

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

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

**v.**

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

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

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**Claimants' Rejoinder on Panama's Expedited Objections Pursuant to Article 10.20.5 of the  
US-Panama Trade Promotion Agreement**

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**14 August 2017**

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Legal Authorities

<b>File Reference</b>	<b>Full Citation</b>	<b>Short Citation</b>
<b>CLA-0038</b>	<i>Mobil Investments Canada v. Canada</i> , ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012	<i>Mobil Investments Canada v. Canada</i>

Exhibits

<b>Exhibit Number</b>	<b>Description</b>
<b>Exhibit C-0119 (ENG)</b>	Census Data
<b>Exhibit C-0120 (ENG)</b>	JP Morgan Chase Bank Statement (October 2016)
<b>Exhibit C-0121 (ENG)</b>	Form 1120 (2013)
<b>Exhibit C-0122 (ENG)</b>	Form 1120 (2014)
<b>Exhibit C-0123 (ENG)</b>	Form 1120 (2015)
<b>Exhibit C-0124 (ENG)</b>	Record of Invoices Paid to Emerson Thomson & Bennett since January 2015
<b>Exhibit C-0125 (ENG)</b>	Record of Invoices Paid to Pillsbury Winthrop Shaw Pittman LLP since January 2015.
<b>Exhibit C-0126 (ENG)</b>	J.P. Morgan Chase Bank Statement (August 2016)

## **I. INTRODUCTION**

1. This Rejoinder is submitted by Bridgestone Licensing Services, Inc. (“**BSLS**”) and Bridgestone Americas, Inc. (“**BSAM**”) (together, the “**Claimants**”) in response to the Respondent’s Reply dated 7 August 2017 (the “**Reply**”) concerning the Expedited Preliminary Objections submitted by the Republic of Panama under Article 10.20.5 of the US-Panama Trade Promotion Agreement (“**TPA**”) on 30 May 2017 (the “**Objections**”), pursuant to the Tribunal’s Procedural Order No. 1 dated 11 July 2017.
2. The Respondent’s election to raise its preliminary objections on an expedited basis has meant that the Claimants have had only 7 days from receipt of the Reply to prepare the present Rejoinder and the accompanying evidence. In the time available, therefore, the Claimants have been unable to respond to each point made in the Reply. Where a point is not responded to, that should not be taken as indicating that the Claimants accept the Respondent’s position.

## **II. SUMMARY**

3. As the Claimants’ noted in their Response to the Preliminary Objections dated 24 July 2017 (the “Response”), the Respondent submitted its Objections without providing any information as to the applicability of Article 10.20.5, and refused to clarify the Claimants’ queries in that regard. However, based on the Respondent’s most recent submission, it now appears that the issues before the Tribunal regarding Article 10.20.5 are relatively narrow: (i) whether the Claimants’ pleaded allegations of fact are to be taken to be true under the “competence” limb of Article 10.20.5; (ii) which party has the burden of proof for the purposes of Article 10.20.5 objections; and (iii) the scope of the “competence” limb of Article 10.20.5.
4. The Claimants’ position is that their pleaded allegations of fact are to be subject to the deemed truthfulness provision at Article 10.20.4(c) either as a matter of construction or pursuant to the Tribunal’s discretion under Rule 34 of the ICSID Arbitration Rules. Further, where there is a dispute of fact (whether or not pleaded) that can only satisfactorily be resolved at a full trial or where by reason of the expedited nature of the current process there may not have been a proper opportunity for the Claimant to obtain and present all of the evidence that may be relevant, then the Tribunal should exercise its discretion for these purposes to take the Claimants’ allegations to be true. The Respondent has the burden of proving its Objections because it invoked this preliminary and expedited process.
5. The Respondent’s position is that the Tribunal is not required to take the factual allegations pleaded by the Claimants as true, that it is permitted to adduce evidence and that the Tribunal should determine factual and legal disputes under the “competence” limb of Article 10.20.5. The Respondent argues that the burden of proof rests with the Claimants because these objections are jurisdictional. The Respondent reads the “competence” limb of Article 10.20.5 so broadly that almost all challenges to a claim could come under this heading, including disputes as to the merits of the case. This position is untenable.

6. As to the substance of the Objections and the arguments raised in the Response, the Respondent has for the most part not engaged with the Claimants' submissions, because it has no answer to them.

First Objection: BSAM does not have a qualifying investment

7. BSAM's investment in Panama is its intellectual property rights. These are rights granted by way of trademark license agreements to BSAM by BSLs and Bridgestone Corporation ("BSJ") to use their Panamanian FIRESTONE and BRIDGESTONE trademarks. These trademark license agreements (i) are assets owned by BSAM; (ii) confer Panamanian intellectual property rights on BSAM; and (iii) have the characteristics of an investment, including such characteristics as the commitment of capital and other resources, the expectation of gain or profit and the assumption of risk.
8. The Respondent has not engaged with these submissions, other than to dispute the fact that the trademark license agreements cannot be assets and/or confer intellectual property rights on BSAM. Instead, they argue that BSAM's supposed investment is its cross-border sales in Panama, which cannot be an investment. The Claimants accept that cross-border sales on their own could not be an investment, but consider this a moot point because the Claimants have not asserted this. Rather, cross-border sales are part of the activities in Panama in which BSAM is engaged on the basis of its intellectual property investment.

Second Objection: the dispute does not arise directly out of BSAM's investment

9. In their Objections, the Respondent asserted that the present dispute could not arise out of BSAM's investment because BSAM was not liable for and had not paid the US\$5.4 million awarded by the Supreme Court, and therefore had nothing to do with this dispute. The Claimants explained in their Response that BSAM's dispute does not relate to the US\$5.4 million, but to loss it has sustained as a result of the Supreme Court's decision, because the judgment had made it much more costly for BSAM to maintain its investment in Panama and other countries in the region.
10. The Reply does not engage with the Claimants' submissions in any detail, and simply dismisses the Claimants' arguments by summarily stating that the Claimants have failed to establish an "*immediate 'cause and effect' between the actions of the host State and the effects of such actions on the protected investments*".<sup>1</sup> But the Claimants have in fact established this, despite the fact that in these preliminary expedited proceedings one cannot be expected to provide detailed evidence of the loss that BSAM has suffered as a result.

Third Objection: Panama denies the benefits of the TPA to BSLs

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<sup>1</sup> Reply ¶ 49.

11. The Respondent asserts that it must put forward “*cogent evidence*”<sup>2</sup> that the denial of benefits provision applies to BSLS, but it has not done so. It has instead put forward a selection of material, primarily the results of cursory database and website searches, but has not provided any authority to support an argument that substantial presence in the databases and websites searched by the Respondent are relevant to an assessment of whether BSLS has “*substantial business activities*” in the United States. On that basis alone, this objection should be dismissed outright.
12. If the Tribunal does not take this approach, then the Claimants submit that there are three alternative courses for the Tribunal, each resulting in dismissal of this objection:
  - (a) **First**, the Tribunal should take the Claimants’ pleaded facts as to BSLS’s business activities (as set out in the Request and supplemental letter to ICSID dated 25 October 2016) to be true, and refuse to consider the disputed facts alleged by the Respondent.
  - (b) **Second**, if the Tribunal does consider the evidence adduced by both sides, it should be mindful of the fact that the Claimants have had limited opportunity to adduce evidence because of the expedited nature of these proceedings, and should dismiss this objection on the grounds that it cannot be determined on an expedited preliminary basis.
  - (c) **Third**, if the Tribunal is minded to review the evidence so far adduced and considers itself able to decide this objection, the Claimants submit that they have provided sufficient evidence to demonstrate that BSLS has “*substantial business activities*” in the United States.

