

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID ARB. No. ARB/16/34

**BRIDGESTONE LICENSING SERVICES, INC.
BRIDGESTONE AMERICAS, INC.**

Claimants

vs.

THE REPUBLIC OF PANAMA

Respondent

POST-HEARING BRIEF

30 October 2019

Justin Williams, Katie Hyman, Johann Strauss
Akin Gump Strauss Hauer & Feld
2001 K Street, N.W.
Washington D.C. 20006

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TABLE OF AUTHORITIES

Awards and Legal Decisions

File Reference	Full Citation	Short Description
CLA-0086 (ENG)	<i>Factory at Chorzów (Germany v. Poland)</i> , Merits, 1928 PCIJ (Ser. A) No. 17 (13 September 1928)	Factory at Chorzów
CLA-0137 (ENG)	<i>Union Fenosa Gas, S.A. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/14/4, Award (31 August 2018)	UFG v. Egypt

Books, Articles, and Reports

File Reference	Full Citation	Short Description
CLA-0052 (ENG)	Davidson Heath and Christopher Mace, "What's a Brand Worth? Trademark Protection, Profits and Strategy." October 20, 2017	Heath and Mace, "What's a Brand Worth?"
CLA-0085 (ENG)	"Case of the Orient (U.S. v. Mexico)" in III John Bassett Moore, <i>History and Digest of the International Arbitrations to Which the United States Has Been a Party</i> (1898)	"Case of the Orient (U.S. v. Mexico)"
CLA-0153 (ENG)	Constantine Partasides, <i>Proving Corruption in International Arbitration: A Balanced Standard for the Real World</i> , ICSID Review (2010).	Partasides, <i>Proving Corruption in International Arbitration</i>

EXHIBIT LIST

File Reference	Description
Exhibit C-0016 (ENG-SPA)	Civil Complaint filed by Muresa Intertrade S.A.
Exhibit C-0048 (ENG)	Agreement to License Trademarks Between Bridgestone Licensing Services, Inc and Bridgestone/Firestone Americas Holding, Inc
Exhibit C-0052 (ENG)	Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001)
Exhibit C-0126 (ENG)	JP Morgan Chase Bank Statement (31 August 2016)

Exhibit C-0161 (ENG-SPA)	Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2)
Exhibit C-0164 (ENG-SPA)	Concluding Remarks Filed by Muresa in Civil Action dated 4 June 2010
Exhibit C-0165 (ENG-SPA)	Formal Application by Muresa Intertrade S.A. to Appeal to the Panama Supreme Court in Cassation (1 July 2013)
Exhibit C-0230 (SPA)	"Otra denuncia contra un magistrado de la Corte llega a la Asamblea" [Another complaint against a magistrate of the Court arrives at the Assembly], article from La Estrella dated 19 April 2017
Exhibit C-0256 (SPA)	Official Panamanian Gazette dated 4 February 2005
Exhibit C-0258 (SPA)	"Corrupción de Martinelli le costó a Panamá USD \$100 millones: Varela" [Martinelli's corruption cost him Panama USD \$100 million: Varela], article from Noticias RCN dated 6 May 2015
Exhibit C-0259 (SPA)	"Palabras des Presidente de la Republica Juan Carlos Varela Durante El Acto de Toma de Posesion" [Word of the President of the Republic Juan Carlos Varela During the Act of Taking Possession], Ministerio de Relaciones Exteriores dated 24 March 2016
Exhibit C-0312 (ENG)	Ex-Panamanian supreme court chief pleads guilty to corruption, Reuters (23 February 2015)
Exhibit C-0313 (ENG-SPA)	Judgment No. 55, Eighth Civil Circuit Court (8 September 2014)
Exhibit C-0314 (ENG-SPA)	Judgment No. 39, Eighth Civil Circuit Court (4 July 2014)
Exhibit C-0315 (ENG-SPA)	Opposition Proceedings Regarding BLACKSTONE Y DISEÑO, Ninth Civil Circuit Court (12 September 2017)
Exhibit C-0316 (ENG-SPA)	Opposition Proceedings Regarding GRANDSTONE y DISEÑO, Ninth Civil Circuit Court (27 August 2018)
Exhibit C-0317 (ENG-SPA)	Certification of projected sales for Muresa Intertrade, S.A. during FY 2005 (25 September 2009)
Exhibit C-0318 (ENG)	BSLS and BSJ Agreement (1 January 2010)

I. INTRODUCTION

1. This Post-Hearing Brief (“**Brief**”) is submitted by Bridgestone Licensing Services, Inc. (“**BSLS**”) and Bridgestone America, Inc. (“**BSAM**”) (together, the “**Claimants**”) pursuant to the Tribunal’s Procedural Order No. 12 dated 11 July 2019.
2. The Claimants’ case is as stated in the pleadings and outlined in the oral opening and closing statements during the hearing that took place the week of 29 July 2019.¹ The Tribunal may wish to re-read the transcripts of those statements. In this Brief, the Claimants do not repeat those submissions, but instead seek to address certain matters raised by the Respondent and the Tribunal during the hearing.
3. Under the Trade Promotion Agreement entered into between the United States of America and the Republic of Panama (the “**TPA**”), Panama is obliged not to deny justice to BSLS and BSAM in respect of their covered investments. Regrettably, the Panamanian Supreme Court judgment issued on 28 May 2014 (the “**Supreme Court Judgment**”) made findings that no honest and competent court could have made. Those incomprehensible findings permeate every element of the Supreme Court’s determination, namely the Cassation Recourse, liability under Article 217 of the Judicial Code, causation and loss. Such findings, individually and/or collectively, amount to a denial of justice in breach of the TPA. As a result of that breach (or breaches) BSLS and BSAM have suffered loss in the amount of the damages imposed on them by the Supreme Court (USD \$5.4 million), plus damage to their trademark rights (USD \$19,954,541). BSLS and BSAM are entitled to damages and interest accordingly.

¹ Hearing Day 1, Tr. 28:10-133:12; Hearing Day 5, Tr. 1216:21-1258:15.

