



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama (ICSID Case No. ARB/16/34) – Decision on Expedited Objections – 13 December 2017

Case Report by: Aikaterini Strataridaki**, Editor Ignacio Torterola***

Summary: The Respondent filed Expedited Objections against the Claimants pursuant to the US-Panama Trade Promotion Agreement (TPA) alleging that the subject-matter of the Claimants' application cannot be examined by the Tribunal. The Tribunal dismissed all five objections raised by Panama, but upheld the second Objection regarding damage alleged to have been sustained outside Panama and upheld the fifth Objection as far as the second Claimant was concerned.

Main Issues: Qualifying investment; dispute arising directly out of an investment; benefits provided under the TPA; abuse of process, claims based on hypothetical actions of other States.

Tribunal: Lord Nicholas Phillips Baron of Worth Matravers (President), Mr. Horacio A. Grigera Naón (Arbitrator), Mr. J. Christopher Thomas, QC (Arbitrator)

Claimant's Counsel: Mr. Justin Williams (Akin Gump Strauss Hauer & Feld LLP, London) and Ms. Kimberly M. Myers, Ms. Katie Hyman, Mr. Johann Strauss (Akin Gump Strauss Hauer & Feld LLP, Washington D.C.)

Respondent's Counsel: Mr. Aristides Valdonedo, Ms. Geniva Escobar (Ministry of Economy and Finances, Republic of Panama) and Mr. Whitney Debevoise, Ms. Gaela Gehring Flores, Ms. Mallory Silberman, Ms. Amy Endicott, Ms. Katelyn Horne (Arnold & Porter Kaye Scholer LLP, Washington DC)

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Digest:

1. Relevant Facts

The Claimants are Bridgestone Licensing Services, Inc. (“**BSLS**”) and Bridgestone Americas, Inc. (“**BSAM**”) (together, the “**Claimants**”). The Respondent is the Republic of Panama (“**Panama**” or the “**Respondent**”) (¶¶ 2-3). The arbitration arose in the context of a worldwide battle between the Chinese-owned Luque Group, that marketed, or sought to market, tires under the mark “**RIVERSTONE**” and the Japanese-owned Bridgestone Group, that marketed tires under the marks “**BRIDGESTONE**” and “**FIRESTONE**” (¶48). Bridgestone Group is the world’s largest manufacturer of tire and rubber products with tires accounting for about 80% of Bridgestone’s sales worldwide (¶49). The Japanese parent company, Bridgestone Corporation (“**BSJ**”) is the owner of the **BRIDGESTONE** trademark, which has been registered by BSJ in Panama among many other countries. Tire sales are made only by subsidiary companies, indirectly wholly owned by BSJ, under licenses or sub-licenses granting the right to use the trademark, while outside tire companies are not granted franchises to use the trademark (¶50). The two Claimants (BSLS and BSAM), subsidiaries in the Bridgestone Group registered in the United States do not manufacture nor sell tires (¶51).

BSLS granted BSAM a license to use the **FIRESTONE** trademarks registered in South American countries, including Panama (the “**FIRESTONE Trademark License**”) (¶52). Bridgestone Costa Rica (“**BSCR**”) is a subsidiary that manufactures and sells tires bearing the **FIRESTONE** mark in Panama; there is however no record of the necessary sub-license to sell these tires in Panama (¶53).

BSJ granted to Bridgestone American Tire Operations, LLC (“**BATO**”) the right to use the **BRIDGESTONE** trademark in relation to all tire products within the United States and elsewhere (the “**BRIDGESTONE Trademark License**”). Through an agreement with BATO, BSCR is authorized to use the Costa Rican trademarks owned by BSJ to manufacture tire products in Costa Rica bearing the **BRIDGESTONE** trademark and to sell these worldwide since 2015 (¶54).

In 2002 L.V. International Inc., a member of the Luque Group, applied to register the **RIVERSTONE** trademark in the United States but withdrew its application after the opposition of a BSJ subsidiary (¶55). Subsequently, in Panama Muresa Intertrade S.A. (“**Muresa**”), member of the Luque Group applied for the registration of the Riverstone trademark. BSJ and BSLS initiated proceedings before the Panamanian courts opposing the registration of the **RIVERSTONE** trademark; L.V. International and Tire Group of Factories Ltd. (“**Tire Group**”) intervened and the opposition claim was denied (¶56). Muresa and Tire Group then commenced proceedings in the Panamanian Courts against BSJ and BSLS alleging that their commencement of the opposition proceedings had been wrongful and had caused them to cease sales of **RIVERSTONE** tires out of fear that their inventory would be seized if they were to lose the proceedings (¶57). Muresa’s claim was rejected at first instance, and by the Panamanian Court of Appeal. Subsequently, the First Civil Chamber of the Panamanian Supreme Court reversed the Court of Appeal’s judgment by holding BSJ and BSLS jointly and severally liable to Muresa and Tire Group in the sum of US\$ 5 million, together with attorney’s fees of US\$ 431,000 (¶58).

