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

SUPPLEMENTAL SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America hereby makes this supplemental submission pursuant to Article 10.20.2 of the United States-Panama Trade Promotion Agreement ("Agreement"), which authorizes a non-disputing Party to make oral and written submissions to the Tribunal regarding the interpretation of the Agreement, and the invitation of the Tribunal to address the meaning of "substantial business activities" in Article 10.12.2. The United States does not take a position on how the interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 10.12.2 (Denial of Benefits)

2. Article 10.12.2 of the Agreement provides:

> 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.

This treaty right is consistent with a long-standing U.S. policy to include a denial of benefits provision in investment agreements to safeguard against the potential problem of "free rider" investors, *i.e.*, third-party entities that may only as a matter of formality be entitled to the benefits of a particular agreement.[1] While it has long been U.S. practice to omit a precise definition of the

[1] *See, e.g.*, Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 388 (1956) (noting that "recent treaties signed by the United States, . . . , indicate that this possibility of a 'free ride' by third-country interests is one to be guarded against . . . .").

term "substantial business activities," in order that the existence of such activities may be evaluated on a case-by-case basis,[2] the United States has indicated in, for example, its Statement of Administrative Action on the NAFTA that "shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established."[3]

Respectfully submitted,

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[2] *See Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27.

[3] North American Free Trade Agreement, Texts of the Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. Doc. 103-159, 103d Cong., 1st Sess., at 145 (Nov. 4, 1993); *see Message from the President: Investment Treaty with Azerbaijan*, 106th Cong., 2d Sess., Sen. Treaty Doc. 106-47 (Sept 12, 2000), at 12 (stating that the denial of benefits provision "would not generally permit [the host State] to deny benefits to a company of [the other Party] that maintains its central administration or principal place of business in the territory of, or has a real and continuous link with" the other Party; the same language appears in the transmittal messages accompanying U.S. investment treaties with Trinidad and Tobago, Georgia, Albania, Jordan, Bolivia, Honduras, El Salvador, Croatia, Mozambique, and Nicaragua).