Fourth Objection: BSLS’s alleged abuse of process

13. The Respondent continues to allege that BSLS’s claim amounts to an abuse of process, but – bearing in mind the high bar the Respondent must reach to make out such allegation – provides little by way of evidence or authority to support this objection.
14. The Respondent alleges: (i) BSLS only incurred loss on the day it paid the US \$5.4 million, and until then did not have a claim under the TPA; (ii) BSLS’s delay in paying the damages award itself amounts to an abuse of process, because BSLS was using that time to try to “*bring itself into compliance with the TPA’s requirements*”<sup>3</sup>; (iii) BSLS is essentially a sham entity and therefore should not have paid (because BSJ should have done so) or in fact did not actually pay (either at all, or BSJ paid “*through*” BSLS<sup>4</sup>).
15. The Claimants have provided complete answers to all of these allegations: (i) BSLS incurred loss on the day it was held liable to pay by the Supreme Court (*i.e.*, 28 May 2014); (ii) BSLS paid after it had exhausted all possibilities of overturning the Supreme

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<sup>2</sup> Reply ¶ 61; CLA-0034, Sinclair, *Substance of Nationality Planning* 381.

<sup>3</sup> Reply ¶ 85.

<sup>4</sup> Reply ¶ 90.

Court judgment, which took nearly two years; and (iii) BSLs is not a sham entity, and made the payment because it was jointly and severally liable for the payment, and because its Board of Directors considered it in the best interests of the company to settle its liability. This is also consistent with the Bridgestone group of companies' (collectively, "**Bridgestone**") general approach to disputes in the Americas, which its US entities are generally responsible for.

Fifth Objection: the Claimants cannot claim for loss in excess of US \$5.4 million

16. The Respondent's objection that the Claimants cannot claim for loss in excess of US \$5.4 million purports to go to the issue of "*consent*" to arbitration, but in fact is an objection to the merits of the case, and thus cannot be decided under Article 10.20.5. The basis for the objection is said to be that the Claimants' have asserted that the Respondent should be held liable for breaches as a result of measures adopted by other States. But the Claimants have never asserted this. The only measure in question is Panama's Supreme Court decision of 28 May 2014, and the Claimants allege that such measure has caused and will continue to cause loss, including loss incurred in other countries. There is no reason why loss resulting from the Respondent's breach must be incurred in Panama. The question of the extent of such loss and whether it can be attributed to Panama is a matter of causation, and as such cannot properly form the basis for an objection under Article 10.20.5 and should be dismissed.

**III. THE NATURE OF THE ARTICLE 10.20.5 REGIME**

17. The Respondent in its Reply has now belatedly indicated its interpretation of Article 10.20.5. Specifically, it has only now identified which limb of Article 10.20.5 is being invoked, as well as its views for the first time as to whether the Claimants' factual allegations should be taken to be true and on burden of proof.
18. Regrettably, no such indication was given in its Objections, and the Respondent refused thereafter to cooperate by clarifying its position in correspondence.<sup>5</sup> Therefore in their Response the Claimants were obliged to address those matters in a vacuum, and hence necessarily at some length.<sup>6</sup>
19. However, from the Reply it appears that the procedural matters in dispute are relatively limited and that a great deal of ink has been spilt in vain.
20. The areas of procedural agreement and dispute can therefore be summarized as follows:
- (a) The Parties agree that there are two types of objection under Article 10.20.5.<sup>7</sup>
  - (b) The Parties agree that the first of these is an "*objection under paragraph 4*", namely: "*that, as a matter of law, a claim submitted is not a claim for which an*

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<sup>5</sup> **Exhibit C-0112** – Letter from Akin Gump to Arnold & Porter Kaye Scholer dated 5 June 2017; Response ¶¶ 56-58.

<sup>6</sup> Response ¶¶ 46-90.

<sup>7</sup> Response ¶ 59; Reply ¶ 4.

*award in favor of the claimant may be made under Article 10.26*". It is common ground that for such objections the Tribunal would be required under 10.20.4(c) to assume for those purposes that facts pleaded by the Claimants are true.<sup>8</sup> However, the Respondent has now told us that none of its Objections are brought under this first limb of Article 10.20.5, so all that may be put to one side.

- (c) Instead, the Respondent states that the Objections are all brought under the second limb of Article 10.20.5, namely: "*an objection that the dispute is not within the tribunal's competence*".<sup>9</sup>
- (d) There are three areas of disagreement.
  - i. First, the parties disagree as to whether the Claimants' pleaded allegations of fact are to be taken to be true for the purpose of objections under the second limb of Article 10.20.5, either as a matter of interpretation of the TPA or pursuant to the Tribunal's procedural discretion.
  - ii. Second, the parties disagree as to which party has the burden of proof for the purposes of an application under Article 10.20.5.
  - iii. Third, the parties disagree as to the scope of an objection on the Tribunal's competence. Although the Respondent purports to bring all of its objections on this basis (presumably both to avoid the Article 10.20.4(c) regime and in order to bring challenges to the merits at an early stage), the scope of the factual disputes involved in these objections make it clear that they are not all appropriate for determination under the second limb of Article 10.20.5.

#### Deemed Truthfulness

- 21. The Respondent says that there should be no "*presumption of the veracity or acceptance pro tem*"<sup>10</sup> of the Claimants' factual allegations, and that all questions of fact are to be determined by the Tribunal by reference to the evidence (which "*both parties are entitled to adduce*"<sup>11</sup>), in the same way as would be done at a full final evidential hearing.
- 22. The Claimants submit that Article 10.20.5 is to be construed such that any objection raised thereunder is to be subject to the deemed truthfulness provision at Article 10.20.4(c). This is because it would make no sense for an objection under the first limb of Article 10.20.5 to be subject to such deemed truthfulness and an objection under the second limb not to be so. Indeed, an objection under the first limb (*i.e.*, "*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*") is no more or less likely to involve disputes of fact than an objection under the second limb (*i.e.*, "*that the dispute is not within the tribunal's*

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<sup>8</sup> Response ¶ 71; Reply ¶ 11.

<sup>9</sup> Reply ¶ 4.

<sup>10</sup> Reply ¶ 14.

<sup>11</sup> Reply ¶ 14.

*competence*”). It is notable that the Respondent does not dispute this, but says that Article 10.20.5 must be construed as they contend, and the parties and the Tribunal are stuck with that regardless whether it makes sense. But that is not right. If Article 10.20.5 is to be construed as the Respondent contends, then the Tribunal nevertheless has discretion under Rule 34 of the ICSID Arbitration Rules to determine what approach to take to evidence and factual disputes for these purposes, including whether it is appropriate, in expedited summary proceedings such as these, to make final determinations on disputed facts.

23. At a minimum, it is submitted that where there is a dispute of fact that can only satisfactorily be resolved at a full trial or where by reason of the expedited nature of the current process there may not have been a proper opportunity for the Claimant to obtain and present all of the evidence that may be relevant, then the Tribunal should exercise its discretion for these purposes to take the Claimants’ allegations to be true.
24. Indeed, the extent of these disputes of fact strongly suggests that these go beyond objections to the Tribunal’s competence and stray into arguments on the merits of the case. For example, the Respondent’s fifth objection purports to go to issues of “*consent*”, but is in fact, as the Respondent accepts, an argument on causation – “*the issue here is not simply a matter of causation, but rather an important question of consent.*”<sup>12</sup> (emphasis added). The second objection likewise goes to issues of causation. To suggest that such merit arguments fall under the “competence” limb of Article 10.20.5 is to ignore the ordinary meaning of Articles 10.20.4 and 10.20.5 and, as the Respondent notes, “*distinctions make a difference. Different treaty provisions have different meanings; different objections are evaluated by reference to different evidentiary standards.*”<sup>13</sup> Attempting to bring arguments on the merits under the umbrella of “competence” as the Respondent does, is contrary to the customary rules of interpretation of public international law, as well as to the fundamental rights of due process of the parties to this arbitration.
25. It may assist the Tribunal to consider two practical examples. *First*, the Claimants in the Request and in their supplement to the Request comprising its letter to ICSID of 25 October 2016 made allegations of fact regarding BSLs’s business activities in the United States, and they exhibited evidence thereto in support (including incorporation documents and a licensing agreement).<sup>14</sup> The Respondent in its Objections disputes those allegations of fact, contends that BSLs does not have “*substantial business activities*” in the United States and has exhibited its own evidence. The Claimants have duly engaged with that dispute both in the Response and in this Rebuttal, and have exhibited such further evidence as could be obtained in the time available, and yet the Respondent has criticized the Claimants for failing to provide documents as of the relevant date (October 2016).<sup>15</sup> These criticisms also go to the Respondent’s allegation of abuse of process, because there

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<sup>12</sup> Reply ¶ 95.