The Claimants contended that the two licenses granting BSAM and BATO the use of the **FIRESTONE** trademark and that of the **BRIDGESTONE** trademark, respectively, registered in Panama, were “intellectual property rights”, i.e. investments owned and controlled by BSAM that are protected under the United States-Panama Trade Promotion Agreement (TPA) (¶¶59-61). Hence they contend that the judgment of the Panamanian Supreme Court violated Panama’s obligations under the TPA, including, inter alia, granting to BSLS and BSAM a fair and equitable treatment, a treatment no less favorable than that accorded to its own investors and their investments as well as refraining from expropriating BSLS’s and BSAM’s investments without prompt, adequate and effective compensation, with the total compensation claimed exceeding US\$16 million (¶¶62-64).

2. Procedural History

2.1. Registration and Constitution of the Tribunal

The Claimants filed a Request for Arbitration on 7 October 2016, which was registered by ICSID on 28 October 2016 (¶¶6-9).

2.2. The First Session, the Parties' Written Submissions and Procedural Applications

On 30 May 2017, the Respondent filed Expedited Objections and on 6 June 2017, the Tribunal held a first session with the Parties by video-conference (¶¶13-14). On 11 July 2017, on behalf of the Tribunal, the President of the Tribunal issued Procedural Order No. 1 embodying the agreement of the Parties on procedural matters and the decision of the Tribunal on the disputed issues (¶16). Having previously consulted with the Parties, on 4 August 2017, the Tribunal informed the TPA “non-disputing Party”, i.e., the United States of America and invited the United States to indicate whether it intended to make any written or oral submission (¶18). On 21 August 2017, the Respondent submitted (i) an application for reconsideration of its procedural request that the session between the Parties and the full Tribunal to resolve the procedural evidentiary issues and their impact on the conduct of the Hearing be held before the first day of the Hearing and (ii) a request for a formal order from the full Tribunal identifying the specific questions that the Tribunal wanted the Parties to address before opening arguments at the Hearing (¶24). On 24 August 2017, the full Tribunal issued Procedural Order No. 2, addressing the Respondent's Request for Questions (¶25). On 24 August 2017, the United States confirmed its intent to file a written submission, and it informed the Tribunal that it was considering whether it would make an oral submission at the Hearing (¶26). On 29 August 2017, the full Tribunal issued Procedural Order No. 3, concerning the Respondent's Request for Reconsideration, and the organization of the Hearing (¶29). On 1 September 2017, each Party filed observations on the tentative Agenda for the Hearing (¶32). On 2 September 2017, the Tribunal approved the Parties' agreements of 1 September 2017, and indicated that it would resolve the limited areas of disagreement at the start of the Hearing (¶33).

2.3. The Oral Procedure

On 3 September 2017, having heard the Parties' oral arguments on the preliminary evidentiary issues, the full Tribunal issued **Procedural Order No. 4** and on 5 September 2017, the Tribunal communicated in writing to the Parties certain questions to be addressed during closing arguments at the Hearing (¶¶37-38).

2.4. The Post-Hearing Procedure

On 25 September 2017, the United States filed a supplementary written submission (¶41). On 20 November 2017, the Tribunal inquired whether the Parties would agree to application of the “extraordinary cause” provision of Article 10.20.5 of the TPA authorizing extension of the 180-day deadline for issuance of the present ruling, for an additional brief period no longer than 30 days. Both Parties confirmed their agreement on the same day (¶46).

3. Burden of Proof and the Evidentiary Standard

3.1. The Parties' Positions

3.1.1. The Claimants' Position

The Claimants contended that it was not for them to prove that the Tribunal did have jurisdiction but rather it was the Respondent that had the burden of proving that it did not, because the Respondent

had invoked that preliminary and expedited process (§68). The Claimants observed that Article 10.20.5 of the TPA includes no express reference to the applicable evidentiary standard in an expedited procedure, and contended that the standard set forth in Article 10.20.4(c) of the TPA applies to the objections in this expedited phase (§69). In the alternative, the Claimants argued that even if the Tribunal concluded that the objections were brought under the competence limb in Article 10.20.5 of the TPA and that the regime in Article 10.20.4(c) did not apply, as a matter of discretion pursuant to ICSID Arbitration Rule 34, the Tribunal should assume as true the Claimants' factual allegations in their Request for Arbitration and their 25 October 2016 letter, and resolve factual disputes in favor of the Claimants (§72). The Claimants did not accept that the Respondent's objections fell under the second limb of Article 10.20.5 of the TPA (i.e. objections to the Tribunal's competence) (§75).

