owns* that right. If they did, use of the trademarks (1) would inure to their benefit (which it does not),⁶¹ (2) would not be subject to external control (which it is),⁶² and

⁵² **Ex. R-0001**, TPA, Art. 10.29 (emphasis added).

⁵³ See **Hearing (Day 4)**, Tr. 590:16–591:1 (Claimants’ counsel); see also **Rejoinder**, ¶ 36(d); **Response**, ¶ 94.

⁵⁴ See **Hearing (Day 4)**, Tr. 603:14–21 (Claimants’ counsel).

⁵⁵ **RLA-0054**, *Emmis*, ¶ 161 (quoting the Oxford English Dictionary) (emphasis added).

⁵⁶ See **Ex. C-0048**, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 27 (“This Agreement may not be assigned or delegated by LICENSEE without obtaining the prior written consent of LICENSOR”); **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 12-1 (“[N]either party shall have the right to transfer or assign this Agreement, in whole or in part, without the prior written consent of the other party”); see also **Hearing (Day 3)**, Tr. 389:1–18, Tr. 395:7–13 (A. Williams).

⁵⁷ **Rejoinder**, ¶ 37.

⁵⁸ **Rejoinder**, ¶ 37.

⁵⁹ See **Rejoinder**, ¶ 37; see also **Hearing (Day 1)**, Tr. 32:10–32:21 (Claimants’ counsel) (asserting that “Ms. Williams gives a three-page statement that solely addresses that question under Panamanian law, whether a right to use a Panamanian trademark is an asset”); **Hearing (Day 2)**, Tr. 296:10–18 (Claimants’ counsel).

⁶⁰ **Hearing (Day 3)**, Tr. 393:3–17 (A. Williams).

⁶¹ **Ex. C-0048**, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 11; **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 4-2.

⁶² **Hearing (Day 2)**, Tr. 273:18–274:9 (Claimants’ counsel) (accepting that “the owner of the trademark, BSJ/BSLS, is going to want to control the final uses of the trademark and to have its say-so in relation to the final use of that trademark on a final product”).

(3) would not have required a license from the trademark owners (which it did). On cross-examination, Ms. Williams confirmed that, under Panamanian law, a trademark licensee does not own the rights set forth in the license agreement.⁶³ Claimants, who previously had encouraged the Tribunal to evaluate “ownership” by reference to Panamanian law,⁶⁴ had no real answer to this.

19. The reality is that BSAM and its subsidiary do not even *control* the right to use the Panamanian versions of the BRIDGESTONE and FIRESTONE trademarks. In their closing statement, Claimants asserted that “[i]t is for BSAM to determine how to use the marks, who to sublicense to, how to market and promote the marks, and to exercise quality control over them.”⁶⁵ That is false. As Claimants explain,⁶⁶ and the licensing agreements confirm, the licensors (meaning Bridgestone Licensing and Bridgestone Corporation (which owns and controls Bridgestone Licensing)): determine which categories of product⁶⁷ (and which specific products),⁶⁸ in which locations, can feature the trademarks; determine when and to whom the licensee can sublicense the marks;⁶⁹ determine the “style, font, and color” of the trademarks;⁷⁰ and determine the quality standards that apply to any products using the marks.⁷¹

B. Even if BSAM *Did* Have an Investment (*Quod Non*), the Present Dispute Does Not “Aris[e] Directly Out of” that Alleged Investment

20. Even assuming *arguendo* that the limited, non-exclusive right to affix another entity’s trademarks to tires qualified as an “investment,” BSAM still would face another barrier: the Centre’s jurisdiction is limited to “legal dispute[s] arising directly out of an investment”⁷² In practical terms, this means that there must be a direct connection — as opposed to an *indirect*

⁶³ **Hearing (Day 3)**, Tr. 381:18–382:7 (A. Williams).

⁶⁴ *See Rejoinder*, ¶ 37.

⁶⁵ **Hearing (Day 4)**, Tr. 599:13–16 (Claimants’ counsel).

⁶⁶ *See, e.g., RFA*, ¶ 14 (“While trademark law is not globally uniform, in most jurisdictions, a registered trademark allows its holder to prevent unauthorized use of the mark”); **Hearing (Day 2)**, Tr. 274:2–10 (Claimants’ counsel) (“[I]n looking at ‘intellectual property’ issues, one has to be real about it, and the arrangements here are entirely normal arrangements. If you are the owner of a trademark, of course, the owner of the trademark, BSJ/BSLS, is going to want to control the final uses of the trademark and to have its say-so in relation to the final use of that trademark on a final product. . . . you’ll find that in any ‘intellectual property’ arrangement where you have an owner that licenses rights to use the trademark to another entity. That is always the case. It is always going to be subject to a degree of control”); **Hearing (Day 4)**, Tr. 594:21–595:2 (Claimants’ counsel) (“License Agreements always, in my experience — always — confer on the holder of the trademark residual control. That’s what you would expect”), Tr. 599:5–9 (Claimants’ counsel) (“No, no License Agreement for ‘intellectual property’ rights would be — would confer an entirely unfettered right or control on the Licensee. That’s not how intellectual property works. The owner of the trademark always retains a degree of control”).

⁶⁷ *See Ex. C-0048*, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 1; **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Arts. 1, 2.

⁶⁸ **Ex. C-0048**, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 5 (explaining that the licensee must obtain the licensor’s approval of design, construction, and quality before using the marks); **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 2-1 (same).

⁶⁹ *See Ex. C-0048*, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), §§ 1, 27; **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 2-2.

⁷⁰ *See Ex. C-0048*, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 5; *see also Ex. C-0052*, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 4-1 (explaining that Bridgestone Corporation has the right to demand copies of all promotional materials using the marks).

⁷¹ **Ex. C-0048**, Trademark Sublicense Agreement between BSLS and BFAH (1 Dec. 2001), § 6; **Ex. C-0052**, Trademark Sublicense Agreement between BSJ and BFNT (1 Dec. 2001), Art. 5.

⁷² **ICSID Convention**, Art. 25(1).

connection — between the alleged actions of the host State and the alleged investment.⁷³ As Claimants put it, “BSAM’s ‘investment’ must be directly affected by the Supreme Court Decision in order for BSAM to be able to bring claims”⁷⁴

21. For BSAM’s alleged “investment” to have been affected directly by the Supreme Court decision, that decision would need to have dealt with the right which comprised the “investment” — *viz.*, the right to put the Panamanian versions of the BRIDGESTONE and FIRESTONE trademarks on tires. But the question before the Supreme Court had nothing to do with that right, and the May 2014 decision does not address it.⁷⁵ As even the most basic review of the decision reveals,⁷⁶ and Claimants themselves concede,⁷⁷ the question before the Supreme Court was whether or not Bridgestone *Corporation* and Bridgestone *Licensing* had acted recklessly when they opposed registration of the RIVERSTONE trademark — an opposition which Claimants *admit* BSAM did not have the right to initiate or pursue.⁷⁸

22. The only way Claimants have been able to connect BSAM’s “investment” to the Supreme Court decision is by alleging that such decision affected *some* rights belonging to third parties, and that BSAM and its subsidiary derived *other* rights from the same third parties.⁷⁹ That connection plainly is “indirect,” and therefore, outside the scope of the Centre’s jurisdiction.

IV. Jurisdictional Bars Relating to Bridgestone Licensing

23. Bridgestone Licensing, which was incorporated in the U.S. state of Delaware,⁸⁰ is also a wholly-owned subsidiary of Bridgestone Corporation.⁸¹ Although it does not appear in any publicly-available organization chart of the Bridgestone group of companies,⁸² Claimants have

⁷³ See **RLA-0013**, *Metalpar*, ¶ 95.