<sup>13</sup> Reply ¶ 2.

<sup>14</sup> See Request ¶ 4; **Exhibit C-0103** – Letter from Akin Gump to ICSID dated 25 October 2016 at 4; **Exhibit C-0048** – FIRESTONE Trademark License.

<sup>15</sup> Reply n. 270, ¶ 71 & n. 301.

it is alleged that BSLS may have engaged in more substantial business activities recently in order to “bring itself into compliance with the TPA’s requirements”.<sup>16</sup> If the Claimants had more time, they would be able to provide further relevant evidence in support of its position. As the Claimants have explained, BSLS archives invoices, bank statements and other documentation shortly after the relevant actions have been taken by the company.<sup>17</sup> Some of this documentation from the relevant date (October 2016) has been recovered so far, but in the time available, the Claimants have not been able to recover all of it. Accordingly, were the Tribunal minded to consider the evidence (rather than concluding that the Claimants’ factual allegations are to be deemed to be true), and were it to conclude that the evidence before it is not sufficient to establish that BSLS does have “substantial business activities” in the United States, the Claimants submit that the Tribunal cannot thereby safely conclude that BSLS fails to satisfy that standard. It is notable that in *Pac Rim v El Salvador*, the respondent also invoked the denial of benefits provision, but did not do so at the preliminary objection stage under Article 10.20.5, although it had other objections under that provision. It did so under Article 41 of ICSID once the preliminary objections had been disposed of.<sup>18</sup>

26. The Respondent’s second objection is that the Claimants have not established that the present dispute arises directly out of BSAM’s investment in Panama. The Respondent argues that the Claimants have failed to establish an “immediate ‘cause and effect’ between the actions of the host State and the effects of such actions on the protected investments”.<sup>19</sup> The Claimants consider that the factual allegations they have made are sufficient for the purposes of this objection (as described at paragraphs 41 to 45 below and at paragraphs 131 to 136 of the Response) as the sort of factual inquiry as to causation that would be necessary to determine whether those allegations are made out is not appropriate for this expedited procedure. The Claimants recognise that they will need to address these factual disputes, but that should be done at a full hearing in light of the complete evidential record, which is not yet available. In these expedited proceedings, the Tribunal’s approach should be to assume that the Claimants have suffered such loss as set out at paragraphs 54 to 58 of the Request, and consider the Respondent’s objection in that light.

#### Burden of Proof

27. The Respondent contends that the standard of proof “is the same one that always applies in the context of jurisdictional objections, under which the **claimant** bears the burden of proof, there is no presumption of the veracity or acceptance pro tem of its factual allegations, both parties are entitled to adduce evidence.”<sup>20</sup> In support of this assertion, the Respondent cites certain authority but in each of these cases, the jurisdictional

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<sup>16</sup> Reply ¶ 85.

<sup>17</sup> Witness Statement of Thomas Kingsbury dated 21 July 2017 (“**Kingsbury 1**”), n. 14, and Witness Statement of Thomas Kingsbury dated 14 August 2017 (“**Kingsbury 2**”) ¶¶ 8-9. See also paragraphs 54 to 55.

<sup>18</sup> **CLA-0018** – *Pac Rim v El Salvador*, Jurisdictional Objections.

<sup>19</sup> Reply ¶ 49.

<sup>20</sup> Reply ¶ 14.

challenges arose as part of bifurcated proceedings – *i.e.*, full hearings on jurisdictional issues which were neither preliminary nor expedited.<sup>21</sup>

28. The Respondent has not cited, and the Claimants are not aware of any authority on the burden of proof in challenges to a tribunal’s competence brought on a preliminary, expedited basis as here - except for one, namely *Pac Rim Cayman LLC v El Salvador*. In that decision the Tribunal found: “*At all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.*”<sup>22</sup> As noted in the Response, CAFTA Articles 10.20.4 and 10.20.5 are in all material respects identical to those in the present TPA. Therefore the only authority relating to burden of proof in preliminary, expedited objections on the terms of those in the TPA is to the effect that the burden rests with the Respondent.
29. And that also accords with practical sense. Article 10.20.5 is a process by which a claim may be disposed of right at the outset of an arbitration, without a full process for exchange of evidence, without a full hearing and on an expedited basis. The party seeking such disposal should bear the burden of persuading the Tribunal that it is appropriate. In this case, the Respondent has not met its burden of proving that this dispute is not within the Tribunal’s competence.

#### **IV. BACKGROUND TO THE CLAIM**

30. The Respondent has included a section on the background and nature of the claims at paragraphs 20 to 27 of the Reply. This section contains no new evidence on the background to the claims and the Respondent instead purports to summarize the Request for Arbitration dated 7 October 2016 (the “**Request**”) and various exhibits submitted by the Claimants.<sup>23</sup> It is submitted that this is unlikely to assist the Tribunal in determining the present Objections. Nevertheless, for the record, the Claimants confirm that they do not accept that these paragraphs accurately summarize the background to the Claimants’ claims (which is set out at paragraphs 24 to 47 of the Request) and they respond to what is said as follows.
31. As Panama accepts,<sup>24</sup> the basis for the Claimants’ claims is the Panamanian Supreme Court decision of 28 May 2014. As the Claimants have previously explained, protecting and maintaining their intellectual property rights is a key part of the business of the Bridgestone group.<sup>25</sup> Accordingly, Bridgestone (through its relevant trademark owners, such as BSL for the FIRESTONE trademark in Panama) opposed the RIVERSTONE

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<sup>21</sup> **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); **RLA-0049**, *National Gas S.A.E. v Egypt*, ICSID Case No. ARB/11/7 (Award, 3 April 2014); **RLA-0050**, *SGS Société Général de Surveillance S.A. v Paraguay*, ICSID Case No. ARB/07/29 (Decision on Jurisdiction, 12 February 2010); and **RLA-0054**, *Emmis International Holding, B.V. v Hungary*, ICSID Case No. ARB/12/2 (Award, 16 April 2014).

<sup>22</sup> **CLA-0019** – *Pac Rim v El Salvador*, Preliminary Objections ¶ 111.

<sup>23</sup> Reply at n.75.

<sup>24</sup> Reply ¶ 27.

<sup>25</sup> Request ¶¶ 14-20; Response ¶ 27.

mark when its registration was published in the United States and in Panama.<sup>26</sup> Bridgestone has also opposed the RIVERSTONE mark in a number of other jurisdictions.<sup>27</sup> It is standard procedure for Bridgestone, as it is for many companies that value their intellectual property, to warn infringers and potential infringers against unlawful use of trademarks and to object to registration of such conflicting marks. Following the voluntary withdrawal of the RIVERSTONE trademark application in the United States, Bridgestone wrote to the lawyer who had submitted the RIVERSTONE application on behalf of L.V. International reserving its rights, should L.V. International attempt in the future to use the RIVERSTONE mark in the United States or elsewhere.<sup>28</sup> In the Panamanian litigation, it was the Claimants' position that this letter to L.V. International was not relevant to the Panamanian proceedings, since it was addressed to a party not involved in the Panamanian proceedings, and was improperly admitted into evidence because the relevant procedures had not been complied with.<sup>29</sup>