In their Post-Hearing Brief, the Claimants recognized the ruling of Procedural Order No. 4 that the evidentiary rule in Article 10.20.4 (c) of the U.S.-Panama TPA has no application in the proceeding, and the Tribunal would address the issues on the basis of the evidence (§76). The Claimants argued that although the Tribunal was required to decide the objections, where the evidence was clearly incomplete [...] the Tribunal was not obliged to make final and definitive findings of fact and law or to decide those Objections that were intertwined with the merits", but rather, it was open to the Tribunal to dismiss the objection(s) on the basis that the Respondent had failed to discharge its burden of proof (§77). The Claimants also contended that if the objections were not properly brought under the competence limb of Article 10.20.5, they should fail on that basis; but, in light of the procedural agreement reached in connection with objection third, the Claimants only asked that the second, fourth and fifth objections be dismissed on the ground that they were not a matter of competence (§78). The Claimants submitted at the Hearing and at the Post-Hearing Brief that, given the requirement in the TPA that the proceedings on the merits be suspended during the expedited objections phase, in circumstances where a decision would necessarily involve aspects of the merits, then that would not conform with what the regime of the TPA requires (§79).

3.1.2 The Respondent's Position

The Respondent disagreed with the statement of the Claimants and contended that Article 10.20.5 of the TPA refers to three different types of objections and contended that the Respondent had only advanced objections to competence and disputed that the evidentiary standard is the same no matter the type of objection under Article 10.20.5 of the TPA (§§80-81). Concerning Article 10.20.4, the Respondent claimed it was "sensible" for expedited objections to competence to have broader scope than objections under that Article, because they were different (§82). The Respondent disputed that there is no difference in practice between objections under Article 10.20.4 and objections to competence because they are both questions of law and denied that Article 10.20.5 of the TPA indicates that the evidentiary standard applicable to Article 10.20.4 objections always applies in the context of an expedited Article 10.20.5 proceeding, regardless of the type of objection (§§84-85).

The Respondent submitted that the applicable standard was the same one that always applied 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, and both parties are entitled to adduce evidence (§87).

3.2. The U.S. Submissions

For the United States, the distinction drawn in Article 10.20.5 between an "objection under paragraph 4" and an objection to the tribunal's competence demonstrates that the requirements in Article 10.20.4 are not incorporated into the paragraph 5 mechanism when it is being used to address the latter (§92). The United States argued that the "normal rules of burden of proof" are not altered by Article 10.20.5 of the TPA; and thus, with respect to objections to competence, the claimant has the burden to prove the necessary and relevant facts to establish the tribunal's competence (§94).

3.3. The Tribunal's Analysis

The Tribunal concluded that the object and purpose of Article 10.20.4 is not in dispute and the Article is designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure, thereby saving time and costs (¶97). Beginning with Article 10.20.4, the Tribunal explained its ruling on Procedural Order No. 4 by using the example of *Pac Rim*, where an identically worded Article in the Dominican Republic-Central America-United States Free Trade Agreement of 2004 (“CAFTA”) was considered, together with Article 10.20.5 (¶105). The Tribunal endorsed the *Pac Rim* tribunal’s remarks that were addressed to an objection under CAFTA Article 10.20.4 that a claim “is not a claim for which an award in favour of the claimant may be made”, and to the expedition of such an objection pursuant to CAFTA Article 10.20.5. However, the Tribunal noted the analysis in *Renco*, that concluded that it did not necessarily follow that that reasoning could be applied to an expedited objection to the competence of a tribunal under Article 10.20.5, because the two regimes are different (¶106). The Tribunal found the reasoning of the tribunal in *Renco* applicable in the case notwithstanding the difference in the wording of Article 10.20.4 of the U.S.-Peru TPA, and concluded that the relevant arbitration rules that authorized the Tribunal to deal with preliminary objections as to the competence of the Tribunal were to be found in Article 41 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rule (¶109). The Tribunal noticed that rule 41(3) gave it an option to suspend the proceedings on the merits and Article 10.20.5 required it to do so (¶116).