II. JURISDICTION

4. The only remaining jurisdictional question is whether BSAM has standing to bring a claim for denial of justice.
5. The Respondent addressed this in one slide of its Closing Presentation,² and not at all in its Opening Submissions at the hearing. It argues that BSAM's claim for denial of justice fails as a matter of law, because a claim for denial for justice can only be pursued by a party to the court proceedings at issue, and since BSAM was not a party, it cannot have a claim. The Respondent cites to *Arif v Moldova*³ as authority for this proposition.
6. *Arif v Moldova* drew a distinction between two types of denial of justice claims. It was found that the first, a claim in delict under customary international law (that is, not under a treaty), may only be pursued by an entity that was a party to the underlying court proceedings.⁴ The second, a claim under the fair and equitable treatment standard in an investment treaty, was found to be capable of being pursued only by those who have a covered investment under such treaty which has been the subject of a denial of justice.⁵ The United States confirmed in its oral submissions in the present case that the obligations in Article 10.5 of the TPA apply to covered investments, not to investors.⁶
7. Despite the distinction in *Arif v Moldova*, the Respondent maintains that a denial of justice claim made pursuant to Article 10.5 of the TPA is a claim made under customary

² RD-0010, Slide 5.

³ RLA-0063.

⁴ RLA-0063 ¶ 435.

⁵ RLA-0063 ¶ 438.

⁶ Hearing Day 1, Tr. 21:12-14.

international law, because Article 10.5(2) provides that the minimum standard of treatment prescribed by Article 10.5 is the customary international law standard.⁷

8. But that is simply not right and no authority has been offered for this statement. The reference to customary international law in Article 10.5 self-evidently refers to the standard of treatment to be applied to a covered investment: “*Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.*” It does not deal with whether an investor has standing to bring a claim, because that is addressed elsewhere in the TPA, namely in Article 10.1, the definitions of investor and investment at Article 10.29, and Article 10.16. As already decided by the Tribunal, BSAM does have standing under the TPA.⁸
9. Secondly, even where a claim is brought under customary international law and not under a treaty, there are exceptions available that would permit a non-party to litigation to bring a denial of justice claim. For example, the Respondent accepts that a parent company may be able to bring a claim on behalf of its subsidiary where the parent did not take part in court proceedings but the subsidiary did.⁹ The Respondent also acknowledged that there is no authority on the particular circumstance in this case, where there is a licensor and a licensee of a trademark.¹⁰ In this case, BSAM does not bring its claim as a subsidiary, but as a trademark licensee, in circumstances where the trademark licensor is the party that is entrusted with protecting the trademark, which protection the licensee then benefits from. As the Tribunal had already noted:

[T]here may be merit in recognizing a second exception in the case of a Licensor and a Licensee of a trademark because the evidence we’ve heard is it’s for the Licensor who has the legal right to protect

⁷ Hearing Day 5, Tr. 1272:1-2.

⁸ Decision on Expedited Objections ¶¶ 242-248.

⁹ Hearing Day 5, Tr. 1264:14-16.

¹⁰ Hearing Day 5, Tr. 1264:20-21.

*the rights of the Licensee by bringing legal proceedings, so that if the Licensor, to protect the rights of the Licensee brings legal proceedings and suffers a denial of justice, doesn't it seem on principle right that the Licensee should be entitled to say that 'I have not received fair and equitable treatment because of the way my Protector has been treated'?*¹¹

10. As a trademark licensee, even if BSAM had brought its claim outside the TPA under customary international law, it would have standing to bring a claim for denial of justice in circumstances where its trademark rights had been the subject of legal proceedings in Panama, and where it had been denied justice because of the way Bridgestone Corporation (“**BSJ**”) and BSLS had been treated by Panama.

III. DENIAL OF JUSTICE

11. The starting point for denial of justice in this case is of course Article 10.5 of the TPA, which contains the fair and equitable treatment standard, and includes specific reference, at subparagraph 2(a), to the obligation not to deny justice.
12. The TPA therefore specifically refers to the customary international law standard for denial of justice. It also states that the obligation is not to deny justice in accordance with “*the principle of due process embodied in the principal legal systems of the world.*” As both parties noted at the hearing,¹² this language appears in most U.S. free trade agreements. The Respondent explained that this language was added into these agreements following the NAFTA Free Trade Commission’s Note of Interpretation of 31 July 2001, which sought to clarify that the “*concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment*”

¹¹ Hearing Day 5, Tr. 1265:21-1266:10.

¹² Hearing Day 1, Tr. 41:22-42:1; Hearing Day 5 Tr., 1273:3-8.

of aliens.”¹³ However, the FTC Note did not address the specific wording above relating to denial of justice, because there is no express reference to denial of justice in NAFTA Article 1105. The TPA does contain a such reference, and the obligation is “*not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*”—that is, specifically with respect to the adjudicatory systems of the parties. The promise to an American investor in Panama in the TPA is that it will encounter a system of justice that would not fail to meet the standards of due process well-established in the courts of the United States, one of the principal legal systems of the world.

13. The Respondent has been reluctant to articulate what the test for denial of justice should be,¹⁴ but the Claimants have articulated the standard as that set forth by Sir Gerald Fitzmaurice, a former judge of the International Court of Justice, in 1932:

*An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given.*¹⁵

This formulation was included by Professor Paulsson in his expert report on behalf of the Respondent, in which he acknowledged that in some cases, “*a failure of process may be proved from a judicial decision so egregiously wrong that no honest or competent court could possibly have given it.*”¹⁶

¹³ See North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission July 31, 2001, at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (referred to by Respondent, Hearing Day 5, Tr. 1273:14-19).

¹⁴ Hearing Day 5, Tr. 1261:15-1264:3.

¹⁵ RLA-185, pp. 112-113.

¹⁶ Paulsson ¶24.