32. As the Claimants have explained, BSLS and BSJ were unsuccessful in the trademark opposition proceedings in Panama. BSLS and BSJ own the FIRESTONE and BRIDGESTONE trademarks around the world<sup>30</sup> and, as previously described, are proactive in defending them. However, that does not always mean taking every trademark opposition to the highest level of appeal. In Panama, there is an automatic right to appeal, thus encouraging appellants to register their appeal immediately after receiving an unfavorable decision. In practice, this means that appeals are often registered first, after which the appellants then consider the prospects of success of the appeal. In this case, BSLS and BSJ filed their appeal shortly after receiving the court decision, but having consulted with their Panamanian lawyers and considered the matter further, they made the final decision to withdraw the appeal because they determined that there was little chance that they would have prevailed on appeal. The Respondent appears to suggest that this action goes against the Claimants' stated robust approach to trademark protection,<sup>31</sup> but that is unfair and inaccurate. BSJ and BSLS robustly pursue legal proceedings where it is sensible to do so, but cannot be criticized for not appealing unfavorable decisions where there is little prospect of success. Of course, if BSLS and BSJ had known at the time that a year after the trademark opposition process Muresa Intertrade S.A. ("**Muresa**") would file its damage claim, they may very well have taken a different approach to the appeal.
33. Muresa did file its damages claim, which was unsuccessful at first instance and then on appeal, but surprisingly succeeded in full in the Panamanian Supreme Court. The Claimants described the action of the Supreme Court as a decision that BSJ and BSLS "*should pay millions of dollars in damages to a Panamanian company for doing no more*

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<sup>26</sup> Request ¶¶ 21, 24.

<sup>27</sup> These jurisdictions include Argentina, Brazil, China, Colombia, Costa Rica, Ecuador, Indonesia, the Philippines, South Africa, South Korea, and Venezuela.

<sup>28</sup> **Exhibit C-0013.**

<sup>29</sup> Request ¶ 39.

<sup>30</sup> BSLS is the owner of the FIRESTONE trademark in all countries outside the United States (see Request ¶ 6.

<sup>31</sup> Reply ¶ 22.

*than invoking – in good faith – Panama’s own trademark opposition procedure.”*<sup>32</sup> The Respondent submits that this is not how the Supreme Court characterized its actions, putting forward its interpretation of the Supreme Court decision and thereby attempting to engage in the merits of this dispute.<sup>33</sup> However, the Claimants submit once again that the nature of the Supreme Court decision and how it breached certain provisions of the TPA are not appropriate for consideration at this stage.

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

34. The Respondent asserts at paragraph 29 of the Reply that “[t]he 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 is neither the “thrust” nor the substance of the Claimants’ argument, which is articulated at paragraphs 110 to 130 of the Response. The Claimants contend that BSAM’s investment in Panama is its registered intellectual property rights, which are rights to sell and market tires under the Panamanian-registered BRIDGESTONE and FIRESTONE trademarks, and the right to pursue remedies against infringers of such marks under Panamanian law.
35. The Respondent fails to engage with the Claimants’ submissions on their investments. Instead, it starts from the premise that ““sales” are not “investments””<sup>34</sup> and then proceeds to give its “six simple reasons” why that is the case. But the Claimants do not contend that BSAM’s sales in Panama constitute an investment. Instead, the Claimants submit that BSAM’s investment in Panama is its assets, which are Panamanian-granted intellectual property rights. The sales data and information on sales and marketing activity were included in the Response in order to explain the commitment of capital, risks, and activities associated with BSAM’s investment, as explained at paragraph 117 of the Response – “*the intellectual property rights contained in the BRIDGESTONE Trademark License and the FIRESTONE Trademark License are BSAM’s core investments. BSAM and its wholly-owned subsidiaries carry out a wide variety of activities in support of these investments.*”
36. The Respondent’s “six simple reasons” address an assertion that is not made, that BSAM’s investment is cross-border sales. Accordingly, there is little of relevance to address.
- (a) **First**, the Respondent simply restates the point that ““sales” are not “investments””. As the Respondent also notes, the Claimants agree with this assertion.<sup>35</sup> However, such sales under the subject marks are only made possible, and indeed are legally protected by, the Claimants’ investment in Panamanian-registered trademark rights.

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<sup>32</sup> Request ¶ 39, 41; Reply ¶ 25.

<sup>33</sup> Reply ¶ 25.

<sup>34</sup> Reply ¶ 30.

<sup>35</sup> Reply ¶ 30; Response ¶101.

- (b) **Second**, the Respondent notes that “*rights, activities, commitments, expectations, and risks*” do not add up to an investment if they are simply the activities associated with cross-border sales.<sup>36</sup> But presumably the Respondent can accept that cross-border sales, while not themselves an investment, can be part of the activities of an investor.
- (c) **Third**, the Respondent considers that the witness evidence of Messrs Hidalgo and Calderon are “*inapposite*”<sup>37</sup> essentially because the Respondent does not consider that there is an investment. But this is a wholly circular argument. The witness evidence was included to provide further information as to the characteristics of BSAM’s investment, including as to commitment of capital and other resources, elements of risk, and duration of the investment. It is submitted that such evidence is indeed apposite.
- (d) **Fourth**, the Respondent sets out what it considers the Claimants must do to prove that there is a covered investment: “*identifying an “asset,” in the territory of the host State, “that an investor owns or controls, directly or indirectly,” at the time of the alleged treaty violation, “that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”*”<sup>38</sup> The Claimants agree with this, and this is precisely what they have done at paragraphs 110 to 130 of their Response. The Respondent simply ignores the Claimants’ submissions on this, because it has no answer. In summary, once again: BSAM’s assets are its intellectual property rights, which are Panamanian law rights owned by BSAM at the time of the alleged treaty violation, which have the characteristics of an investment as described more fully at paragraphs 110 to 130 of the Response.
- (e) **Fifth**, the Respondent notes that rights conferred by contract may constitute assets, and such contract must be “*analyzed on its own merits, separately from the asset to which it relates.*”<sup>39</sup> This point is noted, but since the Respondent does not apply its views on this matter to any particular submission of the Claimant, it is difficult to respond to this.
- (f) **Sixth**, the Respondent asserts that “*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.*”<sup>40</sup> That is not right. The Claimants have identified such assets, but it is convenient for the Respondent to ignore this. Those assets are described at paragraphs 111 to 114 of the Response, namely the trademark license granted by BSJ to Bridgestone/Firestone North American Tire, LLC on 1 December 2001 (the “**BRIDGESTONE Trademark License**”).

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<sup>36</sup> Reply ¶ 31.

<sup>37</sup> Reply ¶ 32.

<sup>38</sup> Reply ¶ 33.

<sup>39</sup> Reply ¶ 34.

<sup>40</sup> Reply ¶ 35.

**Agreement**”),<sup>41</sup> and the trademark license granted by BSLs to Bridgestone/Firestone Americas Holding, Inc. on 1 December 2001 (the “**FIRESTONE Trademark License Agreement**”).<sup>42</sup>

37. As to these assets, the Respondent argues that the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement are not “*asset[s] that an investor owns or controls, directly or indirectly*”.<sup>43</sup> Further, since the FIRESTONE Trademark License Agreement was “*created under, is governed by, and is performed under U.S. law*” the Respondent says it cannot be an “*asset*” in Panama.<sup>44</sup> But the Respondent offers no authority whatever for its bare assertions that BSAM’s Panamanian-registered intellectual property rights are not assets in Panama and are not owned or controlled by BSAM. The question of whether BSAM’s intellectual property rights under a Panamanian trademark registration conferred by the FIRESTONE Trademark License Agreement constitute assets in Panama owned by BSAM is a Panamanian law question. The Claimants explained this at paragraph 116 of their Response, referring to Article 121 of Law No. 35 1996. In the 7 days since receipt of the Reply, the Claimants have not had an opportunity to instruct a new independent expert witness on Panamanian law. However, BSLs’s Panamanian counsel, Ms. Audrey Williams of Benedetti & Benedetti, who was instructed in the Panamanian proceedings that underlie this arbitration, has provided a short witness statement on this point.<sup>45</sup> She opines at paragraphs 7-15 of her witness statement dated 14 August 2017 that under Panamanian law (i) the right to use a trademark granted by a license is an intellectual property right in that trademark; (ii) the license granting such intellectual property right need not be granted under Panamanian law in order to be effective; and (iii) such intellectual property right is an asset owned by the holder of that right.
38. As Ms. Williams also notes, a trademark license holder may sue under its agreement in the Panamanian courts and enforce its rights against third parties. In the United States, BSAM or one of its wholly-owned subsidiaries is typically the key claimant in trademark disputes against third parties under the BRIDGESTONE Trademark License Agreement, because although BSJ could also bring claims as the owner of the BRIDGESTONE trademark, Bridgestone’s approach is for all business activities and litigation in the United States and in other jurisdictions in the Americas to be dealt with by its US-incorporated entities. While this is not possible in trademark opposition proceedings in which the only issue is trademark ownership (such as the opposition action against RIVERSTONE in Panama), in disputes as to use of intellectual property in the Americas, BSAM or one of its wholly-owned subsidiaries is in fact the party that brings or defends claims on the basis of the BRIDGESTONE Trademark License Agreement. And to date, there has never been any challenge to jurisdiction on the basis of BSAM’s or its subsidiaries’ standing in such cases.

