IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-PANAMA TRADE PROMOTION AGREEMENT AND THE ICSID CONVENTION

BRIDGESTONE LICENSING SERVICES, INC., AND
BRIDGESTONE AMERICAS, INC.

Claimants

-and-

THE REPUBLIC OF PANAMA,

Respondent.

ICSID CASE NO. ARB/16/34

SUBMISSION OF THE UNITED STATES OF AMERICA

---

1. The United States of America hereby makes this submission pursuant to Article 10.20.2 of the United States-Panama Trade Promotion Agreement ("U.S.-Panama TPA" or "Agreement"), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretations apply to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Expedited Review Mechanisms in U.S. International Investment Agreements

2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven concluded that it lacked authority to rule on the United States' preliminary objection that, even accepting all of the claimant's allegations of fact, the claims should be dismissed for "lack of legal merit."[1] The tribunal ultimately dismissed all of claimant's claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.[2]

3. In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.

---

[1] *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Partial Award ¶¶ 109, 126 (Aug. 7, 2002) (quoting U.S. submission).

[2] *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part VI (Aug. 3, 2005) (deciding that the tribunal lacked jurisdiction over any of the claims and, even if the tribunal had jurisdiction, the claims would have failed on the merits).

Articles 10.20.4 and 10.20.5 of the U.S.-Panama TPA

4. The U.S.-Panama TPA contains such expedited review mechanisms in Articles 10.20.4 and 10.20.5, which provide, in relevant part:

> 4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.
>
> > (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).
> >
> > …
> >
> > (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
> >
> > ….
>
> 5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

5. Paragraphs 4 and 5 establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence. Additionally, the provisions leave in place any mechanism that may be provided by the relevant arbitral rules to address other objections as a preliminary question. As such, the Agreement, like other agreements incorporating this

language, "draws a clear distinction between three different categories of procedures for dealing with preliminary objections."[3]

6. Paragraph 4 authorizes a respondent to make "any objection" that, "as a matter of law," a claim submitted is not one for which the tribunal may issue an award in favor of the claimant under Article 10.26. Paragraph 4 clarifies that its provisions operate "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." Paragraph 4 thus provides a further ground for dismissal, in addition to "other objections," including those with respect to a tribunal's competence.

7. Subparagraph (a) requires that a respondent submit any such objection "as soon as possible after the tribunal is constituted," and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 5, which authorize a respondent, "within 45 days after the tribunal is constituted," to make an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.

8. Subparagraph (c) states that, for any objection under paragraph 4, a tribunal "shall assume to be true" the factual allegations supporting a claimant's claims. The tribunal "may also consider any relevant facts not in dispute." This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.

9. Paragraph 5 provides an expedited procedure for deciding preliminary objections, whether permitted by paragraph 4 or the applicable arbitral rules. If the respondent makes a request within 45 days of the date of the tribunal's constitution, "the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence." Paragraph 5 thus modifies the applicable arbitration rules by *requiring* a tribunal to decide on an expedited basis any paragraph 4 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal's constitution.[4]

10. As noted, paragraph 5 of Article 10.20 of the Agreement provides that the tribunal shall decide on an expedited basis "an objection under paragraph 4 *and any objection that the dispute is not within the tribunal's competence*" (emphasis supplied), emphasizing that objections asserted under paragraph 4 are distinct from objections to the tribunal's competence. As correctly noted by the tribunal in *The Renco Group*, when discussing this language in paragraph 5 of the Trade Promotion Agreement between the United States and Peru, "this sentence provides additional and cogent confirmation that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections to competence, and that the latter

[3] *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decisions as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, ¶ 191 (Dec. 18, 2014) (discussing these mechanisms in the United States-Peru Trade Promotion Agreement). In that case the United States explained in detail how the two mechanisms provided for in paragraphs 4 and 5 function differently. Submission of the United States ¶¶ 4-12 (Sept. 10, 2014).

[4] Article 10.16.5 provides that the relevant arbitral rules shall govern the arbitration "except to the extent modified by this Agreement."

do not fall within the scope of the Article 10.20.4 objections."[5] That tribunal further stated that "the underlying scheme established by the provisions and the plain language found in the text make it clear that competence objections were not intended to come within the scope of the Article 10.20.4 objections …."[6]

11. The distinction drawn in paragraph 5 between an "objection under paragraph 4" and an objection as to the tribunal's competence demonstrates that the requirements in paragraph 4 are not incorporated into the paragraph 5 mechanism when it is being used to address the latter. As such, when a respondent invokes paragraph 5 to address objections to competence, there is no requirement that a tribunal "assume to be true claimant's factual allegations." To the contrary, there is nothing in paragraph 5 that removes a tribunal's authority to hear evidence and resolve disputed facts. Moreover, paragraph 5 provides that a tribunal "*shall* . . . issue a decision or award" on the preliminary objections. Paragraph 5 provides for extensions of time as may be necessary to accommodate this result.

12. In this connection, nothing in the text of paragraph 5 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim.[7] It is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[8] A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.[9]

Articles 10.29 (Definition of "Investment")

13. Article 10.29 states, in pertinent part, that "investment"

> means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the

---

[5] *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decisions as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, ¶ 198 (Dec. 18, 2014).

[6] *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decisions as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, ¶ 192 (Dec. 18, 2014).