⁷⁴ **Hearing (Day 2)**, Tr. 301:21–302:1 (Claimants’ counsel).

⁷⁵ Nor did it prevent tire sales. See **RFA**, ¶ 13 (“Currently, BSAM, through its wholly-owned subsidiary, BSCR, sells tires into Panama through authorized third party distributors”).

⁷⁶ See **Ex. C-0027**, Judgment, First Civil Chamber of the Supreme Court of Justice of the Republic of Panama (4 Dec. 2013), p. 9 (observing that the plaintiffs sought “compensation for damages caused by virtue of an Action . . . [filed] with reckless intentions”).

⁷⁷ **RFA**, ¶ 39 (“Muresa and TGFL requested that the Supreme Court review the evidence *de novo* and issue a finding that Bridgestone ‘recklessly opposed’ the RIVERSTONE trademark, resulting in losses for Muresa and TGFL”).

⁷⁸ **Rejoinder**, ¶ 38 (explaining that it “is not possible” for “BSAM or one of its wholly-owned subsidiaries” to serve as “the key claimant . . . in trademark opposition proceedings in which the only issue is trademark ownership (such as the opposition action against RIVERSTONE in Panama)”; **Hearing (Day 3)**, Tr. 386:21–388:5 (A. Williams) (conceding that, as a matter of Panamanian law, a trademark licensee could never bring an opposition case on its own).

⁷⁹ See **RD-0002**, Panama’s Opening Statement Presentation, Slides 44–50; **RD-0003**, Panama’s Closing Statement Presentation, Slide 29; **Hearing (Day 2)**, Tr. 305:15–307:3 (Claimants’ counsel) (asserting that “BSAM’s investment is its ‘intellectual property’ rights, which it derives from its Licensing Agreements. Those rights derive from the registered trademarks, which were the subject of the Supreme Court Decision”); **Rejoinder**, ¶ 42 (asserting that, in this case, “[t]he majority of the loss is incurred by BSAM, because the value of its assets is directly contingent on the value of the trademarks to which those assets relate. If, as the Claimants contend . . . , the value of such trademarks has been diluted as a result of the Supreme Court decision, then it follows that the entity which actually uses the trademark in the jurisdiction will also incur loss”).

⁸⁰ **RFA**, ¶ 1.

⁸¹ **RFA**, ¶ 1.

⁸² See **Expedited Objections** (30 May 2017), ¶ 34(c); **Ex. R-0009**, Business Report for the 98th Fiscal Period, Bridgestone Corp. (2016) (listing BSAM as a subsidiary but not Bridgestone Licensing); **Ex. R-0010**, LexisNexis Corporate Affiliations, Bridgestone Corp. (10 Apr. 2017); **Ex. R-0011**, Standard & Poors Capital IQ Corporate Structure Tree, Bridgestone Corp. (14 Apr. 2017). Notably, when the Tribunal President asked Claimants whether

asserted that its role is to “register, maintain and protect” non-U.S. trademarks.⁸³ At the hearing, when asked what Bridgestone Licensing does, Claimants’ witness Mr. Kingsbury responded as follows: “Bridgestone Licensing owns the FIRESTONE trademark outside the United States and licenses it to various entities for use in other countries.”⁸⁴

24. As discussed below, there are two jurisdictional bars to its claim: (1) it is not entitled to the benefits of TPA Chapter Ten; and (2) its claim amounts to an abuse of process.

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

25. Although the Bridgestone group could have structured an investment in Panama in any number of ways, the method the group chose was to have a U.S.-incorporated entity with no offices,⁸⁵ no employees,⁸⁶ no letterhead,⁸⁷ no product,⁸⁸ no public visibility,⁸⁹ and a Japanese board of directors (which neither holds annual meetings nor meets in person)⁹⁰ serve as the registered owner of a Panamanian trademark. That choice had consequences under the TPA.

26. As Panama has explained, the offer of consent to arbitration set forth in TPA Chapter Ten is subject to the caveat that each State Party may deny an investor and its investments the benefits of that Chapter (meaning, deny the investor and its investment “the benefits of both the substantive provisions and the dispute settlement provisions of Chapter Ten”⁹¹) in circumstances where: (1) the investor is an “enterprise of [the] other Party,”⁹² (2) “the enterprise has no substantial business activities in the territory of th[at] other Party,” and (3) “persons of a non-Party, or of the denying Party, own or control the enterprise.”⁹³ It is uncontested that Bridgestone Licensing is an “enterprise” of the United States,⁹⁴ and that it is owned by “persons of a non-Party.”⁹⁵ However, the parties disagree as to whether Bridgestone Licensing “has . . . substantial business activities in the territory of the [United States].”

“there exist[s] a plan of the Bridgestone corporate family” (**Hearing (Day 3)**, Tr. 498:5–7 (Phillips)), Claimants created one from scratch instead of relying on any document in the record. *See Ex. C-0129*, Bridgestone Corporate Structure (Partial List) (5 Sept. 2017) (stating expressly that “[t]his structure chart has been prepared in response to the President’s request made at the hearing on 4 September 2017 [sic] . . .”).

⁸³ **Response**, ¶ 157; *see also* **Hearing (Day 3)**, Tr. 399:5–7 (Kingsbury).

⁸⁴ **Hearing (Day 3)**, Tr. 399:5–7 (Kingsbury).

⁸⁵ *See Rejoinder*, ¶ 51 ([O]ffice space is not formally leased by BSLs . . .); **Hearing (Day 2)**, Tr. 325:01 (Claimants’ counsel) (“[S]pace is not formally leased to BSLs”); **Expedited Objections**, Annex A: BSLs Corporate Directories: LexisNexis Comprehensive Business Report, p. 1 (“Properties: None Found”).

⁸⁶ *See Hearing (Day 2)*, Tr. 324:03–324:04 (Claimants’ counsel) (“BSLs does not itself employ individuals”).

⁸⁷ *See Hearing (Day 3)*, Tr. 439:13–440:8 (Kingsbury).

⁸⁸ *See Hearing (Day 3)*, Tr. 478:1–478:9 (Kingsbury) (“Basically because [we] don’t have a product; right? We’re a Licensing corporation that licenses the mark, as we’ve discussed”).

⁸⁹ **Hearing (Day 3)**, Tr. 473:07–474:06 (Kingsbury) (“Q: . . . [Y]ou’re not in the business of holding yourself out to third parties as having the FIRESTONE mark available for general business . . . ? A: We don’t advertise ourselves as that . . .”).

⁹⁰ **Response**, ¶ 155.

⁹¹ **First U.S. Submission**, fn. 14.

⁹² **Ex. R-0001**, TPA, Art. 10.12.2.

⁹³ **Ex. R-0001**, TPA, Art. 10.12.2.

⁹⁴ *See RFA*, ¶ 70.

⁹⁵ *See RFA*, ¶ 1 (“The Claimants are wholly-owned subsidiaries of Bridgestone Corporation (‘BSJ’), a Japanese incorporated company headquartered in Tokyo, Japan.”); **Response**, ¶ 143.