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<sup>41</sup> **Exhibit C-0052** – BRIDGESTONE Trademark License Agreement dated 1 December 2001

<sup>42</sup> **Exhibit C-0048** – FIRESTONE Trademark License Agreement dated 1 December 2001.

<sup>43</sup> Reply ¶ 37.

<sup>44</sup> Reply ¶ 37.

<sup>45</sup> Witness Statement of Audrey Williams dated 14 August 2017.

39. The Respondent submits that even if the right to use a Panamanian trademark is an asset in Panama, the Claimants cannot demonstrate that BSAM “*owned or controlled*” such right. The Respondent adds, “*The mere fact that Bridgestone Americas needed to license it from a third party demonstrates a lack of ownership and the terms of the agreement demonstrate a lack of control.*”<sup>46</sup> The Respondent appears to have misunderstood the nature of the asset. The asset is the license, because it is the license that confers on the licensee Panamanian intellectual property rights. To be clear, the Claimants’ position is that the BRIDGESTONE Trademark License Agreement and the FIRESTONE Trademark License Agreement are themselves the assets that are owned by BSAM, which constitute Panamanian intellectual property rights. These assets are the core of BSAM’s investment in Panama.
40. The Claimants respectfully submit that they have amply demonstrated that BSAM has a qualifying investment in Panama, and request that the Tribunal dismiss this Objection.

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

41. The Respondent’s Reply to the Claimants’ Response to this Objection consists merely of purporting to summarize the Claimants’ arguments, and then rejecting them without explaining why. The Respondent simply states, sweepingly, that “*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” and thereby fail to demonstrate the requisite link between the dispute and the alleged investment.*”<sup>47</sup>
42. The Claimants have shown “*immediate cause and effect*” between Panama’s action (the Supreme Court decision) and the effect of such action on BSAM’s investment in Panama. As explained at paragraph 39 above and in the Response,<sup>48</sup> BSAM’s investment in Panama is its intellectual property rights – the BRIDGESTONE Trademark License Agreement and the FIRESTONE Trademark License Agreement. Neither of the trademark owners (BSJ for BRIDGESTONE and BSLs for FIRESTONE) use the trademarks in Panama – only BSAM does that (though the BRIDGESTONE Trademark License Agreement and the FIRESTONE Trademark License Agreement). Therefore, although BSLs and BSJ suffer some loss as a result of the Supreme Court decision (in excess of BSLs’s loss of US \$5.4 million), this is limited to the royalties those entities would earn from use of their trademarks.<sup>49</sup> The majority of the loss is incurred by BSAM, because the value of its assets is directly contingent on the value of the trademarks to which those assets relate. If, as the Claimants contend (and the Respondent does not deny), 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. Or put another way, if it is accepted that BSLs (and BSJ)

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<sup>46</sup> Reply ¶ 37.

<sup>47</sup> Reply ¶ 49.

<sup>48</sup> Response ¶¶ 111-114.

<sup>49</sup> For the avoidance of doubt, BSJ’s loss is not claimed in these proceedings.

suffered a loss in royalties as a result of the Supreme Court decision, it is obvious that BSAM would also have suffered loss because the royalties are dependent on sales, manufacturing and use of the trademarks.

43. As to the evidence of this loss suffered as a consequence of the measure adopted by the Respondent, at this stage of the proceedings the Claimants are not required to provide all the evidence.<sup>50</sup> The factual position in this regard is dynamic, therefore this loss was necessarily described in this part of the Request in non-specific terms, to include the loss that the Claimants so far believe they have suffered.
44. In relation to the first basis for damages articulated at paragraph 55 of the Request, that the damages award had a “*direct and substantial impact*” on the ability of the “*US Bridgestone entities*” to grow their business in Panama, the Claimants clarify that the reference to US Bridgestone entities here was to BSLS, which has its own budget for investment in the FIRESTONE brand, but had a reduced ability to invest in its brand due to payment of the damages award.
45. The Claimants accordingly repeat the arguments made at paragraphs 131 to 136 of the Response and urge the Tribunal to dismiss this Objection.

#### **VII. PANAMA’S THIRD OBJECTION: PANAMA PURPORTS TO DENY THE BENEFITS OF THE TPA TO BSLS**

46. What the Reply says about the Respondent’s purported denial of benefits simply ignores evidence inconvenient to the Respondent’s position and comprises a series of unsubstantiated assertions. Before considering the substance of the Reply on this matter, it is first necessary to consider the threshold issue of whether the Respondent has discharged its obligation to provide “*cogent evidence*”<sup>51</sup> that the denial of benefits provision applies.
47. The Parties are agreed that the Respondent “*bear[s] the burden of proving its positive objections.*”<sup>52</sup> In the context of denial of benefits, the Respondent must put forward “*cogent evidence*” that BSLS does not have “*substantial business activities*” in the United States.<sup>53</sup> In a subsequent paragraph, the Respondent sets out the sorts of activities that previous tribunals have considered when determining whether the denial of benefits provision applies: “(1) *the existence of a physical office . . . (2) the number of employees . . . (3) whether “an address with phone and fax numbers are offered to third parties”;* (4) *whether the source of capital expended by the enterprise is actually a parent company;* (5) *the location of annual meetings of the board of directors and shareholders;* and (6) *the existence of records (i.e. minutes) of annual meetings.*”<sup>54</sup> Yet rather than provide any evidence on any of the foregoing points, the Respondent instead relies on a string of

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<sup>50</sup> CLA-0019, *Pac Rim v El Salvador*, Preliminary Objections ¶ 96.

<sup>51</sup> CLA-0034, Sinclair, *Substance of Nationality Planning* 381.

<sup>52</sup> Reply ¶ 61.

<sup>53</sup> Reply ¶ 61; CLA-0034, Sinclair, *Substance of Nationality Planning* 381.

<sup>54</sup> Reply ¶ 64.

unsupported assertions (such as: “*Bridgestone Licensing is a shell company with no discernible assets of its own*”<sup>55</sup>) and provides the results of its cursory review of various documents on BSJ’s and BSAM’s websites and on public databases. In so doing it does not offer any authority to support its contention that “*presence in Bridgestone Corporation’s publically-available corporate documents*” or “*presence in major public databases*” are activities that the Tribunal should take into account in assessing whether the benefits of the TPA should be denied to BSLS.<sup>56</sup> Accordingly, as explained at paragraph 153 of the Response, it is the Claimants’ submission that the Respondent has not discharged its burden to provide “*cogent evidence*” that the denial of benefits provision has been validly invoked. Therefore the Tribunal should dismiss this Objection outright.