14. At the hearing, the Respondent professed to be shocked by the way the Claimants had articulated this standard,¹⁷ despite the fact that the words used were taken from the Respondent's own expert report: "*If the existence of grave and manifest injustice is established, two possibilities present themselves: either the judicial decision-maker was dishonest . . . or he or she was grossly incompetent.*"¹⁸ However, when questioned at the Hearing, the Respondent eventually agreed that this is the applicable standard.¹⁹ Accordingly, it is now common ground that the Tribunal should consider the various findings of the Supreme Court within this framework.
15. It is also common ground that denial of justice is not merely a mistake by a court and that a denial of justice claim is not merely another appeal. Nevertheless, the Respondent says that "*what the Claimants are doing is an appeal.*"²⁰
16. The basis for this assertion appears to be that some of the arguments made by the Claimants in this arbitration were also made by BSLs and BSJ during the court proceedings in Panama. The Respondent's position appears to be that if these arguments were made before the Panamanian Supreme Court, then they cannot be made again before this Tribunal, because they have already been heard on the matter.²¹ The Respondent argued that the fact that a party has had the opportunity to be heard on an issue precludes a claim before an international tribunal of denial of justice.²² But when questioned about this at the hearing, the Respondents accepted that in some situations an appeal might be permissible.²³ However, in this case, the Respondent said that an

¹⁷ Hearing Day 5, Tr. 1276:17-1277:9.

¹⁸ Paulsson ¶ 30.

¹⁹ Hearing Day 5, Tr. 1279:15-16.

²⁰ Hearing Day 5, Tr. 1264:3.

²¹ Hearing Day 5, Tr. 1280:20-1281:5; Rejoinder ¶¶ 161, 121.

²² Hearing Day 5, Tr. 1282:5-11.

²³ Hearing Day 5, Tr. 1282:5-6 ("*it depends on the gradation*"), 1283:15-16 ("*in this particular case*").

appeal was not permissible because it “*just doesn’t come at all close to the level of a denial of justice,*”²⁴ but was unable to explain why not or what the test should be.

17. The fact that the Claimants make similar arguments to those made by BSLS and BSJ in the Panamanian courts, and that similar points appeared in Justice Mitchell’s dissent, is not surprising. But there is no appeal here, because the question before the Tribunal is not merely whether the Supreme Court erred, but whether it transgressed the applicable standards under international law.

IV. THE CASSATION RECOURSE

18. After the claims brought by Muresa Intertrade S.A. (“**Muresa**”) were rejected by the Eleventh Civil Circuit Court of the First Judicial District of Panama (the “**Eleventh Circuit Court**”) and the First Superior Court of the First Judicial District (the “**First Superior Court**”), Muresa filed a Cassation Recourse. According to the Respondent’s expert, Mr. Lee, a Cassation Recourse is an “*extraordinary remedy,*” because it only applies if certain requirements set forth in the Judicial Code are met; it does not allow an open examination of the case and it results in a final judgment.²⁵ If the Cassation Recourse is admitted, then the Supreme Court must examine whether the court of second instance violated the grounds pleaded by the appellant, and if it did, then the Supreme Court acts as a court of first instance and issues a replacement judgment, wiping out the first and second instance judgments previously issued.²⁶
19. Article 1169 of the Judicial Code sets out the grounds for a Cassation Recourse on the merits. There are only five available grounds:

²⁴ Hearing Day 5, Tr. 1283:16-17.

²⁵ Lee 1 ¶ 44.

²⁶ Lee 2 ¶¶ 25-26.

- (a) “*Direct violation*” of “*substantive rules of law*”;
- (b) “*Misapplication*” of “*substantive rules of law*”;
- (c) “*Misinterpretation*” of “*substantive rules of law*”;
- (d) “*Error of fact about the existence of the evidence*”; and
- (e) Error of “*the rule of law in terms of the appreciation of the said evidence.*”²⁷

20. Muresa’s Cassation Recourse was brought on 1 July 2013 on two grounds:²⁸ It was brought on the fourth ground above (*i.e.*, that the First Superior Court had made factual errors as to the existence of evidence); and it was brought on the first ground above (*i.e.*, that there had been a direct violation of a substantive rule of law because the First Superior Court did not apply Article 217 of the Judicial Code or Article 1644 of the Civil Code).

21. On 4 December 2013, the Supreme Court found that the fourth ground had been established, but that the first had not. Therefore the Cassation Recourse was admitted on the fourth ground of Article 1169 only.²⁹ The Decision on the Cassation Recourse does not explain the court’s reasoning but simply states the decision. However, the Supreme Court Judgment, written by the same three Justices who issued the Decision on the Cassation Recourse, does explain the reasoning, and then on that basis performs a *de novo* review of the facts and evidence.³⁰

²⁷ Exhibit R-0067 (excerpts of the Panamanian Judicial Code, Art. 1169).

²⁸ Exhibit C-0165.

²⁹ Exhibit R-0050.

³⁰ Exhibit R-0034.

22. There was substantial discussion in the Claimants’ oral submissions and in the cross-examination of Mr. Lee as to the meaning of the fourth ground under Article 1169, and relatedly, the meaning of the fifth ground (which was not relied on by Muresa).
23. In its Cassation Recourse, Muresa identified six categories of evidence, and argued that the First Superior Court had made a factual error as to the existence of this evidence. The six categories of evidence were discussed extensively in oral submissions in this arbitration and are set out in the chart at CD-003.
24. At the hearing, Mr. Lee appeared to accept that the First Superior Court had indeed recognized that each of the six categories of evidence that had been raised before it “existed” in the ordinary sense of that word³¹ (with respect to the evidence that had not been raised before the First Superior Court, neither he nor Panama were able to explain how there could be an error of fact as to the existence of evidence.) However, his testimony was that a meaning other than the ordinary meaning applies to the fourth and fifth grounds. It is on this question that the dispute between the parties as to the Cassation Recourse now turns.
25. Mr. Arjona explained the fourth ground as a “*sensory problem, one of physical perception of the evidence or item of evidence in the record, without the involvement of any element of appreciation or valuing of the evidence.*”³² If the Court is aware of the existence of evidence, but erroneously chooses to ignore it, Mr. Arjona explained that this may satisfy the fifth but would not satisfy the fourth ground of Article 1169: “*if, according to the question, the Court is aware of the existence yet it attributes no value*

³¹ Hearing Day 2, Tr. 571:6-16.