The Tribunal noted that where an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, it must determine those issues on the evidence and give a final decision on jurisdiction; this applies to Objection No. 3 asserting a denial of benefits (¶118). Conversely, where an objection as to competence raises issues of fact that will fall for determination at the merits stage, it is usual for the tribunal to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct (¶119). However, the Tribunal reasoned that it is open to the Tribunal to make a determinative finding of fact and to base a final award or decision upon this at the expedited phase if it considers this appropriate; Panama’s Expedited Objections, apart from Objection No. 3, did not raise any significant issues of fact (¶121). Finally, the Tribunal decided to address the question of burden of proof in the context of the individual objections (¶123).

4. Objections Relating to BSAM

4.1. First Objection: BSAM Does Not Have a Qualifying Investment

4.1.1 The Parties’ Positions

4.1.1.2. The Respondent’s Position

The Respondent disputed that “tire sales (and profits from tire sales) in Panama, ‘revenue sharing and license rights in Panama’ and ‘intellectual property rights in Panama’” may have constituted BSAM’s “investment”. It could be concluded according to the TPA that the “revenue sharing rights” in the sales by a subsidiary were not “investments” and since Chapter 10 of the TPA applies only to investments located in Panama, which was not the case with respect to the three licenses submitted by the Claimants (¶125).

At the Hearing, the Respondent insisted that it does not matter whether the FIRESTONE and BRIDGESTONE Trademark Licenses qualify as an “intellectual property right”, since BSAM first needs to comply with the chapeau of the definition of “investment” in Article 10.29 of the TPA, and it is not able to do so as it has no “asset owned or controlled directly or indirectly” (¶128). In the Post-Hearing Brief, concerning the argument that BSAM’s investment consists of the “intellectual property rights” to use the Panamanian BRIDGESTONE and FIRESTONE trademarks resulting from the 2001 license agreements, the Respondent pointed out that the only document in the record that authorizes

BSCR to manufacture or sell products using a trademark licensed by BSAM or one of its subsidiaries is a January 2015 sublicense agreement (¶¶129-130).

4.1.1.3. The Claimants' Position

The Claimants, after referring to the *Salini* test and distinguishing its use from the case, submitted that the definition of investment in the TPA and Article 25(1) of the ICSID Convention must be understood together and given that the TPA contains a comprehensive and expansive definition of investment, it would make little sense if Article 25(1) of ICSID operated to limit the scope of the TPA (¶¶136-137). The Claimants contended that an interpretation of Article 25(1) of the ICSID Convention in accordance with its ordinary meaning leads to the conclusion that “rights to royalty payments” and “trademarks” fall under Article 25 and that BSAM’s intellectual property rights, revenue-sharing and license rights in Panama fall within the definition of ‘investment’ under Article 10.29 of the TPA (¶138).

The Claimants asserted that the licenses appended to their 25 October 2016 letter were only an “illustration” of BSAM’s intellectual property rights, and while arguing that no further evidence was required at that stage, they provided further information about BSAM’s intellectual property investment in Panama (¶142). Subsequently, the Claimants argued that BSAM’s assets in Panama have the characteristics of an investment (¶143). The Claimants argued that while cross-border sales were not themselves an investment, they could be part of the activities of an investor and in this case, sales were legally protected by the Claimants’ investment in Panamanian-registered trademark rights (¶145). The Claimants contended that their case was that the assets owned or controlled by BSAM are the intellectual property rights conferred by the FIRESTONE Trademark License Agreement and the BRIDGESTONE Trademark License Agreement and also argued that those license agreements and intellectual property rights were assets themselves (¶149). Finally, with regard to the issue whether the term “intellectual property rights” in the TPA refers only to the trademarks themselves or also encompasses the right to use the trademarks, the Claimants distinguished intellectual property from intellectual property rights and, criticized the Respondent’s contention that the only intellectual property right that could be an asset is the trademark (¶150).

4.1.1.4 The U.S. Submissions

Referring to the definition of “investment” in Article 10.29 of the TPA, the US observed that such definition encompasses “every asset” owned or controlled, directly or indirectly, by an investor that has the characteristics of an investment; and notes that the categories listed in the sub-paragraphs of the definition “are illustrative and non-exhaustive (¶151).

4.2 The Tribunal's Analysis

4.2.1. Introduction

The Tribunal declared that the burden of proof lied on BSAM to demonstrate that it owns or controls a qualifying investment (¶153). The Tribunal could not envisage an investment within the definition in Article 10.29 of the TPA that would not qualify as an investment under Article 25 of the ICSID Convention (¶158).

4.2.2. In What Circumstances Does a Trademark Qualify as an Investment?

The tribunal stated that a trademark is a type of intellectual property; according to BITs and modern FTAs, intellectual property or even specifically trademarks (e.g. *Arif* case, *Philip Morris* case) is commonly listed within the definition of the assets that are, or are capable of being, an investment (¶166).