27. The TPA does not specify the standard to be used when determining whether an “enterprise has . . . substantial business activities in the territory of [a] Party.”⁹⁶ Nevertheless, a VCLT Article 31⁹⁷ analysis makes several points clear. *First*, the activities must be activities of the enterprise itself (in this case, Bridgestone Licensing).⁹⁸ If “the enterprise’s own activities do not reach the level stipulated . . . , it cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities”⁹⁹ *Second*, the activities must take place “in the territory” of the other Party (here, the United States).¹⁰⁰ Activities “with no geographical location”¹⁰¹ will not satisfy this requirement. *Third*, passive ownership and income generation are not sufficient; this is clear from the word “*activities*.” *Fourth*, not just any “activities” will suffice. To escape a denial of benefits, the enterprise must have “substantial” “business” activities. “Substantial” means “sizeable,”¹⁰² and “business” involves offering goods or services to unrelated parties.¹⁰³ Bridgestone Licensing does not meet these requirements.

28. For example, the “activities” that Bridgestone Licensing claims to conduct (*viz.*, the “licensing” and “management” of non-U.S. trademarks¹⁰⁴) essentially take place in the ether. They do not *need* to be done from any particular location, and in fact appear *not* to be done from any particular location: although Claimants have asserted multiple times that Bridgestone Licensing’s “principal place of business” is in Nashville, Tennessee,¹⁰⁵ *none* of its “day-to-day operations” is conducted on site.¹⁰⁶ The contractors that Bridgestone Licensing hires to “license” and “manage” the trademarks (and the sub-contractors that they hire, and the sub-sub-contractors that *they* hire) are all in different locations, some inside the United States, some not. The only reason why a U.S.-incorporated entity sits at the center of the matrix (between Bridgestone

⁹⁶ As the United States explains, this was intentional. See **Second U.S. Submission**, ¶ 2.

⁹⁷ See **Ex. C-0015**, VCLT, Art. 31; see also **Response**, ¶¶ 63–64 (stating that, “[i]n all matters of construction in investor-State arbitration, one must first look to the principles of treaty interpretation required by international law,” and that “the body of international law for interpreting international agreements is codified in the Vienna Convention on the Law of Treaties”); **CLA-0018**, *Pac Rim (Jurisdiction)*, ¶ 4.3 (concluding that it was not “desirable for the Tribunal to draw on past decisions by tribunals addressing provisions on denial of benefits under other treaties, particularly the Energy Charter Treaty[,] . . . given their different wording, context and effect”).

⁹⁸ See **Ex. R-0001**, TPA, Art. 10.12.2 (“[A] Party may deny the benefits . . . if *the enterprise has* no substantial business activities in the territory of the other Party”) (emphasis added).

⁹⁹ **CLA-0018**, *Pac Rim (Jurisdiction)*, ¶ 4.66; see also **Rejoinder**, ¶ 50.

¹⁰⁰ See **Ex. R-0001**, TPA, Art. 10.12.2 (“[A] Party may deny the benefits . . . if the enterprise has no substantial business activities *in the territory of the other Party*”) (emphasis added).

¹⁰¹ **CLA-0018**, *Pac Rim (Jurisdiction)*, ¶ 4.75 (concluding that the claimant lacked “business activities in the territory of the USA” because it had “no geographical location for its nominal, passive, limited and insubstantial activities”).

¹⁰² **Ex. R-0015**, Oxford English Dictionary, p. 3; see also **Rejoinder**, ¶ 49 (“The Respondent defines ‘substantial’ as, *inter alia*, ‘[o]f ample or considerable amount or size; sizeable.’ The Claimants do not argue with this definition”); **Ex. R-0001**, TPA, Art. 10.29 (indicating, by stating that “enterprise of a Party means an enterprise constituted or organized under the law of Party, and a branch located in the territory of a Party *and carrying out business activities there*,” that having *some* business activities is implicit in the definition of “enterprise”; it follows from this that *more* is needed to constitute *substantial* business activities) (emphasis added).

¹⁰³ See **Hearing (Day 3)**, Tr. 409:19–409:21 (Kingsbury) (tying “business” to “marketing” and “sales”); **Hearing (Day 2)**, Tr. 280:1–2 (Claimants’ counsel) (“[M]ost businesses ultimately sell something”).

¹⁰⁴ See **Hearing (Day 2)**, Tr. 325:10–326:14 (Claimants’ counsel).

¹⁰⁵ See **RFA**, ¶ 4; **Notice of Intent**, ¶ 5.

¹⁰⁶ **Hearing (Day 3)**, Tr. 497:16–19 (Kingsbury) (“[A]ll of the day-to-day operations of that company [BSLS] are conducted out of Akron”).

Corporation and all of these contractors)¹⁰⁷ is because that is how things worked when Bridgestone Corporation took over Firestone.¹⁰⁸ If Bridgestone Licensing were to re-incorporate in Japan, that likely would have no material difference on the “activities” alleged.

29. Moreover, the licensing “activity” consists merely of receiving royalty payments on intra-group trademark licensing agreements un-amended since 2001,¹⁰⁹ and affixing a signature to form contracts (and contracts that other Bridgestone entities negotiate) with third parties.¹¹⁰ The management “activity,”¹¹¹ for its part, consists of using outside counsel (Thomas Kingsbury and Mallory Smith — working from BSAM, not Bridgestone Licensing, facilities)¹¹² to retain and oversee other outside counsel (Ladas & Parry) who (1) use a database to monitor trademark registrations,¹¹³ and (2) supervise and instruct counsel in the non-U.S. jurisdictions where Bridgestone Licensing has registered trademarks.¹¹⁴ To the extent that what Bridgestone

¹⁰⁷ All of the trademark management and licensing work that the contractors are doing ultimately is authorized and supervised by executives in Japan. See **Ex. C-0086**, Legal Representation Agreements for Mallory Smith, pp. 1–2 (“Mr. Kitamura-san shall supervise Mr. Kingsbury, and Mr. Kingsbury shall report all activities to Kitamura-san, either personally or through Ms. Smith”); **Hearing (Day 3)**, Tr. 428:9–432:1 (Kingsbury) (“[W]e consult with Mr. Kitamura on whether we should proceed or whether he agrees with our recommendation [on trademark opposition and enforcement]”), Tr. 429:11–16 (Kingsbury) (explaining that Mr. Kitamura is “the Head of the BRIDGESTONE trademark group, and he [wa]s also an officer and a member . . . [of] Bridgestone Licensing Services”), Tr. 497:16–497:17 (Kingsbury) (“So, yes, [BSLS] is a Japanese company. Yes, the directors are Japanese”); **Ex. C-0085**, Invoices from Pillsbury Winthrop Shaw Pittman LLP, p. 2 (showing that, even though their bills are addressed to Mr. Kingsbury, outside counsel corresponds with Mr. Kitamura about their work); **Ex. C-0087**, Agreement between Ulmer & Berne LLP and BSLS (17 Apr. 2008), p. 1 (addressed to a Mr. Takeda at Bridgestone Corporation *in Tokyo*), p. 2 (stating that Mr. Takeda will supervise the work of outside counsel).

¹⁰⁸ **Hearing (Day 2)**, Tr. 335:22–336:6 (Claimants’ counsel) (explaining, in response to a question from the Tribunal, that the reason why Bridgestone Licensing is based in the United States, and not Japan, is “historical, because the Firestone company, which is what BSLS originally was, was a U.S. company, and that’s how they did it, and that’s how it continues to be once the Firestone company was taken over by Bridgestone. BSJ and Firestone agreed when they had that merger that America would continue to be the hub of Firestone activities, and that’s just how it is”).

¹⁰⁹ Mr. Kingsbury conceded that *BSAM* does all of the work associated with collection of these royalty payments. See **Hearing (Day 3)**, Tr. 421:14–16 (Kingsbury) (“*BSAM* is the collection agency for BSLS for the Licenses that the Companies charge for the use of the trademark, the FIRESTONE trademark”).