³² Hearing Day 2, Tr. 375:12-15.

*to it, that is a problem that goes to another ground, which is error of law in the appreciation of the evidence.”*³³

26. Mr. Lee said that he agreed with Mr. Arjona’s interpretation,³⁴ but he contended that in addition to the ordinary meaning of the fourth ground, the words “*Error of fact about the existence of the evidence*” could also mean “*ignoring or skipping over, which is not the same as declaring that it does not exist.*”³⁵ Mr. Lee said that just because the First Superior Court mentioned the evidence, this does not mean that the Court correctly appreciated it: “*what it means here is that they knew it existed, that they saw it.*”³⁶
27. But Mr. Lee’s interpretation of the second meaning of ground four overlaps with the ordinary meaning of the word “appreciation” in ground five. Therefore he also has to give a meaning to ground five other than its ordinary meaning. Accordingly, he says that ground five covers an error of appreciation *other than* an error of applying no weight to particular evidence.³⁷ It follows that on Mr. Lee’s evidence ground five covers (amongst other things) any error in relation to the amount of weight that is given to evidence *other than* an error of applying no weight.
28. Mr. Arjona disagrees. He says that the ordinary meaning of the words is to be applied to both grounds four and five. Therefore if a court makes any mistake about the existence of evidence (whether it be that evidence does not exist when in fact it does, or vice versa), then that falls within ground four; and if a court recognizes that particular

³³ Hearing Day 2, Tr. 375:20-376:2.

³⁴ Hearing Day 2, Tr. 558:21-559:2.

³⁵ Hearing Day 2, Tr. 559:14-16.

³⁶ Hearing Day 2, Tr. 571:14-15.

³⁷ Hearing Day 2, Tr. 572:22-573:10.

evidence exists but makes any mistake of appreciation (ranging from applying no weight to applying too much weight) then that falls within ground five.³⁸

29. It is obvious that Mr. Lee's interpretation makes no sense:
- (a) The distinction as to weight of evidence is one that no tribunal would have any need to make. No tribunal in practice will decide to apply a very small amount of weight to particular evidence rather than no weight, or vice versa. This is because such a distinction would serve no useful purpose; a piece of evidence is either persuasive (on its own, or taken together with other evidence) or it is not. Mr. Lee's suggestion that different grounds under Article 1169 apply where the mistake is one of no weight and where the mistake is in applying a very small amount of weight is absurd. No tribunal has the need to make any such distinction, and would not do so.
 - (b) It follows that it is very hard to see how or why the Supreme Court would ever have developed the interpretation of 1169 for which Mr. Lee contends.
 - (c) A further difficulty is that Mr. Lee's interpretation requires applying meaning to words that is contrary to their ordinary meaning.
 - (d) And indeed, Mr. Lee's interpretation is entirely unnecessary if one simply gives grounds four and five their ordinary meaning. Why perform linguistic gymnastics by giving words special meanings if grounds four and five would address the issue at hand simply on the basis of their ordinary meanings?
 - (e) Mr. Lee testified that the Supreme Court had interpreted Article 1169 in the manner for which he contended "*throughout decades*"³⁹ and "*for many decades, at least for*

³⁸ Hearing Day 2, Tr. 376:18-22.

³⁹ Hearing Day 2, Tr. 571:8; 573:2.

the past 40 years”,⁴⁰ and if he called his office he could produce “*several*” such decisions.⁴¹ But if it is hard to envisage a situation in which the Court of Appeal would have issued a judgment giving rise to this issue in the first place, it is inconceivable that there would have been a series of such judgments stretching back over decades.

(f) And of course the Respondent did not take this up with Mr. Lee in re-direct, and took no less than six weeks after the final hearing to find two authorities that it thought might support him.

30. It is therefore no surprise that when the Respondent conducted its exhaustive search to find authorities in support of Mr. Lee’s interpretation, it did not find any, let alone “*decades*” of judgments. The Respondent has introduced an extract from the leading Panamanian law treatise by Jorge Fábrega Ponce, which supports Mr. Arjona’s interpretation of grounds 4 and 5 of Article 1169,⁴² and one Cassation Recourse judgment, which does not support the point for which the Respondent argues.⁴³

31. The extract from Fábrega cites jurisprudence confirming the position described above: “*In this case the evidence was not ignored, but the court did not grant value to the appellant’s evidence. No evidence was ignored in the judgment. Thus, it is wrong to speak of an error of fact.*”⁴⁴ The case produced by the Respondent is a Cassation Recourse brought on both the fourth and fifth grounds of Article 1169. Consistent with Mr. Arjona’s interpretation, the Court held that there was no error of appreciation of evidence (the fifth ground) where evidence was not considered at all: “*one can see that*

⁴⁰ Hearing Day 2, Tr. 576:17-18.

⁴¹ Hearing Day 2, Tr. 579:19.

⁴² RLA-0225.

⁴³ RLA-0226.

⁴⁴ RLA-0255, p. 5.

*the evidence whose assessment is questioned was not considered by the Upper Court. The Upper Court judge, when issuing the judgment, did not consider Public Deed No. 3031 of March 29, 2001, Eighth Circuit Notary, Province of Panama. Hence, the judge could not have incurred in error of law when assessing the evidence.”*⁴⁵ However, the Respondent did not include the appellate court judgment on which the Cassation Recourse was based. The Claimants have made enquiries, but the relevant judgment is not available online and as the Claimants had only fourteen days to produce responsive material, there was insufficient time to obtain a hard copy. Without seeing that judgment, it is impossible to know whether the facts of that case were similar to that in the Muresa case, in other words, whether the appellate court actually did consider the evidence in question or not.