The Tribunal defined a trademark as the features that a consumer expects to find in a product that bears the mark, and made reference to the goodwill that attaches to products that bear the trademark (¶167). At first, it seemed to the Tribunal that the mere registration of a trademark in a country manifestly does not amount to an investment in that country, however it stated that it is different when a trademark is exploited by the manufacture, promotion and sale of goods that bear the mark (¶¶171-172). The Tribunal concluded that a registered trademark will be a qualifying investment on the part of the owner, provided that the owner licenses the use of the trademark under a franchise agreement that grants to the licensee the right to exploit the trademark for its own benefit (¶¶173-174). Finally, the Tribunal considered that a registered trademark will constitute a qualifying investment provided that it is exploited by its owner by activities that, together with the trademark itself, have the normal characteristics of an investment (¶177).

4.2.3. In What Circumstances, if Any, Are the FIRESTONE Trademark License and the BRIDGESTONE Trademark License Capable of Qualifying as an Investment?

The Tribunal opined that “intellectual property rights” must be rights protected under the law of Panama, otherwise they can neither properly be described as “intellectual property **rights**”, nor as “assets” (¶178). The tribunal stated that the respective Claimant must own or control, directly or indirectly, the rights granted by each License and that the License must be exploited by the licensee in the same way as a trademark must be exploited if it is to qualify as an investment (¶¶179-180).

4.2.4. Was the FIRESTONE Trademark License an Investment in Panama Owned or Controlled by BSAM?

After assessing evidence provided, the Tribunal concludes that under the law of Panama a registered trademark constitutes intellectual property. The tribunal also stated that if the owner licenses the use of the trademark, the license constitutes an intellectual property right; the owner of the trademark has to use the trademark to keep it alive, but use by the licensee counts as use by the owner (¶195). Since BSAM owned the license granted by BSLS, and BSLS did not, in practice control the manner in which the license was exploited, the Tribunal found that the FIRESTONE Trademark License created rights that were protected under the law of Panama and was thus capable of constituting an investment under Article 10.29 of the TPA (¶¶197-198).

The Tribunal concluded that, it does not matter whether the document under which BSAM granted authority to BSCR to sell tires bearing the FIRESTONE trademark in Panama has been lost or whether it has never existed, since BSLS entered into the FIRESTONE Trademark License with BSAM in order to confer on the latter the right, either directly or through its subsidiaries, to sell tires bearing the FIRESTONE mark in countries where the mark was registered, including Panama. The Tribunal was satisfied that BSAM can properly be treated as having, itself and through BSCR, been exploiting its right to sell tires bearing the FIRESTONE trademark in Panama and hence, the FIRESTONE Trademark License was an investment in Panama owned by BSAM (¶210).

4.2.5. Was the BRIDGESTONE Trademark License an Investment in Panama Owned or Controlled by BSAM?

Although the issues raised by this question mirror those already discussed in relation to the FIRESTONE Trademark License, the difference lies in that the BRIDGESTONE Trademark License granted a license to use the BRIDGESTONE trademark not to BSAM but to BATO, a wholly owned subsidiary of BSAM, and unlike the FIRESTONE trademark, which is owned by BSLS outside of the United States, the BRIDGESTONE trademark is owned by BSJ, a Japanese entity that holds no rights under the TPA (¶211). The tribunal concluded that BSJ, as owner of the BRIDGESTONE trademark, passed to BSAM the right to use the trademark which was a right in respect of intellectual property, granted under license, and fell within the list of forms that an investment may take, as tabled in Article 10.29 of the TPA. Consequently, it was an investment in Panama owned by BSAM (¶217).

4.3. Second Objection: BSAM Does Not Have a Dispute “Arising Directly Out” of An Investment

4.3.1 The Parties’ Positions

4.3.2. The Respondent’s Position

The Respondent contended that even if BSAM had an investment, the dispute did not arise directly out of that investment as required by Article 25(1) of the ICSID Convention, because there was no “immediate ‘cause and effect’” or “causal link” between the host-State actions at issue and the effects of such actions on the alleged investment (¶223).

4.3.3. The Claimants’ Position

The Claimants argued, BSAM claimed because its intellectual property rights under the FIRESTONE and BRIDGESTONE Trademark Licenses had been “diluted” as a consequence of the Supreme Court decision, and the decision had made it much more costly for BSAM to maintain its investment in Panama and other countries in the region, not because it claimed for the penalty that the Supreme Court ordered BSJ and BSLS to pay, and BSLS paid (¶229).

