

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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 In the Matter of Arbitration between: :
 :
 BRIDGESTONE LICENSING SERVICES, INC. :
 and BRIDGESTONE AMERICAS, INC., :
 :
 Claimants, :
 : Case No.
 and : ARB/16/34
 :
 REPUBLIC OF PANAMA, :
 :
 Respondent. :
 ----- x Volume 1

ORAL HEARING

Monday, July 29, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
Conference Room C 3-100
Washington, D.C.

The hearing in the above-entitled matter
commenced on at 9:00 a.m. before:

LORD NICHOLAS PHILLIPS, President of the
Tribunal

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MR. J. CHRISTOPHER THOMAS, QC, Co-Arbitrator

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Secretary to the Tribunal

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19 OPENING STATEMENT BY COUNSEL FOR THE UNITED STATES

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 MS. THORNTON: Good morning, Mr. President,
Members of the Tribunal. My name is Nicole Thornton,
and I'm the Chief of Investment Arbitration in the

1 Office of International Claims and Investment Disputes
2 within the Office of the Legal Adviser at the
3 Department of State.

4 I would like to thank the Tribunal and the
5 disputing parties for the opportunity to make the
6 following brief oral submission pursuant to
7 Paragraph 2 of Article 10.20 of the U.S.-Panama Trade
8 Promotion Agreement, or "TPA."

9 Specifically, the United States offers
10 interpretations on three issues: The
11 fair-and-equitable-treatment obligation, including the
12 obligation not to deny Justice; the burden of proof
13 for such a claim; and damages. The United States does
14 not take a position on how these interpretations apply
15 to the facts of this case. As we have also stated in
16 our written submissions, no inference should be drawn
17 from the absence of comment on any issue not addressed
18 in either our written or oral submissions.

19 The first issue I will address is the
20 minimum-standard-of-treatment obligation, which
21 includes fair and equitable treatment, as provided in
22 Paragraph 1 of Article 10.5. That obligation is

1 circumscribed by the customary international law
2 minimum standard of treatment of aliens and does not
3 require treatment in addition to or beyond that
4 standard.

5 Two provisions of the TPA address this
6 explicitly:

7 First, Paragraph 2 of Article 10.5 explicitly
8 prescribes the customary international law minimum
9 standard of treatment of aliens as the minimum
10 standard of treatment to be afforded to covered
11 investments. That paragraph additionally provides
12 that the concept of "fair and equitable treatment"
13 does not require treatment in addition to or beyond
14 that which is required by that standard, and does not
15 create additional substantive rights.

16 Additionally, Annex 10-A of the TPA, entitled
17 "customary international law," explains that the
18 Parties view the customary international law
19 obligations referenced in Article 10.5 as resulting
20 from the general and consistent practice of States
21 that they follow from a sense of legal obligation.
22 Thus, the fair-and-equitable-treatment obligation in

1 the TPA is the customary international law obligation.

2 Turning to denial of justice, as noted by
3 Paragraph 2(a) of the Article 10.5, the obligation not
4 to deny justice is included as part of the concept of
5 fair and equitable treatment. Because the obligation
6 not to deny justice is subsumed within fair and
7 equitable treatment, it is also therefore a customary
8 international law obligation. And this is made clear
9 by Annex 10-A, which, as I just noted, refers to the
10 customary international law obligations in
11 Article 10.5.

12 The obligations in Paragraph 1 of
13 Article 10.5 apply to covered investments rather than
14 to investors. That is in contrast with other
15 obligations of Section A of Chapter 10, the Investment
16 chapter of the TPA. For example, the obligation to
17 accord national treatment found in Article 10.3
18 applies to both investors and covered investments, as
19 explicitly provided in Paragraphs 1 and 2 of that
20 Article. Similarly, the obligation to accord
21 most-favored-nation treatment found in Article 10.4
22 also applies to both investors and covered

1 investments, and likewise the obligation in
2 Article 10.6 Paragraph 1 regarding treatment in case
3 of strife explicitly applies to both investors and
4 covered investments.

5 So, the Parties to the TPA made deliberate
6 decisions to require that some obligations apply to
7 both investors and covered investments. However, for
8 Article 10.5, the TPA Parties made the decision to
9 extend the obligation only to covered investments.

10 The obligations contained in Paragraph 1 of Article
11 10.5 including the obligation not to deny justice only
12 apply to treatment accorded to covered investments.

13 And I note that in Paragraph 3 of our Third
14 Submission, dated December 7, 2018, we always address
15 this point.

16 This means that a denial of justice claim,
17 just like any claim alleging a violation of
18 Paragraph 1 of Article 10.5, may not be arbitrated
19 pursuant to Chapter 10 of the TPA if the Claim is for
20 treatment accorded to an investor rather than a
21 covered investment. It may only be arbitrated if the
22 Claim is for treatment accorded to the Investor's

1 covered investment.

2 And that's made clear by Article 10.16, which
3 is the provision which authorizes claims to be
4 submitted to arbitration. And there are two
5 provisions in Article 10.16 which authorize claims to
6 be submitted to arbitration, the first being
7 Paragraph 1(a) and the second being Paragraph 1(b).