48. Alternatively, if the Tribunal is minded to consider the merits of this Objection, the following discussion is offered.
49. As a preliminary point, the Respondent contends that there is a certain level of activity inherent in the word “*substantial*” which BSLS needs to have in order to defeat the denial of benefits objection. The Respondent defines “*substantial*” as, inter alia, “[*o*]f ample or considerable amount or size; sizeable”.<sup>57</sup> The Claimants do not argue with this definition, but would simply note that the Respondent has not pointed to any authority which would assist in clarifying what “*considerable amount or size*” means in relation to any one particular entity. Indeed, annual revenue of US \$5 million is certainly “*substantial*” when considered against other businesses in the United States. The US Census Bureau’s data from its last Economic Census in 2012 shows that the average value of sales, business, revenue, receipts or business of a US entity was US \$ 4,396,871.<sup>58</sup> At over US \$5 million a year, BSLS’s annual revenue is greater than average.<sup>59</sup>
50. Next, the Parties are agreed that in examining the activities of BSLS, the activities of the wider Bridgestone group of companies cannot be attributed to BSLS, as stated by the tribunal in *Pac Rim* “[*T*]his first condition under CAFTA Article 10.12.2 [*r*equiring “*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.”<sup>60</sup> The Respondent extrapolates from this that BSLS’s engagement of external contractors (not within the Bridgestone group), such as legal counsel, are not activities which can be

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<sup>55</sup> Objections ¶ 41.

<sup>56</sup> Reply ¶ 61.

<sup>57</sup> Reply n. 258; **R-0015**.

<sup>58</sup> **Exhibit C-0119 (ENG)** – Census Data. The figure cited was taken by totaling the entries in the column “*Value of sales, shipments, receipts, revenue, or business done*” and dividing it by the total of the entries in the column, “*Number of establishments*”.

<sup>59</sup> BSLS’s total income, as reported to the IRS in 2013, 2014, and 2015 was US \$7,833,299, US \$7,040,379, and US \$5,151,602, respectively. See **Exhibit C-0121 (ENG)** – Form 1120 (2013); **Exhibit C-122 (ENG)** – Form 1120 (2014); **Exhibit C-123 (ENG)** – Form 1120 (2015).

<sup>60</sup> **RLA-0017**, *Pac Rim v El Salvador (Decision on Jurisdiction)* ¶ 4.66.

attributed to BSLS.<sup>61</sup> This is a surprising contention, unsupported by any authority, when BSLS itself engages and pays for such services.<sup>62</sup>

51. On situs of incorporation and business address, the Claimants have provided BSLS's address which appears to be rejected by the Respondent on the basis that it is the same address as BSAM's headquarters; that there is no separate phone number or office suite; and that BSLS does not appear to lease any office space.<sup>63</sup> BSLS is in fact located at the same address as BSAM, but the Respondent does not explain why this is a problem. It is an office building of over 25,000 square feet in which a number of Bridgestone companies are located. An address and phone number "*are offered to third parties*"<sup>64</sup> as seen in its filings with the Delaware Franchise Tax Board and the Tennessee Secretary of State.<sup>65</sup> As Mr. Kingsbury explains at paragraph 3 of his second witness statement dated 14 August 2017 ("**Kingsbury 2**"), office space is not formally leased by BSLS, but Mr. Akiyama and Mr. Crothers work at this office and BSLS's hard copy documents are stored there and at the Bridgestone Operations Center in Antioch, Tennessee.
52. As to corporate governance, the Respondent considers that BSLS's Board of Directors "*adds more to the mystery*"<sup>66</sup> but it is not clear why. Mr. Kingsbury has explained that the Board of Directors hold conference calls rather than in-person meetings because two of the directors are located in Japan and one is in Nashville,<sup>67</sup> and that he and Mr. Crothers communicate regularly with members of the Board to discuss the day to day management of the business, intellectual property and tax issues.<sup>68</sup>
53. With regards to employees, several people are engaged to work part-time for BSLS. Mr. Kingsbury spends approximately 7-10% of his time on BSLS at the moment, although in previous years he has spent up to 20% of his time working for BSLS.<sup>69</sup> As Mr. Kingsbury explains, Mr. Akiyama spends approximately 30% of his time working for BSLS (notwithstanding the fact that his role at BSLS is not mentioned on his Facebook profile), and Mr. Crothers also spends some time working for BSLS, primarily on tax-related matters.
54. As to financial activities, the Respondent complains that the bank statement exhibited to Kingsbury 1 is from June 2017 and therefore is not relevant to the state of affairs at the time of the Request. BSLS's bank statement for the period 1 to 31 October 2016 has now

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<sup>61</sup> Reply ¶ 75.

<sup>62</sup> See, e.g., **Exhibit C-0085** – invoices from Pillsbury Winthrop Shaw Pittman LLP; **Exhibit C-0088** – Ladas & Parry LLP payment documentation.

<sup>63</sup> Reply ¶ 68.

<sup>64</sup> **RLA-0041**, *Alps Finance* ¶ 217.

<sup>65</sup> Kingsbury 1 ¶ 19 (citing to **Exhibit C-0095 (ENG)** – Delaware Annual Franchise Tax Report and **Exhibit C-0096 (ENG)** – Tennessee Corporation Annual Report Form).

<sup>66</sup> Reply ¶ 69.

<sup>67</sup> Kingsbury 1 ¶ 5 and Kingsbury 2 ¶ 4.

<sup>68</sup> Kingsbury 2 ¶ 4.

<sup>69</sup> Kingsbury 1 ¶¶ 9-10.

been retrieved from archives and is exhibited.<sup>70</sup> The Respondent also complains that only Form 8453-Cs were provided, rather than full tax returns (although Form 8453-C includes the full amount of the tax that was payable). Accordingly, the Claimants now provide Form 1120 for the years 2013 to 2015 (the 2016 Form 1120 has not yet been submitted). These clearly show not only BSLS's substantial tax liability in those years, but also its income, assets and liabilities.<sup>71</sup> They also provide some insight into the relationship between BSLS and BSJ: Form 5472 shows that BSJ provided a loan to BSLS in the amount of US \$3,100,000, which BSLS was in the process of repaying, with interest.<sup>72</sup> BSLS is not simply an entity through which BSJ passes funds.

55. On trademark management, the Respondent's objection to the evidence put forward by the Claimant on the substantial business activity in the form of monitoring, registering, maintaining and protecting the trademarks owned by BSLS, is that this work is outsourced by BSLS to external lawyers who are retained, instructed and paid by BSLS.<sup>73</sup> It is hard to see why this means that BSLS is not to be considered as engaging in these activities itself. BSLS could employ individuals to perform all of this work, and if it did so then presumably the Respondent would not object, but it is difficult to see why paying for an employee to do work is substantively different to paying for various external lawyers, all with different areas of expertise relevant to BSLS's requirements, to do the work. The fact remains that BSLS pays for this work to be done, in the most efficient and cost-effective way.<sup>74</sup>
56. Further, similar to BSLS's tax records, the Respondent also takes issue with the fact that invoices for the legal services agreements referenced above do not reflect the state of affairs as of October 2016. However, BSLS archives invoices, bank statements and other documentation shortly after the relevant actions have been taken by the company.<sup>75</sup> Some of this documentation from the relevant date (October 2016) has been recovered so far, but in the time available, the Claimants have not yet been able to recover all of it. This includes invoices for Emerson Thomson & Bennett and Pillsbury Winthrop Shaw Pittman LLP. In lieu of these invoices—which BSLS has requested from archives, we instead refer to internal records of invoices paid on these accounts since January 2015.<sup>76</sup>
57. In relation to BSLS's licensing agreements,<sup>77</sup> the Respondent complains that "*many are not revenue-generating.*"<sup>78</sup> It is true that some of the licenses do not directly generate

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<sup>70</sup> See **Exhibit C-0120 (ENG)** – JP Morgan Chase Bank Statement (October 2016).

<sup>71</sup> See **Exhibit C-0121 (ENG)** – Form 1120 (2013); **Exhibit C-122 (ENG)** – Form 1120 (2014); **Exhibit C-123 (ENG)** – Form 1120 (2015).

<sup>72</sup> **Exhibit C-123 (ENG)** – Form 1120 (2015). Form 5472 appears at page 43 of the PDF file.

<sup>73</sup> Reply ¶¶ 74-75.