32. Put simply, it is clear that the correct ground for Muresa’s Cassation Recourse was the fifth ground under Article 1169, but Muresa did not bring its appeal on that basis. Therefore, unless the Supreme Court could find that Muresa’s argument of a failure of appreciation of evidence fell within ground four, then Muresa’s Cassation Recourse would fail. Accordingly the Supreme Court did just that. It made the inexplicable decision that the fourth ground in Article 1169 was satisfied. It did that by finding that the second instance court had made an “*Error of fact about the existence of the evidence*” when it is apparent that no such error had been made—the evidence had either been specifically referred to in the First Superior Court’s judgment or it had not even been submitted to or raised with the First Superior Court.⁴⁶ The Supreme Court decision therefore is nonsensical and entirely incoherent. No honest or competent court could have made this finding.

⁴⁵ RLA-0266, p. 5.

⁴⁶ CD-003.

V. THE SUPREME COURT JUDGMENT

33. Having wrongly admitted the Cassation Recourse, the Supreme Court proceeded to make the following findings of liability, causation and loss, each of which are considered in further detail below:

- (a) Liability: (i) The trademark opposition proceedings were “*reckless and intimidating in order to cause harm*”,⁴⁷ “*cannot be held as good faith behavior*”,⁴⁸ and were “*negligent*”⁴⁹; (ii) the letter from Foley and Lardner to lawyers for L.V. International, Inc. (“**LV International**”) dated 3 November 2004 (the “**Foley Letter**”) was “*obviously intimidating and reckless conduct*”⁵⁰; (iii) the withdrawal of the appeal was “*reckless*”;⁵¹ and (iv) Breach of Articles 217 of the Judicial Code and Article 1644 of the Civil Code.⁵²
- (b) Causation: The trademark opposition proceedings, the Foley Letter and the threat of seizure caused Muresa and the Tire Group of Factories Ltd (“**TGFL**”) to sell fewer RIVERSTONE tires and sell lower quality tires, resulting in reduced profits.⁵³
- (c) Loss: “[*BSJ*] and [*BSLS*] are ordered to jointly pay [*Muresa*] and [*TGFL*] the sum of FIVE MILLION DOLLARS”.⁵⁴

A. Liability

- i. The trademark opposition proceedings were “reckless and intimidating in order to cause harm”, “cannot be held as good faith behavior” and were “negligent”

⁴⁷ Exhibit R-0034, p. 14.

⁴⁸ Exhibit R-0034, p. 17

⁴⁹ Exhibit R-0034, p. 17.

⁵⁰ Exhibit R-0034, pp. 15.

⁵¹ Exhibit R-0034, pp. 16.

⁵² Exhibit R-0034, p. 13.

⁵³ Exhibit R-0034, pp. 11-12, 14-16.

⁵⁴ Exhibit R-0034, p. 18.

34. The Supreme Court Judgment set out the test for “recklessness” by citing Jorge Fábrega Ponce on page 16. It is a high threshold: procedural recklessness involves litigating without any legal basis, in order maliciously to cause harm to the other party.

35. Nevertheless, on four bases the Supreme Court found that the opposition proceedings met this standard:

(a) First, the court found that BSLS/BSJ were reckless in opposing Muresa’s trademark application when Muresa had a “*legal right to market a product*”⁵⁵ and had the “*right of representation and distribution of the brand.*”⁵⁶ However, Muresa’s right to do these things was entirely unaffected by BSLS/BSJ’s trademark opposition action. If BSLS/BSJ had wanted to prevent Muresa’s use of the trademark, they could have filed an improper use action, but they did not do so. The Respondent’s expert, Ms. Lasso de la Vega Ferrari, confirmed this in her evidence: “*they are two different requests. If you would like to request for a use of a brand trademark to be suspended, then you request - have you a proceeding for improper use. But if you want to prevent registration of a trademark, then you have an Opposition Proceeding.*”⁵⁷ Therefore, the Supreme Court’s finding of recklessness on this ground does not make any sense, and fundamentally misunderstands Panamanian intellectual property law. The logical consequence of the finding is that in order to bring a non-reckless trademark opposition proceeding it is necessary first to seek and obtain an injunction restraining the sale of the products of the registrant. But that is simply not what Panamanian trademark law says, and it is not what other trademark opposers have done and continue to do in other cases.

⁵⁵ Exhibit R-0034, p. 17.

⁵⁶ Exhibit R-0034, p. 14.

⁵⁷ Hearing Day 3, Tr. 745:16-746:2.

(b) Second, the court found that BSLS/BSJ were reckless in bringing the opposition because Muresa's product competes with BSLS/BSJ's product. But paragraph 9 of Article 91 of Law 35 of 1996 expressly contemplates that oppositions may be brought in relation to products that are of the same type,⁵⁸ and Mr. Molino confirmed that, unsurprisingly, most trademark oppositions are brought by competitors.⁵⁹ Therefore, this ground for recklessness simply makes no sense.

(c) Third, the court found that BSLS/BSJ were reckless because they had the intent to cause damage. There is no explanation for this in the Supreme Court Judgment. It seems to be based on the fact that RIVERSTONE was a competitor to BRIDGESTONE and FIRESTONE so it was inferred that BSLS/BSJ would want to cause harm to a competitor. But, since most trademark opposition applications are brought by competitors, it follows that the court's reasoning would make most trademark opposition applications reckless, which is absurd. The Respondent goes to great lengths in this arbitration to try to present the Bridgestone group as a "trademark bully". But this is groundless. The only basis for that assertion is the statement made by Muresa's employee, Mr. Fernan Jesus Luque Gonzalez, who referred to seizures of inventory in the Dominican Republic, which the Respondent also referred to at the hearing.⁶⁰ No evidence was produced either in the Panamanian litigation or in these proceedings that Bridgestone was responsible for the alleged seizures in the Dominican Republic, and Mr. Kingsbury has made clear that has never been any seizure of any RIVERSTONE tires by any Bridgestone entity anywhere in the world.⁶¹ The Supreme Court also made no finding that there

⁵⁸ Exhibit R-0026, p. 17.