8 Paragraph 1(a) authorizes a Claimant to bring
9 a claim on its own behalf for a breach of Section A of
10 Chapter 10. Section A of Chapter 10 includes Articles
11 10.1 through 10.14 and no other articles. Paragraph
12 1(b) of Article 10.16 authorizes a Claimant to bring a
13 claim not on its own behalf but on behalf of an
14 enterprise of the Respondent that is a juridical
15 person that the Claimant owns or controls, directly or
16 indirectly. Again, these claims are authorized for a
17 breach of Section A of Chapter 10. This means that an
18 alleged breach of the minimum standard of treatment,
19 including a denial of justice claim, may only be
20 submitted to arbitration under Article 10.16 to the
21 extent that it would constitute a breach of the
22 customary international law obligations incorporated

1 in Section A of Chapter 10.

2 In the context of a denial of justice claim,
3 a Claimant therefore must establish that the treatment
4 accorded through an adjudicatory proceeding was
5 treatment accorded to the covered investment. In
6 addition, a Claimant must establish that this
7 treatment failed to meet the standards for denial of
8 justice, which the United States discussed in more
9 detail in its Third Submission in this matter, dated
10 December 7th, 2018, in Paragraphs 2 to 4.

11 The question then, is how a covered
12 investment is accorded treatment in an adjudicatory
13 proceeding for the purposes of a denial of justice
14 claim. For a claim submitted under Article 10.16,
15 Paragraph 1(a), a Claimant, investor, alleging that
16 the treatment accorded to its covered investment
17 amounted to a denial of justice must establish that
18 the Claimant was, or sought to be but was prohibited
19 from becoming, a party to an adjudicatory proceeding
20 in order for that treatment to result in a denial of
21 justice by virtue of that proceeding.

22 Alternatively, for a claim submitted under

1 Article 10.16 Paragraph 1(b) on behalf of its covered
2 investment that is an enterprise of the Respondent
3 State that the Investor owns or controls directly or
4 indirectly, a Claimant must establish that the
5 enterprise was, or sought to be but was prohibited
6 from becoming, a party to an adjudicatory proceeding
7 in order for the treatment accorded to result in a
8 denial of justice by virtue of those proceedings.

9 The United States has also explained this in
10 its recent non-disputing party submission under the
11 U.S.-Peru TPA in Gramercy Funds Management versus
12 Republic of Peru, which has an ICSID Case Number of
13 UNCT/18/2. That submission is dated June 21, 2019,
14 and it is available on the ICSID website. The
15 discussion at issue is at Paragraph 43 of that
16 submission.

17 The second issue I will address briefly is
18 the burden of proof for a claim of denial of justice
19 under Article 10.5 of the TPA and applicable rules of
20 international law. Of course, Article 10.22 of the
21 TPA states that the Tribunal shall decide issues in
22 dispute in accordance with the TPA and applicable

1 rules of international law, subject to Paragraph 3 of
2 that Article, which provides for binding FTC
3 Commission interpretations.

4 General principles of international law
5 concerning the burden of proof in international
6 arbitration provide that a Claimant has the burden of
7 proving its claims, and if a Respondent raises any
8 affirmative defenses, the Respondent must prove such
9 defenses. And the standard of proof is generally a
10 preponderance of the evidence. However, when
11 allegations of corruption are raised, either as part
12 of a claim or part of a defense, the general
13 principles of international law applicable to
14 international arbitration require that the Party
15 asserting that corruption occurred must establish the
16 corruption through "clear and convincing" evidence.

17 An example of a tribunal that has ruled that
18 the clear and convincing evidence standard is required
19 for findings of corruption is EDF Services Limited
20 versus Romania at Paragraph 221 of its Award dated
21 October 8, 2009. And that case is ICSID Case Number
22 ARB/05/13.

1 The third and last issue I will address is
2 the issue of monetary damages, as that term is used in
3 Paragraph 1(a) of Article 10.26. An investor may
4 recover damages only to the extent that damages are
5 established on the basis of satisfactory evidence that
6 is not inherently speculative. Further, an investor
7 may only recover for loss or damage that the Investor
8 incurred in its capacity as an investor of a party.
9 That means that the Investor may only recover for
10 damages it incurred in its capacity as an
11 investor-seeking to make, making or having made an
12 "investment" in the territory of the other Party. In
13 Article 2.1 of the TPA further defines "covered
14 investment" as an investment within the territory of
15 the other Party. The United States has made a
16 comparable submission on this issue in the context of
17 the NAFTA as an intervenor in Mexico's action to
18 partially set aside a NAFTA Award in the Court of
19 Appeals for Ontario. That was the case of Cargill
20 versus Mexico.

21 Mr. President, Members of the Tribunal, that
22 concludes the Fourth Submission on behalf of the

1 United States pursuant to Paragraph 2 of Article 10.20
2 of the TPA. The United States stands by the
3 interpretations we made in our previous three
4 submissions, and we thank you very much for your time
5 and attention.

6 PRESIDENT PHILLIPS: Thank you. The Tribunal
7 is grateful for your submissions.

8 So, we shall now proceed to the Claimants'
9 opening.

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