[7] *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility ¶ 150 (June 14, 2013) ("Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction[.]").

[8] *See, e.g., Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 61*; Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Jurisdiction (June 1, 2012) ¶ 2.8 (finding "that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that 'prima facie' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case.").

[9] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award ¶ 155 (Aug. 2, 2006) ("If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence, then it has no alternative, but to deal with them ….").

> commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

14. As the chapeau makes clear, the definition of "investment" encompasses "every asset" that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The "[f]orms that an investment may take include" the categories listed in the subparagraphs, which are illustrative and non-exhaustive. In determining whether an asset falls within the definition, the analysis should be guided by whether it 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.

15. Subparagraph (e) of the definition lists, among forms that an investment may take, "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts." Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e).

16. The definition of "investment" explicitly excludes claims to payment that arise from commercial contracts for the sale of goods or services and that are not immediately due.[10]

Article 10.12.2 (Denial of Benefits)

17. Chapter Ten of the Agreement provides that a Party shall provide protection for "investors"[11] of the other Party, which are defined to include a broad class of "enterprise[s]," including those that are "constituted or organized under the law of a Party."[12] At the same time, however, Article 10.12.2 of the Agreement provides that a Party "may deny the benefits" of Chapter Ten to an enterprise of the other Party that has "no substantial business activities in the territory" of the other Party and is owned or controlled by a person from the denying Party or from a non-Party:

> Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.

Thus Parties to the Agreement may deny Chapter Ten benefits under these specified circumstances.

18. Article 10.12.2 imposes two substantive requirements that must be met before the provision can be invoked by a Party to the Agreement; specifically, an enterprise must (1) have

[10] Art. 10.29(c), n.8. The ordinary meaning of the text "[f]or purposes of this Agreement" demonstrates that the principle articulated therein applies to the entire definition found in Article 10.29 (and, indeed, the entire U.S.-Panama TPA).

[11] *See* "investor of Party" in Article 10.29.

[12] *See* "enterprise of a Party" in Article 10.29.

no substantial business activities in the territory of the non-denying Party, and (2) be owned or controlled by persons of a non-Party or of the denying Party. Article 10.12.2 does not impose any requirement, however, with respect to when a respondent may invoke the denial of benefits provision.[13] Neither this Article nor any other provision of the Agreement precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional objection (expedited or otherwise) after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement.[14]

19. Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party. It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territory of the other Party that attempt to make, are making, or have made investments in the territory of the respondent.[15] This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in the other Party. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring the Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision.

20. Similarly, there is no basis in the plain language of the Agreement to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration. Article 10.16.2, for example, requires that a notice of intent include a claimant's "name and address," but Article 10.16.2 does not require a claimant to disclose the extent of the claimant's business activities in the territory of the other Party to the Agreement or the names of any persons or entities that own or control the claimant enterprise.

---

[13] Although Article 10.12.2 does not contain a temporal requirement, other authorities, such as the governing arbitral rules or a procedural order, may be relevant to the timing of a "denial of benefits" objection in a Chapter Ten arbitration. For example, ICSID Arbitration Rule 41(1) states that "[a]ny objection that the dispute . . . is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, . . . unless the facts on which the objection is based are unknown to the party at that time."

[14] Under Article 10.12.2, "[a] party may deny the benefits of this Chapter …." As such, a Party may invoke Article 10.12.2 to deny the benefits of both the substantive provisions and the dispute settlement provisions of Chapter Ten.

[15] *See* Meg N. Kinnear et al., Article 1113 – *Denial of Benefits, in* INVESTMENT DISPUTES UNDER NAFTA, AN ANNOTATED GUIDE TO CHAPTER 11 1113-16 (2006) (discussing the denial of benefits provision under NAFTA Article 1113.2, which has language similar to the denial of benefits provision under Article 10.12.2 of the Agreement.

> Given that a Party cannot know which enterprises in another Party may some day attempt to file a NAFTA Chapter 11 claim, and given the rapidity with which ownership and control of a corporation may change, [the prior notification requirement under NAFTA Article 1113.2] *cannot mean that a Party needs to notify the other Party before a claim is submitted to arbitration* under Chapter 11.

Id. (emphasis added).

21. In sum, for the above reasons, Article 10.12.2 does not impose any requirement with respect to when a respondent may invoke the denial of benefits provision.

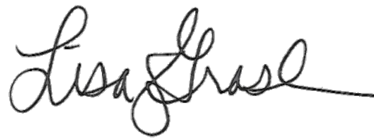
Article 20.4 (Consultations)

22. Article 20.4.1 provides:

> Either Party may request in writing consultations with the other Party with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

23. Where a Party seeks to deny the benefits of Chapter Ten of the Agreement to an investor of the other Party, either Party *may* – but is not required to – request consultations. A request for consultations pursuant to Article 20.4.1 is wholly discretionary, and there is no basis in the Agreement to draw any inference from a Party's decision not to request consultations.[16] Moreover, the right to request consultations belongs to the Parties to the Agreement.

Respectfully submitted,



____

Lisa J. Grosh
Assistant Legal Adviser
Nicole C. Thornton
Chief of Investment Arbitration
John I. Blanck
Attorney-Adviser
Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

August 28, 2017

[16] Where consultations are requested under Article 20.4.1, they must meet the remaining relevant requirements of Article 20.4.