⁵⁹ Hearing Day 3, Tr. 650:19-20.

⁶⁰ Exhibit C-0161, p. 3; Hearing Day 1, Tr. 153:17-20.

⁶¹ Kingsbury 3 ¶ 14.

had been any seizures. Therefore there is and was no evidential or any other basis for a finding that BSLS/BSJ had an intent to cause damage and so were reckless. The finding is impossible to understand.

(d) Fourth, the court found that BSLS/BSJ were reckless because the opposition was said to be without legal basis. However, even the Respondent's expert in this arbitration admitted that the opposition "*did not completely lack merit*".⁶² The Respondent previously argued that the opposition was without merit because no evidence of actual confusion was given,⁶³ but if this was the problem, that was not identified by the Supreme Court. In any case, Mr. Molino has confirmed that actual confusion in Panama is typically assessed by the court without expert or other evidence, and market surveys as to whether actual confusion exists are disproportionately expensive.⁶⁴ But in any event, the test under paragraph 9 of Article 91 of Law 35 is not whether actual confusion has arisen, but whether the mark in question is "*liable*" to confuse.⁶⁵ The Respondent's other experts were unable to comment on this: Ms. Jacobson said that she had not read the record of the litigation,⁶⁶ and was unable to opine on Panamanian law;⁶⁷ and Mr. Lee said that he could not opine on this or any issue of Panamanian trademark law.⁶⁸ However, at a minimum it is strongly arguable that marks for tires that include the suffix "stone" may be liable to be confused with the BRIDGESTONE or FIRESTONE marks.⁶⁹ Indeed, this is evident from the finding by the Eighth Civil Circuit Court

⁶² Hearing Day 3, Tr. 772:3.

⁶³ Hearing Day 1, Tr. 150:20-21.

⁶⁴ Hearing Day 3, Tr. 656:9-20.

⁶⁵ Exhibit R-0026, p. 17.

⁶⁶ Hearing Day 3, Tr. 823:17-18.

⁶⁷ Hearing Day 3, Tr. 825:16-17.

⁶⁸ Hearing Day 2, Tr. 454:6-19.

⁶⁹ Hearing Day 4, Tr. 931:3-11.

of the First Judicial District, that BSLS/BSAM had acted with “*evident good faith*” in the trade mark opposition action, a finding that was not appealed and remains extant; and it is also evident from other successful opposition actions that Bridgestone group companies have brought in Panama for use of the “stone” suffix.⁷⁰ It is simply not possible to understand on what basis the Supreme Court found that the opposition by BSLS/BSAM to the RIVERSTONE mark was so entirely devoid of merit as to be reckless.

36. There is a further fundamental problem with the Supreme Court’s finding of recklessness that the Claimants outlined in oral closings.⁷¹ As the Supreme Court explained at page 16 of the judgment, a finding of liability against a party under Article 217 of the Judicial Code should follow from underlying litigation in which that party has exhibited malicious bad faith. It is absolutely obvious that Article 217 liability against a party should not arise where the first court has found that the party acted with evident good faith in the litigation. But that is exactly what has happened in the present case. The Eighth Civil Circuit Court of the First Judicial District, which heard the trademark opposition proceedings, made a specific finding of “*evident good faith*” in respect of BSLS and BSJ. That judgment was not quashed by the Supreme Court Judgment, and indeed the Supreme Court had no jurisdiction to do so because there was no Cassation Recourse in respect of the trademark opposition proceedings. Only the Eleventh Circuit Court and the First Superior Court judgments were quashed by the Supreme Court Judgment. Therefore, there are currently two extant judgments: one holding that BSLS and BSJ acted with evident good faith, and the second holding that BSLS and BSJ acted with malicious bad faith. Both of those findings are in respect of

⁷⁰ Exhibits C-0313, C-0314, C-0315, and C-0316.

⁷¹ Hearing Day 5, Tr. 1227:16-1230:5.

the same trademark opposition proceedings. Mr. Lee expressed the astonishing view that there was no problem with this, but he offered no explanation and it is utterly incoherent and impossible to understand.⁷²

ii. The Foley Letter was “obviously intimidating and reckless conduct”

37. The Supreme Court’s findings with regard to the Foley Letter are manifestly incorrect on numerous grounds:

(a) It was not admitted as evidence in accordance with Panamanian law. It is common ground that the Foley Letter was not admitted in the “evidence taking stage”⁷³ and did not comply with the requirements of that stage.⁷⁴ It was “casually introduced”⁷⁵ by Muresa’s quantum experts, and BSLS/BSJ made objections as to its admissibility. It was appended to LV International’s *coadyuvante* petition, but it is common ground that it did not become evidence just because of that.⁷⁶

(b) The effect of this is that BSLS/BSJ had no opportunity to put in responsive evidence (for example, a witness statement from Foley and Lardner confirming whom they were acting for). In the Eleventh Circuit Court, BSLS/BSJ did not apply to the court to put in responsive evidence because they were objecting to the admissibility of the evidence. Mr. Lee accepted that BSLS/BSJ had no opportunity to put in new evidence at the appeal stage unless it was in response to new evidence from Muresa or new facts that were unknown before, but Muresa did not put in any new evidence and these were not unknown facts.⁷⁷ Therefore, BSLS/BSJ were

⁷² Hearing Day 2, Tr. 462:3-10.

⁷³ Hearing Day 5, Tr. 1285:20-1286:1.

⁷⁴ Hearing Day 3, Tr. 710:6-18.

⁷⁵ Hearing Day 2, Tr. 535:9.

⁷⁶ Hearing Day 2, Tr. 500:16.