<sup>74</sup> See, e.g., Kingsbury 1 ¶¶ 7, 9-13 (citing to **Exhibit C-0085** - Invoices from Pillsbury Winthrop Shaw Pittman LLP, **Exhibit C-0086** - Legal Representation Agreements for Mallory Smith, **Exhibit C-0087** – Ulmer Berne Agreement, and **Exhibit C-0088** – Ladas & Parry Payment Documentation);

<sup>75</sup> Kingsbury 1, n. 14 and Kingsbury 2 ¶¶ 8 - 9.

<sup>76</sup> **Exhibit C-0124 (ENG)** – Record of Invoices Paid to Emerson Thomson & Bennett since January 2015; **Exhibit C-0125 (ENG)** - Record of Invoices Paid to Pillsbury Winthrop Shaw Pittman LLP since January 2015.

<sup>77</sup> **Exhibit C-0089** – Licensing Agreements.

income for BSLS (although many do, resulting in BSLS's yearly income of above US \$5 million)<sup>79</sup> but those that do not directly generate income do nevertheless have material value for BSLS. For example, as explained at paragraph 156 of the Response and paragraph 14 of the first witness statement of Thomas Kingsbury dated 21 July 2017 ("**Kingsbury 1**"), Microsoft's agreement with BSLS is a placement agreement, whereby the FIRESTONE trademark is used in Microsoft's video games by way of 'product placement' advertising.<sup>80</sup>

58. The Respondent then states that "*the mere existence of licensing agreements.... does not alone constitute evidence of substantial business activities.*"<sup>81</sup> These licensing agreements generate revenue for BSLS of around US\$5 million a year. On any view, this is substantial business activity. The Respondent disagrees, and states, "*Just as a holding company may hold shares **and** be considered a shell company, so too can a licensing company be a party to licensing agreements **and** exist only on paper.*"<sup>82</sup> While the first part of this sentence is supported by reference to authority,<sup>83</sup> the second part is not, presumably because there is none. While a holding company may merely passively hold shares, it is difficult to be a passive holder of licensing agreements. These are not share certificates, but rather they are agreements which are negotiated, signed and renegotiated as necessary; they are discussed by BSLS's directors and officers; they generate income; and BSLS pays lawyers to draft these agreements. If disputes arise under these agreements, they are litigated in the United States, pursuant to the jurisdiction clauses therein.<sup>84</sup> The Respondent states that "*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.*"<sup>85</sup> This is untrue. The Response<sup>86</sup> and the accounts included in the tax returns make clear that BSLS generates revenue each year on the basis of its licenses.<sup>87</sup>
59. The Respondent goes on to express its "*surprise*" that BSLS's licensing agreements are put forward by the Claimants 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.*"<sup>88</sup> This is both confused and confusing.

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<sup>78</sup> Reply ¶ 76.

<sup>79</sup> See **Exhibit C-0121 (ENG)** – Form 1120 (2013); **Exhibit C-0122 (ENG)** – Form 1120 (2014); **Exhibit C-0123 (ENG)** – Form 1120 (2015).

<sup>80</sup> Kingsbury 1 ¶ 15 (citing to **Exhibit C-0090** – Microsoft Licensing Agreement).

<sup>81</sup> Reply ¶ 76.

<sup>82</sup> Reply ¶ 76.

<sup>83</sup> **RLA-0017** – *Pac Rim v El Salvador (Decision on Jurisdiction)* ¶¶ 4.69-4.73.

<sup>84</sup> See Kingsbury 1 ¶ 14.

<sup>85</sup> Reply, ¶ 68.

<sup>86</sup> Response ¶156.

<sup>87</sup> See **Exhibit C-0121 (ENG)** – Form 1120 (2013); **Exhibit C-0122 (ENG)** – Form 1120 (2014); **Exhibit C-0123 (ENG)** – Form 1120 (2015).

<sup>88</sup> Reply ¶ 78.

The FIRESTONE Trademark License Agreement is one of many license agreements held by BSLS. That agreement, like most agreements, gives rights to both parties. For the licensor (BSLS), it generates revenue in the United States.<sup>89</sup> For the licensee (BSAM), it provides intellectual property rights in various jurisdictions, including Panama. The other license agreements exhibited by the Claimants are included to demonstrate BSLS's (as the licensor) activities in the United States since that is where BSLS is situated. They are not included as evidence of any rights or activities of the licensees to those licenses.

60. The foregoing paragraphs, together with paragraphs 137 to 163 of the Response, Kingsbury 1 and Kingsbury 2 amply demonstrate that BSLS has “*substantial business activities*” in the United States, and, if the Tribunal is not minded to dismiss this Objection on the threshold basis that the Respondent has not put forward sufficient evidence even to make its objection, then it is respectfully submitted the Tribunal should dismiss this Objection on the basis of the evidence, while bearing in mind that the Claimants have not had a full opportunity to put forward all of the evidence that they would like to at this stage, due to the compressed timetable required by the Respondent's expedited process.

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

61. This section of the Reply begins: “*As Panama has explained, and the Claimants have not contested, the dispute in this case arose some time in 2015.*”<sup>90</sup> But both the Respondent and the Claimants have always been clear that the dispute in this case arose following the judgment of the Panamanian Supreme Court on 28 May 2014.<sup>91</sup>
62. The breach by Panama occurred on 28 May 2014, the date of the Supreme Court decision. The 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.<sup>92</sup> The parties disagree on when loss was incurred. The Respondent's position is thus a surprising one, unsupported by any authority: that the loss to BSLS was only incurred on the date on which it made payment. But that is not right. BSLS incurred loss on the day that it was ordered to make payment, and it occurred on the same day as the breach: 28 May 2014. On that date, the Supreme Court ordered that BSLS and BSJ pay damages to Muresa; accordingly, BSLS and BSJ incurred a liability on that date. In *Mobil Investments Canada v Canada*, the tribunal held that “*damages are incurred and compensation is due when there is a firm obligation to make a payment and there is a call for payment or expenditure, or when a payment or expenditure related to the implementation of the 2004 Guidelines has been made.*”<sup>93</sup> In that case, the question was whether compensation was due to the claimant based on money owed to the respondent, and so there was an issue as to which of the possibilities listed above applied (for example, whether there was a firm obligation to make payment or not). In this case, there

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<sup>89</sup> Exhibit C-0048, Section 2 – Compensation.

<sup>90</sup> Reply ¶ 82.

<sup>91</sup> Request ¶¶ 3, 54; Reply ¶ 26.

<sup>92</sup> TPA Article 10.16; Reply ¶ 83.

<sup>93</sup> CLA-0038 - *Mobil Investments Canada v. Canada* ¶ 469-470.

is no question as to when and whether there was a firm obligation to make payment because such obligation arose from an order contained within a Supreme Court judgment.

63. However, even if the Respondent is right that BSLS only incurred “*loss*” of the US\$5.4 million when payment of that sum had actually been made, the Claimants also claim loss in excess of that sum, which is loss consequential on the Supreme Court award. The Claimants began to incur such loss on the date of the Supreme Court judgment.
64. The Respondent appears to be suggesting that BSLS and BSJ did not need to pay the damages award and unnecessarily chose to do so, since it states, “*the judgment creditors took no formal action to enforce the judgment in their favor.*”<sup>94</sup> It is absurd to suggest that BSLS and BSJ should have put themselves in contempt of a court order and/or waited until enforcement action was underway before making payment and exposed itself to reputational harm and the risk of harm to its credit rating that would have arisen from having an unpaid judgment debt. As the Respondent notes, BSLS and BSJ “*spent more than two years seeking to avoid payment*”<sup>95</sup> – that is, BSLS and BSJ did everything they could to reverse the Supreme Court decision, and it was only after March 2016, when the Supreme Court dismissed the second and final appeal motion, that BSLS and BSJ considered that they had no further option and so made the payment, rather than leave a judgment debt unpaid.
65. The Respondent asserts that the “*delay*” in payment itself amounts to an abuse of process.<sup>96</sup> As best the Claimants can make out, this assertion is an attempt by the Respondent to argue that BSLS used the time between the Supreme Court decision and the date of payment to “*bring itself into compliance with the TPA’s requirements*”<sup>97</sup> The Respondent does not elaborate on what exactly BSLS is said to have been doing during these two years to “*bring itself into compliance*”, and the argument is hopeless.
  - (a) The Respondent accepts that BSLS is and always has been a US-incorporated company,<sup>98</sup> so it cannot be alleged that BSLS was changing its situs of incorporation during those two years in order to manipulate its nationality.
  - (b) The Respondent has repeatedly made the same (unfounded) assertion that BSLS has no business activities at all in the United States,<sup>99</sup> but the evidence the Claimants have submitted with its Response and Rebuttal show that this is plainly not the case.
  - (c) The Respondent has not alleged that BSLS tried to increase its activities during the two period in order to become a more “*substantial*” entity. Indeed, the

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<sup>94</sup> Reply ¶ 84.