¹¹⁰ See **Hearing (Day 3)**, Tr. 463:12–465:6 (Kingsbury) (confirming that “one of the important functions” of BSLS is to conclude licensing agreements, most of which are concluded with other Bridgestone entities); **First Kingsbury Statement**, Appendix A (indicating that BSLS partnered with another Bridgestone entity for most of the licensing agreements presented by Claimants); **Hearing (Day 3)**, Tr. 467:22–468:5 (Kingsbury) (failing to dispute that Bridgestone Brands takes the initiative in the licensing agreements to which Bridgestone Brands and Bridgestone Licensing both are parties); **Ex. C-0089**, Trademark Sublicense Agreements of BSLS and Bridgestone Brands (containing a number of licensing agreements (many of which were signed on behalf of Bridgestone Licensing by someone in Japan, even though Mr. Kingsbury was able to sign the agreements on behalf of another Bridgestone entity) that are virtually identical).

¹¹¹ At the hearing, Mr. Kingsbury asserted at the “Bridgestone Licensing Services . . . conduct[s] activities in the United States” because “outside counsel, . . . in combination with the Bridgestone Americas Law Department” supposedly “manage[s] the entire 2,400 portfolio of *patents* from Akron, Ohio . . .” **Hearing (Day 3)**, Tr. 497:5–15 (Kingsbury) (emphasis added). However, there is no evidence in the record to support the notion that Bridgestone Licensing owns any U.S. patents. Moreover, it appears (even from this brief assertion by Mr. Kingsbury) that other people and entities (*viz.*, outside counsel from BSAM and elsewhere) are the ones conducting these alleged activities.

¹¹² See **Hearing (Day 3)**, Tr. 402:1–2 (Kingsbury) (“I receive my paycheck from Bridgestone Americas.”); **Ex. C-0086**, Legal Representation Agreements for Mallory Smith, p. 1; **Response**, ¶ 157.

¹¹³ See **Response**, ¶ 157; **First Kingsbury Statement**, ¶ 12.

¹¹⁴ See **Response**, ¶ 157.

Licensing does (*i.e.*, sign pre-negotiated contracts, collect royalty payments,¹¹⁵ and enter into retainer agreements with outside counsel) can be considered “activity,” it is neither *substantial* activity nor *business* activity in the territory of the United States.

30. In sum, Bridgestone Licensing is just like the claimant in *Pac Rim*: it is a paper company “with no geographical location for its nominal, passive, limited and insubstantial activities.”¹¹⁶ Even though it has been able to scrounge up tax filings, tax returns,¹¹⁷ bank statements, board resolutions, retainer agreements, and law firm invoices — which, incidentally, Claimants never even attempted to designate as “confidential business information”¹¹⁸ — those documents simply show that Bridgestone Licensing is doing the bare minimum required of an entity formally incorporated in the United States. As Claimants themselves have observed, a “denial of benefits” clause is intended to ensure there is a “factual business connection”¹¹⁹ between the claimant and the putative home State, and “that persons of a non-Party do not ‘freeload’ off the rights granted under a treaty.”¹²⁰ In this case, no such connection exists,¹²¹ and — given that Japanese nationals do everything from the hiring of counsel and initiation of this arbitration¹²² to the handling of finances¹²³ — allowing Bridgestone Licensing to submit a claim to arbitration under the TPA would be authorizing this self-described “Japanese company,”¹²⁴ and, effectively, Bridgestone Corporation, to “‘freeload’ off the rights granted under a [U.S.] treaty.”

¹¹⁵ See **Hearing (Day 3)**, Tr. 456:19–457:2 (Kingsbury) (conceding that royalties, which are Bridgestone Licensing’s only source of revenues, are passive income).

¹¹⁶ **CLA-0018**, *Pac Rim (Jurisdiction)*, ¶ 4.75.

¹¹⁷ All U.S. corporations must file a tax return. Accordingly, the mere existence of a U.S. tax return cannot be used to establish “substantial business activities.”

¹¹⁸ See **Ex. R-0001**, TPA, Art. 10.21(2) (authorizing each disputing party to designate “protected information”), Art. 10.29 (stating that “protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law”).

¹¹⁹ **Response**, ¶ 149.

¹²⁰ **Response**, ¶ 149.

¹²¹ Interestingly, the U.S. congressmen who wrote to the U.S. Trade Representative in connection with this very case either did not know or did not care that Bridgestone Licensing exists. See **Ex. C-0035**, Congressional Support Letters, p. 2 (“We are writing to express concern about a Panamanian Supreme Court decision resulting in a substantial penalty against Bridgestone *Americas* simply for utilizing legal mechanisms provided under Panamanian law to protect *its* intellectual property (IP) rights in Panama”) (emphasis added).

¹²² See **Ex. C-0086**, Legal Representation Agreements for Mallory Smith (which was signed by an employee of Bridgestone Corporation); **First Kingsbury Statement**, ¶ 5 (conceding that all of BSLs’ directors are Japanese nationals); **Ex. C-0001**, Power of Attorney for BSLs (which was signed in Japan by a Mr. Kitamura); **Hearing (Day 3)**, Tr. 429:11–16 (Kingsbury) (explaining that Mr. Kitamura is “the Head of the BRIDGESTONE trademark group, and he [wa]s also an officer and a member . . . [of] Bridgestone Licensing Services”); **First Kingsbury Statement**, ¶ 5 (conceding that all of BSLs’ directors are Japanese nationals).

¹²³ See **Hearing (Day 3)**, Tr. 423:12–17 (Kingsbury) (explaining that “Mr. Akiyama does most of the financial stuff”); **First Kingsbury Statement**, ¶ 5 (explaining that Mr. Akiyama is a Japanese citizen).

¹²⁴ **Hearing (Day 3)**, Tr. 497:16 (Kingsbury).

B. Bridgestone Licensing’s Claim Amounts to an Abuse of Process¹²⁵

31. Claimants have stated that they are not sure what Bridgestone Licensing did that was “abusive.”¹²⁶ The answer is simple: it colluded with Bridgestone Corporation and BSAM after the dispute arose to concoct an illusion of jurisdiction retroactively.

32. As Panama has explained, “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre,”¹²⁷ and, in this case, consent is limited to “the submission of a claim to arbitration under [Section B of Chapter Ten of the TPA] in accordance with this Agreement.”¹²⁸ The “submission of a claim to arbitration under this Section”¹²⁹ is a specific process governed by pages of detailed rules,¹³⁰ three of which are important here:

- only a “claimant” may submit a claim to arbitration,¹³¹
- the only type of “claim” that may be submitted is “a claim that the respondent has breached an obligation under Section A [of Chapter Ten], an investment authorization, or an investment agreement; *and* that *the claimant* has incurred loss or damage by reason of, or arising out of, that breach,”¹³² and
- a claimant may only submit this type of claim “on its own behalf”¹³³ or “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.”¹³⁴

33. When the dispute arose — which could not have been any later than 13 March 2015¹³⁵ — these rules presented a problem for the Bridgestone group. The group wanted to submit a claim to arbitration under the TPA for the amount of the 2014 damages award.¹³⁶ But Bridgestone Corporation did not qualify as a “claimant,”¹³⁷ and the rules therefore barred any

¹²⁵ For the Tribunal’s convenience, a chronology of relevant events can be found at Annex A. Annex A confirms to the formatting rules agreed between the parties and, taken together, the present submission and Annex A adhere to the 20-page limit.

¹²⁶ See, e.g., **Hearing (Day 1)**, Tr. 45:7–45:14 (Claimants’ counsel); **Hearing (Day 2)**, Tr. 336:17–337:4 (Claimants’ counsel).