⁷⁷ Hearing Day 2, Tr. 554:12-13.

denied the opportunity to confront the evidence against them, which is a fundamental breach of due process (as “*embodied in the principal legal systems of the world*”⁷⁸), and which Professor Paulsson accepted could form an element of a denial of justice claim under Article 10.5 of the TPA.⁷⁹

- (c) The letter was sent within the United States from a U.S. attorney to another U.S. attorney. Yet the Supreme Court determined that the Foley Letter was reckless and intimidating under Panamanian law, was unlawful under Panamanian law, and that the Panamanian court had jurisdiction in respect of those matters. The application of Panamanian law and jurisdiction to these matters is fundamental to the Supreme Court’s judgment, but no analysis or explanation whatever of these matters appears in the judgment. Indeed, Muresa/TGFL did not offer any submissions on these matters during the litigation. It appears that either it did not occur to the Supreme Court to consider these issues, or if the Court did undertake the requisite analysis then it inexplicably did not bother to mention that in its judgment. Either way, the upshot is that the judgment is incoherent, and without any explanation of proper law and jurisdiction the conclusions reached cannot be understood. The Respondent’s experts were asked if they understood why the Supreme Court had applied Panamanian law and jurisdiction to the Foley Letter, but none had any coherent explanation.⁸⁰ The Respondent was asked to address this question in oral closing submissions, and argued that Panamanian law was applicable (i) because the letter was shared with a Panamanian company;⁸¹ (ii) the sender should have known that it was likely that the letter would be shared with others including a

⁷⁸ TPA Article 10.5(2).

⁷⁹ Paulsson ¶ 58.

⁸⁰ Hearing Day 2, Tr. 608:22-609:1; Day 3, Tr. 757:2-13; Day 4: 938:5-939:7.

⁸¹ Hearing Day 5, Tr. 1304:6-9.

Panamanian company;⁸² (iii) the letter referred to “*the world*” and therefore (presumably) the law of any country in the world could apply to it;⁸³ and (iv) that BSLS/BSJ had referred to the U.S. opposition proceedings themselves in the Panamanian trademark action.⁸⁴ In the absence of any supporting testimony from the Panamanian law experts or any other authority, the Tribunal has no basis to accept these assertions. But even if it were assumed that the arguments the Respondent now suggests in support of the Supreme Court judgment do provide some basis for Panamanian law and jurisdiction, the complete absence of any mention of these issues in the judgment renders it incoherent and incapable of being understood.

- (d) The Supreme Court found that the Foley Letter had been sent by attorneys for BSLS/BSJ, even though Muresa itself had told the Supreme Court that the Foley Letter was sent by attorneys for BFS Brands, LLC.⁸⁵ Mr. Lee speculated that this was not a highly careless but serious error by the Supreme Court, but that the Supreme Court may have assumed that Foley was acting for BSLS/BSJ because the letter referred to “*Bridgestone/Firestone*” and so he said it would have been obvious that the Foley Letter was from any and every entity within the Bridgestone group of companies.⁸⁶ But there was no evidence before the court that Foley was acting for any party other than BFS Brands, LLC and Bridgestone/Firestone North American Tire, LLC, and the reference to “*Bridgestone/Firestone*” cannot sensibly be said to establish that Foley was acting as agent for every entity within the Bridgestone group of companies. Indeed, BFS Brands stands for

⁸² Hearing Day 5, Tr. 1304:14-1305:1.

⁸³ Hearing Day 5, Tr. 1306:10-21.

⁸⁴ Hearing Day 5, Tr. 1308:3-1309:4.

⁸⁵ Exhibit R-0046, p. 2.

⁸⁶ Hearing Day 2, Tr. 590:2.

Bridgestone/Firestone Brands, and Bridgestone/Firestone North American Tire, LLC had “Bridgestone/Firestone” in its name, and hence “*Bridgestone/Firestone*” may well have stood for those two entities. Mr. Lee opined that if a fact is controversial, it cannot be assumed and must be proved.⁸⁷ This principle is uncontroversial, and it means that either the Supreme Court made a highly careless but serious error in finding that the Foley Letter was sent on behalf of BSLS/BSJ, or it made an unjustified assumption without requisite evidence. The Supreme Court appears to have placed considerable weight on the Foley Letter in finding that BSLS and BSJ acted recklessly, so it is particularly egregious that it made such a fundamental error as to misstate who Foley and Lardner were acting for. Either way, the Supreme Court made a mistake that was so obvious and fundamental that it could not have been made by a competent and honest court.

- (e) The Foley Letter was not raised by Muresa in its complaint. Mr. Lee explained that the complaint only needs to include the “*fundamental facts*”,⁸⁸ yet by the time the case got to the Supreme Court, the Foley Letter appeared to be a fundamental fact—it was the first of the six pieces of evidence Muresa said had been ignored by the First Superior Court and which, had it been properly appreciated, Muresa said would have caused the First Superior Court to find in its favor.
- (f) Article 217 of the Judicial Code is concerned with procedural recklessness – that is, reckless behavior in litigation proceedings. The litigation proceeding in question was the trademark opposition action brought by BSLS and BSJ against Muresa, which concerned only whether Muresa should be permitted to register its RIVERSTONE trademark in Panama. The Foley Letter was not evidence in those

⁸⁷ Hearing Day 2, Tr. 590:18-19.

⁸⁸ Hearing Day 2, Tr. 534:14-15.

proceedings and was unrelated to those proceedings, so it is impossible to see how the Foley Letter could found liability under Article 217.

(g) Finally, the Supreme Court’s findings as to the contents of the Foley Letter were wrong and entirely divorced from what the letter actually said. The Tribunal needs no assistance as to the meaning of the words in the letter, but as Ms. Jacobs-Meadway said, “*It is a Demand Letter with respect to the United States, and it is not a Demand Letter with respect to any other jurisdiction. It’s a Reservation of Rights Letter.*”⁸⁹ Contrary to the clear wording of the Foley Letter, the Supreme Court found that “*opposition proceedings were going to be filed in various countries*” and that “*the Plaintiffs should abstain from selling the product*”.⁹⁰ Mr. Lee said that these errors did not matter because “*when one understands a document, there’s no need to transcribe it literally.*”⁹¹ And judges don’t need to read the text of the letter, they simply apply “*maximum experience . . . draw on one’s own experience or knowledge that one has picked up in day-to-day life.*”⁹² These explanations are completely implausible and obviously wrong. The Supreme Court’s analysis of the Foley Letter is impossible to understand and no honest or competent court could have made a finding of liability on the basis of the Foley Letter in the way that it did.

iii. The withdrawal of the appeal was “reckless”

38. It appears to be common ground that the appeal to the trademark opposition filed by BSLS and BSJ was withdrawn at a very early stage of the proceedings, before any work

⁸⁹ Hearing Day 4, Tr. 902:11-14.