<sup>95</sup> Reply ¶ 84.

<sup>96</sup> Reply ¶ 85.

<sup>97</sup> Reply ¶ 85.

<sup>98</sup> Reply ¶ 18.

<sup>99</sup> See, e.g., Objections ¶ 37.

Claimants' evidence is that BSLS has been doing exactly the same thing since at least 2001, and certainly since before 2015.<sup>100</sup>

66. Finally, the Respondent makes various assertions about the identity of the entity which made the US \$5.4 million payment.<sup>101</sup>
- (a) The Respondent complains that no evidence has been put forward of BSLS's payment of the damages award. A complete record of the evidence is not required at this stage of the dispute,<sup>102</sup> but nevertheless proof of payment is now exhibited through BSLS's bank statement from August 2016 showing a debit in the amount of US \$5,431,000 to Muresa.<sup>103</sup>
- (b) The suggestion is that even if BSLS made the payment, it was not really BSLS that paid, but in fact BSJ "through" BSLS.<sup>104</sup> This ignores corporate identity entirely. BSLS may be a wholly-owned subsidiary of BSJ, but it is a separate company with its own Board of Directors, each of whom owes fiduciary duties to BSLS. Even if BSLS had taken out a loan to make the payment, as the Respondent suggests,<sup>105</sup> that would be a legitimate decision for a company to make and certainly could not amount to an abuse of process.
67. In fact, BSLS's payment of the judgment debt is consistent with the approach taken by BSJ and its subsidiaries in disputes outside of Japan. As described at paragraph 38 above in relation to BSAM's disputes under the BRIDGESTONE Trademark Licensing Agreement, BSAM or one of its wholly-owned subsidiaries is the party to such disputes, rather than BSJ, which has delegated responsibility for business activities in the Americas to its US-based entities, including BSAM and BSLS.
68. As the Claimant submitted at paragraphs 164 to 171 of the Response, the bar for an allegation of abuse of process is high, and the Respondent does not even attempt to justify how it meets it. Whether or not the Respondent considers that BSJ "should" have made the payment of the damages award, the facts remain that (i) BSLS is and always has been a US-incorporated company; (ii) BSLS was held jointly and severally liable for the payment; and (iii) BSLS is an entity with assets and substantial business activities and therefore was able to make the payment. The Respondent's complaints about the timing of the payment are also ill-founded, as explained above. BSLS made the payment shortly after its final appeal motion in the Supreme Court was dismissed. A few months later, the Claimants commenced these proceedings. Accordingly, the Tribunal should dismiss this Objection.

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<sup>100</sup> See, e.g., Kingsbury 1 App'x A (providing information for seven licensing agreements that BSLS entered into before in 2015 or earlier).

<sup>101</sup> Reply ¶ 87.

<sup>102</sup> **CLA-0019**, *Pac Rim v El Salvador*, Preliminary Objections ¶ 96.

<sup>103</sup> **Exhibit C-0126 (ENG)** – J.P. Morgan Chase Bank Statement (August 2016).

<sup>104</sup> Reply ¶ 90.

<sup>105</sup> Reply n. 335.

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

69. The Respondent’s fifth objection is that the Claimants’ loss in excess of US \$5.4 million is based on the actions of other states, for which the Respondent cannot be held responsible.<sup>106</sup> The Respondent characterizes this objection as “jurisdictional”, but this objection is actually an argument on the merits of the case and as it goes to causation and loss.
70. The Respondent contends that the Claimants’ claim for damages in excess of the Supreme Court judgment debt relates not to measures taken by Panama, but rather measures taken by third parties.<sup>107</sup> On that footing, the Respondent contends that its fifth objection goes to “consent”, because the parties’ consent to arbitration extends only to claims that “*the respondent has (A) breached an obligation under Section A [of Chapter 10]*”, when such obligations apply only to “*measures adopted or maintained by a Party*”.
71. But the only measure in respect of which the Claimants bring claims is the Panamanian Supreme Court judgment of 28 May 2014, and the Respondent does not address the submissions made by the Claimants that their claims are not asserted on the basis of the conduct of other states but on the basis of Panama’s conduct, the effects of which may be felt throughout the Americas and around the world.<sup>108</sup> The Claimants accordingly repeat the arguments made at paragraphs 172 to 179 of the Response. The Respondent’s measure has caused and continues to cause loss to the Claimants in a number of ways, including loss incurred in other countries.<sup>109</sup> The Claimants accept that they will only be entitled to recover such loss to the extent that they can prove causation and loss – but there is no reason in principle that loss must only be sustained in Panama.<sup>110</sup> However, this is a matter that requires a full process of exchange of evidence and a full evidential hearing.
72. Therefore the fifth objection cannot properly be brought under Article 10.20.5, because it is a question of causation rather than an “*objection that the dispute is not within the tribunal’s competence*”.
73. Even if the fifth objection could properly be brought under Article 10.20.5 and even if it succeeded, that would not eliminate the Claimants’ claims for damages in excess of US \$5.4 million. As the Claimants stated at paragraph 175 of the Response, the Respondent only disputes two of the four stated grounds for claims set out at paragraphs 55 to 58 of the Request, and the Respondent acknowledges that it could not object to the remaining two grounds under the Article 10.20.5 procedure.<sup>111</sup> The Respondent considers that the Claimants’ use of the word “*inter-related*” in respect of the stated grounds means that if

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<sup>106</sup> Objections ¶ 48.

<sup>107</sup> Reply ¶ 95.

<sup>108</sup> Response ¶ 172.

<sup>109</sup> Request ¶¶ 55-58.

<sup>110</sup> **CLA-0031**, - *S.D. Myers v. Canada* ¶ 118.

<sup>111</sup> Reply ¶ 96.

its objection to two of the grounds succeeds that is sufficient to dispose of the entirety of the claim in excess of US \$5.4 million.<sup>112</sup> But “*inter-related*” does not mean “*combined*”, it means “*related to each other*”. The four grounds stated by the Claimants are related to each other because they all relate to the Claimants’ loss and to the extent of such loss, since (for example) similar court decisions in Panama or other jurisdictions would lead to further financial outlay by the Claimants, which in turn would mean that the Claimants’ ability to invest in their brands was limited, resulting in loss of profit. One ground may have an effect on another, but this does not mean that each of these bases are inextricably linked, such that if one falls away they all do, and that fact is obvious from simply reviewing the substance of the grounds themselves. If, for example, the Tribunal dismissed the Claimants’ claim that it had suffered loss as a result of the Supreme Court decision being followed in other countries, it would still need to consider whether the Claimants had suffered loss as a result of the impact on BSLS’s ability to grow its brand in Panama due to payment of the damages. A challenge to two arguments alone cannot amount to an “*objection that the dispute is not within the tribunal’s competence*” because even if the Tribunal accepted that these two arguments could not found a claim, the others remain. Accordingly, this objection should be dismissed.

**X. CONCLUSION**

74. For the reasons stated above and in their Response, the Objections should be dismissed in their entirety.

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<sup>112</sup> Reply ¶ 96.