¹²⁷ **Report of the Executive Directors on the ICSID Convention**, ¶ 23.

¹²⁸ **Ex. R-0001**, TPA, Art. 10.17.1.

¹²⁹ **Ex. R-0001**, TPA, Art. 10.17.1.

¹³⁰ See **Ex. R-0001**, TPA, pp. 10-10 to 10-22.

¹³¹ **Ex. R-0001**, TPA, Art. 10.16.1.

¹³² **Ex. R-0001**, TPA, Art. 10.16.1 (internal numbering omitted) (emphasis added). As Claimants observe, “[t]he parties are agreed that under the TPA, the Claimants must show both breach by the Respondent and *loss incurred by the Claimant* in order to *submit a claim to arbitration*.” **Rejoinder**, ¶ 62 (emphasis added).

¹³³ **Ex. R-0001**, TPA, Art. 10.16.1(a).

¹³⁴ **Ex. R-0001**, TPA, Art. 10.16.1(b). In their Submission on Registration, Claimants asserted 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 [sic].” **Claimants’ Submission on Registration**, p. 1 (emphasis added).

¹³⁵ **RFA**, ¶¶ 76, 80 (asserting that Claimants attempted to *resolve* the dispute on 13 March 2015).

¹³⁶ See **Ex. C-0032**, Special 301 Public Hearing Statement (24 Feb. 2015), p. 3.

¹³⁷ See **Ex. R-0001**, TPA, Art. 10.29 (explaining that “claimant means an *investor of a Party* that is a party to an investment dispute with the other Party,” that an “investor of a Party” is “a Party or state enterprise thereof, or a national or *enterprise of a Party*, that attempts to make, is making, or has made an investment in the territory of the other Party,” and that and that “enterprise of a Party means an enterprise *constituted or organized under the law of a Party* . . .”) (emphasis added); **RFA**, ¶ 1 (explaining that Bridgestone Corporation is a “Japanese incorporated

claim by, on behalf of, or for loss or damage incurred by, Bridgestone Corporation. Moreover, neither of the entities that the group intended to use as “claimants” — *viz.*, BSAM and Bridgestone Licensing — could plausibly characterize the amount of the damages award as a “loss” that it specifically had already incurred.

34. Of those entities, Bridgestone Licensing was better-positioned, as it at least had been a party to the Supreme Court proceeding. But not even it could make the requisite showing. Because it was one of two entities that were jointly and severally liable for payment,¹³⁸ and no payment had been made, it could not possibly characterize the amount of the 2014 damages award as a loss that it (and it alone) had incurred already.¹³⁹ Even assuming *arguendo* that Bridgestone Licensing somehow could demonstrate that the amount of the damages award constituted an already-incurred “loss,”¹⁴⁰ it still could not establish, even by preponderance, that *it* (and not the other, equally-liable, entity) had been the one to incur such “loss.” Months went by, a Notice of Intent was transmitted to Panama, and more time passed. The situation remained the same.

35. At the hearing, Claimants asserted that “[t]here is nothing new that BSLS did in the last two years to bring itself into compliance with the TPA.”¹⁴¹ That is just not true. In the spring of 2016,¹⁴² the Bridgestone group, which had been advised that Bridgestone Licensing would have no case under the TPA if Bridgestone Corporation paid the damages award,¹⁴³ devised a plan to get around the jurisdictional barriers discussed above. The plan centered on having Bridgestone Licensing pay the damages award.¹⁴⁴ Even though Bridgestone Licensing lacked the funds to do so, “its Board of Directors,”¹⁴⁵ consisting of Bridgestone Corporation executives,¹⁴⁶ apparently

company headquartered in Tokyo, Japan”); **Response**, ¶¶ 138–39 (accepting that Bridgestone Corporation is a “person[] of a non-Party”).

¹³⁸ **Response**, ¶ 134.

¹³⁹ See **Ex. R-0001**, TPA, Art. 10.16.1(a) (“[T]he claimant, on its own behalf, may submit to arbitration . . . a claim that the respondent has breached an obligation under Section A . . . and that the claimant has incurred loss or damage by reason of, or arising out of, that breach”) (emphasis added; internal numbers omitted).

¹⁴⁰ As Panama explained at the hearing, Claimants have accepted on multiple occasions that “loss” in this scenario would be linked to payment. See, e.g., **Response**, ¶¶ 134, 136 (asserting that the entity that *did* pay suffered loss, and accepting that an entity that did *not* pay did not); **Notice of Intent**, ¶ 22 (asserting, before payment had been made, that “[t]he loss and damage suffered to date by Claimants is currently estimated as being in excess of \$10 million”); **RFA**, ¶ 67 (asserting, *after* payment had been made, that “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”).

¹⁴¹ **Hearing (Day 2)**, Tr. 345:10–12 (Claimants’ counsel).

¹⁴² See **Hearing (Day 2)**, Tr. 338:19–22 (Claimants’ counsel) (explaining that, “after spending two years trying to overturn the [May 2014] Supreme Court Judgment,” “BSLS and BSJ . . . had to decide between themselves which entity would pay”).

¹⁴³ See **Hearing (Day 3)**, Tr. 484:1–6 (Kingsbury) (“And did counsel tell you that if Bridgestone Corporation paid this you would have no case to bring under the Free Trade Agreement? A. I don’t want to say there was no case to bring because they’re not the *only* Claimant, but certainly it was a factor, sure”) (emphasis added).

¹⁴⁴ See **Hearing (Day 3)**, Tr. 483:9–22 (Kingsbury).

¹⁴⁵ **Rejoinder**, ¶ 15.

¹⁴⁶ See **Hearing (Day 3)**, Tr. 452:02–19 (Kingsbury) (admitting that senior Bridgestone Corporation officials in Tokyo are “rotat[e]d” into BSLS). In early 2016, BSLS’s Board of Directors was composed of Mr. Eiji Mineki, Mr. Mitsuru Araki, and Mr. Hayato Shiraishi. See **Ex. C-0081**, BSLS Board of Directors Resolution (1 Oct. 2015). Mr. Mineki worked for Bridgestone Corporation in Tokyo. See **Ex. C-0086**, Legal Representation Agreements for Mallory Smith, p. 1 (addressed to Mr. Mineki at Bridgestone Corporation in Tokyo); **Ex. C-0029**, Second Appeal

“considered [this plan to be] in the best interests of the company”¹⁴⁷ nonetheless. Making this happen required months of advance planning¹⁴⁸ and a USD 6 million loan from BSAM.¹⁴⁹

36. At the hearing, counsel for Claimants assured the Tribunal that “it was, indeed, BSLS that made the payment,”¹⁵⁰ using its own funds.¹⁵¹ But Claimants’ own witness testified otherwise on cross-examination,¹⁵² and the pleadings,¹⁵³ exhibits,¹⁵⁴ and transcript¹⁵⁵ confirm the reality of the situation: Bridgestone Corporation (a Japanese entity which could not assert claims under the TPA) paid the damages award *through* Bridgestone Licensing (an entity which theoretically *could* assert claims under the TPA). It did so deliberately, and with help from outside counsel,¹⁵⁶ after the dispute arose,¹⁵⁷ to enable Bridgestone Licensing to assert a claim under the TPA,¹⁵⁸ despite considering the payment a “loss” of the Bridgestone *group*.¹⁵⁹ In doing so, it created an illusion of compliance with the TPA’s jurisdictional requirements. “But like all illusions, [this was] a misleading illusion.”¹⁶⁰

Motion, First Civil Chamber of the Supreme Court (30 Sept. 2014). Mr. Araki is a Japanese national who works lives in Tokyo. **First Kingsbury Statement**, ¶ 5.