The Claimants submitted that they had shown an immediate ‘cause and effect’ between the Panama’s actions and the effect on BSAM’s investment, even though in the preliminary expedited phase they could not be expected to provide detailed evidence of the loss that BSAM had suffered as a result (¶233).

Rejecting the contention that the dispute is necessarily indirect as BSAM’s investment is contingent on BSLS’s and BSJ’s trademarks in Panama, the Claimants contended that BSAM’s investment could only exist because of those trademarks, BSAM’s dispute arose directly out of its own investment as BSAM’s assets suffered loss because of the Supreme Court decision (¶235). Finally, the Claimants observed that the requirements in Article 25(1) of the ICSID Convention were not to be interpreted narrowly, and the measure did not have to be directed specifically towards BSAM’s investment (¶236).

4.3.4. The Tribunal’s Analysis

In the Tribunal’s view that dispute arose directly out of the investments of BSLS and BSAM, since the subject of the dispute is whether a decision of the Supreme Court to award damages against BSJ and BSLS, for taking action designed to protect their investments and those of BSAM, had caused damage to the value of those investments (¶246). The Tribunal also found that there was no “immediate cause- and-effect relationship” between the judgment given by the Supreme Court and the alleged effects outside Panama and, consequently, the claims made by BSAM in relation to losses caused outside Panama fell outside its jurisdiction (¶247).

5. Objections Relating to BSLS

5.1. Third Objection: BSLS Is Not Entitled to the Benefits of Chapter 10 of the TPA

5.1.2 The Parties’ Positions

5.1.2.1. The Respondent’s Position

Relying on Article 10.12.2 of the TPA (denial of benefits provision), the Respondent argued that BSLS was not entitled to bring any claim under Chapter 10 of the TPA, as Panama denied the benefits of Chapter 10 to it (¶249).

5.1.2.2. The Substantive Requirements

Panama contended that the three substantive requirements for the exercise of the denial of benefits provision in Article 10.12.2 of the TPA were met, because BSLS: (i) was an “enterprise” of the other TPA Party (the United States); (ii) was wholly owned by BSJ (a Japanese corporation); and (iii) did not have any “discernible operations” or “business activities” at all in the territory of the United States, let alone “substantial business activities” (¶251).

5.1.2.3 The Procedural Requirements

The Respondent further contended that, under Article 10.12.2 of the TPA, read in conjunction with Article 18.3.1 of the TPA, the only procedural requirement for the exercise of the denial of benefits is for the denying TPA Party to provide notice to the other TPA Party “to the maximum extent possible”, which had been done by letter to the United States dated 22 May 2017. The Respondent argued that under the TPA, the State is not required to give advance notice to the claimant, nor is it required to carry out the denial of benefits before the arbitration proceeding begins (¶257).

5.1.2.4 Burden and Standard of Proof

Panama argued that the burden of proving a fact rests with the party asserting that fact, however, in that specific situation, as Panama was required to prove a negative objection (i.e. that BSLS has no substantial business activities), the burden shifted back to the Claimants once the Respondent submitted “*cogent evidence*” that the denial of benefits provision applies, as it did (¶260).

5.2. The Claimants’ Position

The Claimants argued that the objection should be dismissed because BSLS had shown that it had “substantial business activities” in the United States (¶262).

5.2.1 The Notice Requirement

The Claimants argued that, to exercise the provision in Article 10.12 of the TPA, Panama had been required to provide adequate and timely notice to the United States of its intent to deny benefits to BSLS, as required by Article 18.3 of the TPA, and to engage in consultations with the United States as required by Article 20.4 of the TPA, both of which it failed to do (¶263).

5.2.2. The Evidentiary Standard

The Claimants submitted that the Respondent was not entitled to introduce new facts for determination by the Tribunal and the Tribunal was not permitted to consider the facts in dispute asserted by the Respondent pursuant to the regime in Article 10.20.5 of the TPA (¶266).

In the Rejoinder on Expedited Objections, inter alia, the Claimants invited the Tribunal to dismiss the objection “outright” on the basis that the Respondent had not put forward “*cogent evidence*” that the denial of benefits provision applied (¶267).

5.2.3. Substantial Business Activities

The Claimants submitted that the fact that BSLS was an entity incorporated in Delaware and wholly-owned by BSJ, a Japanese incorporated entity, it was not sufficient to allow the denial of benefits, as Panama could not prove that BSLS lacked substantial business activities in the United States (¶270). Further, the Claimants argued that the Respondent had not contributed to clarifying with authority what “substantial” means in relation to an entity and hence, they considered that annual revenue

exceeding US\$ 5 million (as BSLS's) was substantial (¶272).