¹⁴⁷ **Rejoinder**, ¶ 15.

¹⁴⁸ *See* **Hearing (Day 3)**, Tr. 486:9–20 (Kingsbury) (accepting that there was some planning involved in this process, which took place over the course of several months).

¹⁴⁹ *See* **Hearing (Day 3)**, Tr. 482:15–483:7 (Kingsbury).

¹⁵⁰ **Hearing (Day 1)**, Tr. 41:17–22 (Claimants’ counsel).

¹⁵¹ *See* **Hearing (Day 2)**, Tr. 340:19–341:5 (Claimants’ counsel).

¹⁵² *See* **Hearing (Day 3)**, Tr. 496:22–497:2 (Kingsbury) (“Ultimately, yes, you know, Bridgestone is the parent company. They’re the ones who are paying as the parent of Bridgestone Services”).

¹⁵³ *See* **RFA**, ¶ 53 (asserting that “*Bridgestone, through its subsidiary BSLS*, which was jointly and severally liable for the judgment, *paid the damages award to Muresa and [Tire Group]* on August 19, 2016”). As Panama explained at the hearing, because Bridgestone Corporation is the only entity Claimants have described as a parent of Bridgestone Licensing, the reference here to “Bridgestone” could only mean “Bridgestone Corporation.”

¹⁵⁴ *See* **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 Aug. 2016), p. 1 (“*Bridgestone Corporation and Bridgestone Licensing Services, Inc.*, in compliance with the Judgment of May 28, 2014 . . . [will proceed to make] payment on the indicated amounts . . . through electronic bank transfer . . .”) (emphasis added); *see also* **Reply**, ¶ 86 and **Hearing (Day 3)**, Tr. 390:18–391:03 (A. Williams) (confirming that the language in brackets (*i.e.*, “will proceed to make”) is the proper translation for the Spanish word used in the original version of the letter (*viz.*, “procederán”).

¹⁵⁵ **Hearing (Day 2)**, Tr. 348:10–13 (Claimants’ counsel) (“Once all domestic routes to overturning the Judgment were exhausted, that’s when *BSLS and BSJ* realized they had no further recourse, so *they paid* — well, BSLS paid”) (emphasis added).

¹⁵⁶ *See* **Hearing (Day 3)**, Tr. 389:19–392:2 (A. Williams) (confirming that she coordinated with Akin Gump when preparing the letter that was sent to Muresa and Tire Group regarding payment of the 2014 damages award (which states — somewhat strangely for a letter between private parties — that “Bridgestone Corporation and Bridgestone Licensing Services, Inc. reserve their rights under International law, including the Trade Promotion Agreement between the United States of America and Panama”)). *See* **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 Aug. 2016), p. 2.

¹⁵⁷ *Compare* **RFA**, ¶ 53 (asserting that “Bridgestone . . . paid the damages award . . . on August 19, 2016”) with *id.*, ¶¶ 76, 80 (asserting that Claimants attempted to *resolve* the dispute on 13 March 2015).

¹⁵⁸ *See* **Hearing (Day 3)**, Tr. 484:1–6 (Kingsbury).

¹⁵⁹ **RFA**, ¶ 67 (asserting that “*Bridgestone*’s losses arising from the Supreme Court are USD 5,471,000,” and distinguishing this from “[t]he diminution in value of *BSLS and BSAM*’s trademarks and its business losses in the region . . .”) (emphasis added); *id.*, ¶ 1 (defining “Bridgestone” to mean “the Bridgestone group of companies”).

¹⁶⁰ **RLA-0021, ST-AD**, ¶ 317.

37. In their closing statement, Claimants insisted that “[t]here is nothing suspicious, there is no abuse here.”¹⁶¹ That is just not true. When the dispute arose — and when the Notice of Intent was submitted, and for almost a year thereafter — there was no jurisdictional avenue available under the TPA for a claim for the amount of the 2014 damages award. The Bridgestone group, together with counsel, attempted to get around that problem through *post hoc* unilateral action and a carefully-constructed ruse. These actions are precisely the type of conduct that has been deemed “abusive” in the past. Just as the entities in *Phoenix Action*,¹⁶² *ST-AD*,¹⁶³ and *Philip Morris*¹⁶⁴ attempted after the dispute arose to create a scenario that would meet the nationality and subject matter rules in the relevant BITs, in this case, the Bridgestone group attempted after the dispute arose to create a scenario that would meet the TPA’s rules regarding the type of claim that can be submitted, on whose behalf, and by whom.

38. Panama accepts that when Bridgestone Licensing “paid” the damages award, it was, on some level, “doing what the Panamanian Court had ordered it [and Bridgestone Corporation] to do.”¹⁶⁵ But the question here is not simply *whether* Bridgestone Licensing “d[id] what the Panamanian Court had ordered it to do,” but *when* (vis-à-vis the investment dispute) it did so. Given the “when” (*i.e.*, that it was not until *after* the investment dispute had arisen, the Notice of Intent had been transmitted, and the Bridgestone group had been told that Bridgestone Licensing could not otherwise submit a claim¹⁶⁶ that Bridgestone Licensing, using borrowed funds, “d[id] what the Panamanian Court had ordered”), an ulterior “why” must be presumed. This is the entire point of the “objective” standard¹⁶⁷ that Claimants themselves endorse.¹⁶⁸

39. Claimants have asserted that “the really significant point . . . in terms of timing” is that “[i]t was only when all of the local options were exhausted that BSLs paid”¹⁶⁹ That is significant. The fact that local remedies were pending until March 2016¹⁷⁰ confirms that the “denial of justice” claim described in the Notice of Intent¹⁷¹ lacked merit when asserted;¹⁷²

¹⁶¹ **Hearing (Day 4)**, Tr. 628:4–5 (Claimants’ counsel).

¹⁶² See **RLA-0020**, *Phoenix Action*, ¶¶ 142–44.

¹⁶³ See **RLA-0021**, *ST-AD*, ¶¶ 412–23.

¹⁶⁴ See **CLA-0044**, *Philip Morris*, ¶¶ 585–88.

¹⁶⁵ **Hearing (Day 4)**, Tr. 628:18–19 (Claimants’ counsel).

¹⁶⁶ See **Hearing (Day 3)**, Tr. 484:1–6 (Kingsbury) (“Q. Okay. And did counsel tell you that if Bridgestone Corporation paid this you would have no case to bring under the Free Trade Agreement? A. I don’t want to say there was no case to bring because they’re not the *only* Claimant, but certainly it was a factor, sure”) (emphasis added).

¹⁶⁷ See **CLA-0022**, *Philip Morris*, ¶ 539 (explaining that “the notion of abuse 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”); **CLA-0018**, *Pac Rim (Jurisdiction)*, ¶ 2.96 (explaining that the date on which “the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy” serves as a “dividing line”; “before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be”).

¹⁶⁸ See **Response**, ¶ 166.

¹⁶⁹ **Hearing (Day 4)**, Tr. 627:22–628:4 (Claimants’ counsel).

¹⁷⁰ See **Hearing (Day 4)**, Tr. 627:14–628:4 (Claimants’ counsel) (asserting that local remedies were only “exhausted” when the challenges by Bridgestone Corporation and Bridgestone Licensing to the Supreme Court decision had been decided) and **RFA**, ¶¶ 46–47 (explaining that the second challenge was decided in March 2016).

¹⁷¹ **Ex. C-0043**, Notice of Intent (30 Sept. 2015), ¶¶ 4, 19.