Finally, the Claimants, running back to the history of the brand, contended that BSLS had a “real and continuous link with the country where it was established”, a test mentioned in the U.S. Second Submission (¶281).

5.2.3. The U.S. Submissions

The United States observed that Article 10.12.2 of the TPA allows the TPA Parties to deny the benefits of Chapter 10 under certain circumstances specified in that provision (¶282).

Furthermore, referring to Article 20.4.1 of the TPA, the United States noted that when a TPA Party seeks to deny the benefits of Chapter 10, it may but it is not required to request consultations, which are discretionary (¶285).

5.2.4. The Tribunal's Analysis

The Tribunal noted on two initial issues arose: firstly, that it is satisfied that it is an objection that goes to competence, because one of the benefits of Chapter 10 is the right to arbitrate. That right is subject to the condition subsequent that it is not removed by a valid denial of benefits. Secondly, the Tribunal considered that the overall burden was on Panama as the Party asserting an entitlement to deny benefits, but as Panama had to prove a negative in relation to matters that fall essentially within the knowledge of the Claimants, the evidential burden was shifted. Subsequently, the Tribunal noted that the burden of proof was immaterial as there was ample material to enable the Tribunal to reach its decision (¶¶288-289).

The Tribunal agreed with the U.S. Submission that the TPA's benefits should not be denied to firms that have a real and continuous link with the country where they are established. It concluded that BSLS carried out substantial business activities in the United States, as they had been a significant part of the business activities of the American Firestone Group, with its headquarters in the United States, before it was taken over by BSJ and continued to be after the takeover (¶302).

5.3. Fourth Objection: BSLS's Claims Amount to an Abuse of Process

5.3.1 The Parties' Positions

5.3.1.1. The Respondent's Position

The Respondent argued that the Tribunal lacked jurisdiction over BSLS's claims because BSLS had committed an abuse of process by attempting to manipulate the nationality of a claim after the dispute had already materialized, in order to create a jurisdictional basis when none existed. The alleged abuse had occurred when BSLS paid the damages awarded by the Supreme Court – which the Claimants argued had occurred on 19 August 2016 – after the present dispute had already arisen (¶303).

Relying on Article 10.16.1(a) of the TPA, Panama disputed the allegation that the relevant date to assert BSLS's eligibility to bring a claim was the date of the treaty breach, and not that of the loss and it does not accept that the date of the loss was the date on which the Supreme Court ordered BSLS to pay damages (¶¶307-308).

In fact, for the Respondent, the timing of the payment alone would be sufficient to demonstrate the abuse. Panama submitted that under the objective standard, the Tribunal did not need to consider the reason why BSLS (and not BSJ) chose to pay, however, if that was to be considered, the “only plausible explanation” was that BSLS was trying to bring itself into compliance with the TPA (¶309).

The Respondent also questioned the allegation that BSLS had paid with its own funds (¶313).

Finally, referring to the Claimants' assertion that the significant point on timing was that the payment had been made after all local remedies were exhausted, the Respondent submitted that this did not absolve the impropriety (¶315).

5.3.1.2. The Claimants' Position

The Claimants submitted that the objection should be dismissed for either of the following alternative reasons: (i) it was not a matter of competence; and (ii) if the objection was a matter of competence and the Tribunal had sufficient evidence before it to decide it safely, then it should conclude that the Respondent had failed to articulate the abuse (¶316).

The Claimants explained that BSLS had paid after it exhausted all possibilities to overturn the Supreme Court judgment and had no other option; and it made that payment because it was jointly and severally liable, and because its board considered that settling the liability was in the best interest of the company. The argument that BSLS had used the time between the Supreme Court decision and the payment to bring itself into compliance with the TPA jurisdictional requirements was "hopeless" given that: (i) BSLS had always been a U.S. incorporated company; (ii) it did not lack substantial business activities; and (iii) there was no allegation that within this time BSLS had tried to increase activities to make them more "substantial" (¶¶320-321).

In response to Panama's allegations concerning the identity of the entity that made the payment, the Claimants: (i) provided additional proof of BSLS's payment in the form of a bank statement from BSLS and; (ii) argued that the suggestion that it had not been BSLS who paid, but rather BSJ "through" BSLS, ignored corporate identity (¶322).

5.4. The Tribunal's Analysis

The Tribunal did not contest that BSLS's claim for an alleged loss caused by alleged breaches of obligation under the TPA by Panama fell within the jurisdiction of the Tribunal (¶323).