¹⁷² See **RLA-0063**, *Arif v. Moldova*, ¶¶ 442–43 (explaining that a prerequisite to any denial of justice claim is the exhaustion of local remedies).

undermines Claimants’ assertion that issuance of the 2014 damages award resulted in automatic loss to Bridgestone Licensing of the amount of that award;¹⁷³ and casts doubt on whether Bridgestone Licensing followed the TPA’s mandatory sequence for submitting a claim to arbitration.¹⁷⁴ But it cannot be used to absolve the Bridgestone group of impropriety.

40. Even if it was “after spending two years trying to overturn the Supreme Court Judgment” that “BSLS and BSJ . . . decide[d] between themselves which entity would pay,”¹⁷⁵ the fact remains that, at that time, the dispute already had materialized, and the decision was guided by what the Bridgestone group knew about the TPA’s jurisdictional requirements.¹⁷⁶ As the Tribunal rightly observed, “Bridgestone Japan . . . had every legal interest [in paying the damages award] that BSLS had and more,”¹⁷⁷ given that Bridgestone Corporation *owns* Bridgestone Licensing.¹⁷⁸ “[I]t is a bit odd” that, in a situation where “a parent company and a subsidiary who [we]re held jointly liable” for damages, and the “subsidiary [did not have] enough funds to discharge the whole of the judgment debt,” the subsidiary — “instead of saying to the parent, ‘Well, you pay your share,’” — went “to another subsidiary and borrow[] the money to [pay].”¹⁷⁹ The only reasonable explanation for this chain of events was that the Bridgestone group was attempting to manufacture jurisdiction under the TPA after the dispute had arisen.

V. Jurisdictional Bars Relating to Both Claimants

41. It is plain from the text of the Request for Arbitration that Claimants are seeking compensation for hypothetical future injury¹⁸⁰ that supposedly will result from hypothetical future action of States other than Panama.¹⁸¹ This is improper. There are two aspects to the problem.

42. *First*, consent to arbitration, as expressed in the TPA, is limited to claims based on “measures” that already were “adopted or maintained”¹⁸² and the resulting “loss or damage” that the claimant *already* incurred.¹⁸³ Apart from arguing¹⁸⁴ (incorrectly)¹⁸⁵ that Panama did not mention this aspect of the problem before the hearing, Claimants failed entirely to address it.

¹⁷³ See **Rejoinder**, ¶ 62.

¹⁷⁴ See **Hearing (Day 4)**, Tr. 562:13–563:11 (Panama’s counsel) (describing the mandatory sequence of events for the purpose of jurisdiction under the TPA).

¹⁷⁵ **Hearing (Day 2)**, Tr. 338:19–22 (Claimants’ counsel).

¹⁷⁶ See **Hearing (Day 3)**, Tr. 484:1–6 (Kingsbury).

¹⁷⁷ **Hearing (Day 4)**, Tr. 630:3–5 (Thomas).

¹⁷⁸ **RFA**, ¶ 1.

¹⁷⁹ **Hearing (Day 4)**, Tr. 628:20–629:4 (Phillips).

¹⁸⁰ See **RFA**, ¶ 54 (explaining that the USD 16 million figure that Claimants ask the Tribunal to order Panama to pay “includes the USD 5,431,000 in damages and fees that were ordered by the Supreme Court, as well as an estimate of the loss that has been *and will be* incurred by BSLS and BSAM as a result of the decision”) (emphasis added).

¹⁸¹ **RFA**, ¶ 56 (“[T]he decision of the Panamanian Supreme Court *may be* followed in *other Latin American countries* as a matter of government policy”) (emphasis added), ¶ 57 (“[T]he decision of the Panamanian Supreme Court establishes a precedent that is *likely to be* followed in *other Latin American legal systems*”) (emphasis added), ¶ 59 (“[T]he *risk* that similar decisions *may be* issued in *other countries* makes it much costlier for Bridgestone to invest not only in Panama, but in other countries in Latin America”) (emphasis added).

¹⁸² See **Ex. R-0001**, TPA, Arts. 10.1, 10.16.1; **RD-0001**, Panama’s Preliminary Issue Presentation, Slides 15–16.

¹⁸³ See **Ex. R-0001**, TPA, Art. 10.16.1; **RD-0001**, Panama’s Preliminary Issue Presentation, Slide 15.

¹⁸⁴ See **Hearing (Day 2)**, Tr. 350:1–10 (Claimants’ counsel).

¹⁸⁵ See **Expedited Objections**, ¶ 48 (“The Tribunal cannot entertain claims based on the hypothetical actions of other States, as Claimants ask it to do”); **Reply**, ¶ 95 (“Panama has explained that, in this case, consent is limited to claims

43. *Second*, Chapter Ten of the TPA only “applies to measures adopted or maintained by [*Panama*] relating to: (a) investors of [the United States]; (b) covered investments; and (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.”¹⁸⁶ It does not apply to investments in other States or to measures adopted or maintained by other States.¹⁸⁷ Claimants tried to circumvent this barrier by asserting that “the only measure in respect of which the Claimants bring claims is the Panamanian Supreme Court judgment of 28 May 2014,”¹⁸⁸ and that the hypothetical future conduct of other States flows causally therefrom.¹⁸⁹ But as Panama has explained, and Claimants have not contested, it is a basic principle of international law “that each State is responsible for its *own* conduct in respect of its *own* international obligations.”¹⁹⁰ The only time that one State can be held internationally-responsible for the conduct of another is if the first State has aided or assisted or directed and controlled that second State in the commission of an internationally-wrongful act, or coerced the second State to commit an act that would be internationally-wrongful but for the coercion.¹⁹¹ Thus, the only way for Claimants’ argument to work would be if a State other than Panama had committed an internationally-wrongful act.

44. But the Tribunal has no authority to evaluate that issue, and as the ICJ advised in *Monetary Gold*, in circumstances where, as here, an international adjudicator would need to determine whether a third State had acted wrongfully in order to decide a claim, the adjudicator would not have jurisdiction over the claim.¹⁹² Claimants now “accept that, to the extent that loss could be said to have been caused by the Measures of other States and, therefore, not caused by the Measures that [they] say were taken by Panama, . . . such loss would not be recoverable.”¹⁹³

45. At this juncture, Panama is *not* asking the Tribunal to make any findings as to the *quantum* of any alleged injury; it merely is asking the Tribunal to confirm that its jurisdiction does not extend to claims based on (1) hypothetical future events or injury, (2) investments outside of Panama, or (3) the conduct of other States. If that is done (which, for the reasons above, it should be), the Tribunal will find that there is no remaining claim for damages by BSAM,¹⁹⁴ and that the

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’ They do not apply in respect of (hypothetical) measures that other States (might) thereafter adopt in reaction thereto”).

¹⁸⁶ **Ex. R-0001**, TPA, Art. 10.1.

¹⁸⁷ See **Hearing (Day 1)**, Tr. 89:18-90:17 (Panama’s counsel).

¹⁸⁸ **Rejoinder**, ¶ 71.

¹⁸⁹ See **Rejoinder**, ¶ 71.

¹⁹⁰ **RLA-0027**, J. CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (Cambridge University Press 2002), Art. 1, comment 6 (emphasis added).

¹⁹¹ See **RLA-0028**, Draft Articles on State Responsibility, Arts. 16–18.

¹⁹² See **RLA-0029**, *Monetary Gold*, pp. 32–33; see also **RLA-0037**, *Chevron*, ¶¶ 4.61–4.63.

¹⁹³ **Hearing (Day 2)**, Tr. 357:5–10 (Claimants’ counsel).

¹⁹⁴ Claimants asserted in their RFA that the USD 10,569,000 figure was based on four “inter-related factors,” one of which was that “the damages awarded to Muresa and [Tire Group]” allegedly “ha[d] a direct and substantial impact on the ability of the U.S. Bridgestone entities to re-invest in their business” **RFA**, ¶¶ 54–55. Claimants have since “clarif[ied] that the reference to US Bridgestone entities here was to *BSLS*” **Rejoinder**, ¶ 44 (emphasis added). The three other “factors,” which supposedly apply to both Claimants, are plainly hypothetical. See **RFA**, ¶ 56 (asserting that “the decision of the Panamanian Supreme Court *may* be followed in other Latin American countries”) (emphasis added), ¶ 57 (asserting that “the decision of the Panamanian Supreme Court establishes a precedent that is *likely to be* followed in other Latin American legal systems”) (emphasis added), ¶ 58 (asserting that “the decision of the Panamanian Supreme Court . . . is *likely to* result in more trademark applications that are similar and confusingly similar to the Bridgestone mark, both in Panama and elsewhere in Latin America”) (emphasis added).

only remaining claim by Bridgestone Licensing (assuming it survives the other jurisdictional challenges) is for alleged loss associated with payment of the 2014 damages award.¹⁹⁵

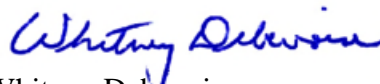
VI. Conclusion and Request for Relief

46. Throughout this proceeding, Claimants have attempted to establish jurisdiction through misstatements and legerdemain. But the law and facts are against them, and the remedy for that is clear: the Tribunal should dismiss the case for lack of jurisdiction, and award full costs to Panama (including attorneys' fees).

47. As the Tribunal will recall, Panama requested, in both of its prior pleadings, that Claimants be deemed jointly and severally liable for any costs award in its favor.¹⁹⁶ Claimants failed to address that request until the final minutes of the hearing, when they emphasized that some objections related to one Claimant and not the other.¹⁹⁷ That is true, but inapposite. Claimants decided to bring a case jointly, using the same counsel; have argued throughout that the attributes of one Claimant are applicable to the other; and have tried their best to blur the lines between the two entities. They should not be permitted to draw a dividing line now simply because it suits them — particularly when the record amply demonstrates that Bridgestone Licensing is entirely dependent financially on Bridgestone Corporation and loans from affiliates.

48. Thus, for the reasons set forth above, and in its prior submissions, Panama respectfully requests that the Tribunal issue an award: (1) dismissing the case in its entirety for lack of jurisdiction; (2) ordering Claimants jointly and severally to bear all costs of the arbitration; and (3) awarding Panama full recovery (from either Claimant) of all of its costs and expenses, including attorneys' fees and expenses, with interest thereon at the rate of six-month LIBOR plus 2% per annum from the date of the award to the date of payment.

Respectfully submitted,



Whitney Debevoise
Gaela Gehring Flores
Mallory Silberman
Amy Endicott
Katelyn Horne

ARNOLD & PORTER
| KAYE SCHOLER

¹⁹⁵ As explained in the preceding footnote, Claimants asserted in their RFA that the USD 10,569,000 figure was based on four “inter-related factors,” three of which consist of hypothetical future events. The lone remaining “factor,” which applies only to Bridgestone Licensing, and appears to be a form of double-counting, is that Bridgestone Licensing supposedly “had a reduced ability to invest in its brand *due to payment of the damages award.*”

Rejoinder, ¶ 44 (emphasis added); *see also* **RFA**, ¶ 55.

¹⁹⁶ *See* **Expedited Objections**, ¶ 55(b); **Reply**, ¶ 99.

¹⁹⁷ *See* **Hearing (Day 4)**, Tr. 644:11–21 (Claimants' counsel).

Annex A

28 May 2014: Supreme Court issues a decision (“**Decision**”) holding Bridgestone Corporation (“**BSJ**”) and Bridgestone Licensing (“**BSLS**”) jointly and severally liable for damages.

28 Nov. 2014: Supreme Court denies BSJ/BSLS motion for clarification and modification.¹⁹⁸

Feb. 2015: After the Bridgestone group and Akin Gump consult regarding a potential investor-State claim, BSAM asserts to the USTR that the Decision violates the TPA.¹⁹⁹

12 Mar. 2015: **Latest possible date (based on Claimants’ explanation as to when they attempted to resolve the present dispute)²⁰⁰ on which the dispute could have arisen.**

30 Sept. 2015: After consultations among Claimants, BSJ, and Akin Gump, Claimants send a Notice of Intent to Panama, alleging, *inter alia*, that a “denial of justice” had been committed.²⁰¹

16 Mar. 2016: The Supreme Court rejects a *recurso de revision* initiated by BSJ/BSLS.²⁰²

Spring 2016: The Bridgestone group is told by counsel that BSLS will not have a case under the TPA if BSJ pays the 2014 damages award, and — following a “joint discussion” involving “people in Tokyo,” Claimants, legal counsel, and tax advisors — concludes that BSLS should pay the 2014 damages award.²⁰³ BSAM loans USD 6 million to BSLS to make this happen.²⁰⁴

18 Aug. 2016: USD 5,431,000 is transferred from a BSLS bank account to Muresa, with the reference line: “Bsj and Bsls Loss of Litigation Payment for Damages And Legal Fee”²⁰⁵

19 Aug. 2016: BSJ and BSLS send a letter (drafted by Akin Gump and Benedetti & Benedetti)²⁰⁶ to Muresa and Tire Group, stating that they both will proceed to pay the damages award.²⁰⁷

25 Aug. 2016: USD 204,830.10 is transferred from a BSLS bank account to Akin Gump.²⁰⁸

19 Sept. 2016: Akin Gump sends BSAM a copy of the RFA.²⁰⁹

7 Oct. 2016: RFA is submitted to ICSID.

¹⁹⁸ RFA, ¶¶ 44, 46.

¹⁹⁹ See **Hearing (Day 3)**, Tr. 444:16–449:6 (Kingsbury); **Ex. C-0032**, Special 301 Public Hearing Oral and Written Statement (24 February 2015), pp. 5, 9; *id.* at pp. 1–3.

²⁰⁰ See RFA, ¶¶ 50, 76–80.

²⁰¹ See **Ex. C-0002**, BSAM Internal Approval for Submitting Claim, p. 2; Notice of Intent, ¶¶ 4, 19.

²⁰² RFA, ¶ 47.

²⁰³ The record would indicate that the decision was made sometime before April 2016. In early 2016, Bridgestone Licensing projected a partial payment would be made in April 2016. See **Ex. C-0092**, BSLS “Income Statement,” p. 3 (“Other Non-opex” row, column for April 2016); **Hearing (Day 3)**, Tr. 484:1–484:6, 485:21–486:20 (Kingsbury) (explaining that the figures in this “Income Statement” were projections).

²⁰⁴ **Hearing (Day 3)**, Tr. 482:2–483:8 (Kingsbury).

²⁰⁵ **Ex. C-0126**, BSLS Bank Statement (August 2016), p. 2.

²⁰⁶ **Hearing (Day 3)**, Tr. 389:19–392:2 (A. Williams).

²⁰⁷ See **Ex. C-0036**, Letter from BSJ and BSLS to Muresa and Tire Group (19 August 2016), p. 1.

²⁰⁸ **Ex. C-0126**, BSLS Bank Statement (August 2016), p. 2.

²⁰⁹ See **Ex. C-0002**, BSAM Internal Approval for Submitting Claim, p. 2.