The Tribunal considered that the alleged abuse of process was that, by deliberately discharging the entirety of the judgment debt against itself and BSJ, its parent company, BSLS had made that sum part of its claim under the TPA to the benefit of its parent, which indisputably lacked standing to bring a claim under the TPA. It also considered that BSLS's motive for paying the entirety of the judgment debt might have been to achieve that end. However, it concluded that whether it was or not, the consequences of BSLS's payment was an issue that would fall to be resolved if and when quantum would be considered. It did not follow that the whole of the payment would be recoverable as loss sustained by BSLS (¶329).

Finally, the Tribunal noted that there was nothing improper or colorable in BSLS discharging the whole of the judgment debt for which it had been jointly liable when it did (¶330).

The Tribunal dismissed this objection, since there was no basis upon which it would have been proper to strike out the claim in question as an abuse of process (¶331).

6. Objections Relating to both BSAM and BSLS

6.1. Fifth Objection: The Tribunal Cannot Entertain Claims Based on Hypothetical Actions of Other States

6.1.1. The Parties' Positions

6.1.1.2. *The Respondent's Position*

The Respondent contended that there was no jurisdictional basis for the claim for over US\$10 million dollars (in excess of the US\$ 5,431,000 million ordered by the Supreme Court judgment) for the 'loss' that supposedly had been and would be incurred as a result of the Supreme Court decision (¶332). In particular, concerning Claimants' contentions that (i) the loss arose out of the fact that the Supreme Court decision might have been followed by other countries in Latin America, or (ii) might lead to more trademark applications similar and confusingly similar to the Bridgestone mark in Panama and other Latin American countries, Panama referred to Articles 10.17, 10.1 and 10.16 of the TPA and argued that the only claims that the Tribunal has jurisdiction to entertain are claims that Panama allegedly has breached the TPA, though 'measures' that **Panama** 'has adopted or maintained, and therefore, the Tribunal "cannot entertain claims based on the hypothetical actions of other States (¶333). For Panama, the issue is not a matter of causation, but rather of consent, because consent is limited to claims for breaches of Articles 10.1 to Article 10.14 of the TPA (¶335).

6.2. *The Claimants' Position*

According to Claimants' submission, the objection should be dismissed for either of the following alternative reasons: (i) it was not a matter of competence; (ii) it was intertwined with the merits, and all the necessary evidence was not before the Tribunal such that the Respondent had not discharged its burden of proof; or (iii) if the objection was a matter of competence and the Tribunal had sufficient evidence before it to decide it safely, then it should have concluded that there was nothing for the Tribunal to decide as there was no claim for actions by other States (¶340).

The Claimants observed that there was nothing for the Tribunal to decide at this point", since the Claimants did not claim for measures adopted by other States, and agreed that the Tribunal did not have jurisdiction to hear those claims (¶343). Lastly, they submitted that because the objection about "hypothetical future actions of private actors had not been raised within the 45-day time limit prescribed in Article 10.20.5 of the TPA, the Claimants argue, it was out of time and should be dismissed (¶344).

6.3. *The Tribunal's Analysis*

Dealing with the last point first, the Tribunal agreed that it was not open to Panama to pursue, outside the 45-day period, the general objection that the Claimants could not advance a claim founded on the hypothetical future actions of private actors (¶345).

The Tribunal, distinguished the *Monetary Gold* case from the one in question, since a finding as to the likely conduct of Latin American countries other than Panama would not purport to affect their legal rights or amount to an assertion of jurisdiction over them. In the opinion of the Tribunal, a dispute as to whether States other than Panama were likely to copy Panama's alleged abuse of the Claimants' intellectual property rights to the detriment of the Claimants was both speculative and remote from each of the Claimants' investments. According to the Tribunal's view, that part of the overall dispute could not possibly be said to "arise directly out of" either Claimant's investment, thus concerning BSAM, this Objection was upheld not upon the grounds relied on in support of it but upon the grounds advanced in support of Objection No. 2 (¶¶353-354). Since objection No. 2 was only made against BSAM, the Tribunal dismissed this objection (No. 5) against the BSLS (¶355).

7. **Costs**

The Tribunal considered that it would be better placed to resolve issues of costs at the end of the arbitration and would therefore make no order as to costs at this stage (¶361).

8. Decision

For the aforementioned reasons, the Tribunal handed down a decision dismissing Objection No. 1, Objection No. 2 - only in respect of damage alleged to have been sustained within Panama but allowed it in respect of damage alleged to have been sustained outside Panama, Objection No. 3, and Objection No. 4. Further, Objection No. 5 is allowed as against BSAM on the grounds advanced by Panama in support of Objection No. 2 but dismissed as against BSLS. Finally, as stated above, the Tribunal reserved all questions of costs.