⁹⁰ Exhibit R-0034, p. 15.

⁹¹ Hearing Day 2, Tr. 598:13-15.

⁹² Hearing Day 2, Tr. 601:13-15.

would have been done by Muresa or any costs incurred.⁹³ As we have explained in our submissions and at the hearing, given the very short timeframe in which a party must file an appeal, it is not uncommon to file an appeal on a precautionary basis, before the judgment has been reviewed.⁹⁴

39. Panamanian law expressly provides the right to withdraw appeals at Article 1087 of the Judicial Code. It is the very opposite of reckless to withdraw an appeal at an early stage, because it ensures that court time is not wasted. Justice Mitchell set out his concerns with the Supreme Court's determination on this basis in his dissent:

To qualify the withdrawal of an appeal as reckless is incorrect. It is not reckless conduct, rather, there is no abuse of litigation. The Respondents understood that they could not go further in the proceedings. The proceeding did not reach the end, the last consequences, as argued by the project. Punishing a party for a procedural decision such as this, qualifying it as recklessness and abuse of a right, is inappropriate.⁹⁵

40. Therefore, the withdrawal of the appeal was not reckless in any sense.
41. At the recent hearing in the present arbitration, it was suggested that the withdrawal of the appeal constituted recklessness in another way: that it suggested that the applicants had not been serious about their claim in the first place, and that it was evidence that the claim itself was without legal merit.⁹⁶ According to Mr. Lee, "99.9 percent" of claims that fail at first instance in Panama are appealed.⁹⁷ But this argument is hopeless. Mr. Lee accepted (as he had to) that it was not reckless to read a first instance decision and take it into account when deciding whether or not to proceed with an appeal.⁹⁸ And,

⁹³ Hearing Day 2, Tr. 479:19-20.

⁹⁴ Memorial ¶ 43; Reply ¶ 64; Hearing Day 1, Tr. 86:5-88:19.

⁹⁵ Exhibit R-0034, p. 25.

⁹⁶ Hearing Day 5, Tr. 1240:22-1241:5.

⁹⁷ Hearing Day 2, Tr. 481:18.

⁹⁸ Hearing Day 2, Tr. 474:6-13.

as set out at paragraph 35(d) above, it is clear that the trademark opposition action was not without legal merit, and the Respondent's expert has confirmed this.⁹⁹

iv. Articles 217 of the Judicial Code and Article 1644 of the Civil Code were breached

42. The Supreme Court based its decision on provisions of Panamanian law that had not been cited by Muresa and TGFL in their complaint. The complaint alleged that BSLS/BSJ had breached Articles 1644, 1644A and 1706 of the Judicial Code,¹⁰⁰ but the Supreme Court Judgment based its decision on Article 217 of the Judicial Code. The latter was accepted by the Respondent at the hearing.¹⁰¹
43. There are two problems with this from a denial of justice perspective:
- (a) First, it was an egregious breach of Panamanian law that rises to the level of serious incompetency or bad faith, since Panamanian law requires that a judgment is based solely on the legal grounds in a complaint; and
- (b) Second, this meant that BSLS/BSJ did not have the opportunity to fully defend themselves on this ground, since it was not raised by Muresa and TGFL.
44. As to the first issue, Panamanian law is clear that a decision cannot be made on the basis of legal grounds that were not raised by the claimant. Article 991 of the Judicial Code provides: "*the defendant cannot be sentenced to pay a superior amount, or for a matter which is different from that requested in the claim.*"¹⁰² This fundamental principle of Panamanian law is also known as the Principle of Consistency.

⁹⁹ Hearing Day 3, Tr. 772:3.

¹⁰⁰ Exhibit C-0016.

¹⁰¹ Hearing Day 5, Tr. 1275:12-14.

¹⁰² Exhibit R-0067, p. 17 (excerpts of the Panamanian Judicial Code, Article 991).

45. According to Mr. Lee, the Supreme Court was able to issue a judgment under Article 217 of the Judicial Code because of the principle that “*the judge knows the law*”,¹⁰³ but he offered no authority for the proposition that this principle means that the judge can substitute a different legal basis for the claim that a party wishes to make. Mr. Lee also noted at the hearing that while claimants need not include legal arguments in their complaint, they must do so during the closing argument stage.¹⁰⁴ But the Closing Arguments filed by Muresa and TGFL state that the legal ground for the complaint was Article 1644 of the Civil Code, and there is no mention of Article 217 of the Judicial Code.¹⁰⁵ In his expert report, Mr. Lee further argued that because the Supreme Court conducted a *de novo* review of the evidence and became a court of first instance, it was able to apply whatever provisions of law it chose, because of the same principle that “*the judge knows the law*”.¹⁰⁶ But this does not make any sense either: the judge may know the law, but that does not mean that if a party brings a claim on the wrong basis the court will rewrite the claim for the claimant.
46. Second, because Muresa did not raise Article 217 of the Judicial Code in its claim, BSLS/BSJ did not have the opportunity to defend themselves against it. For the Respondent, the fact that BSLS/BSJ repeatedly referred to Article 217 to explain to the court that Muresa’s claim had been brought on the wrong basis means that it cannot now be said that they had not been heard on the allegations under Article 217.
47. But there were no allegations under Article 217 and therefore nothing for BSLS/BSJ to defend themselves against. Professor Paulsson suggests that this situation is similar to that which the claimants encountered in *Vivendi v Argentina*, and quotes from the

¹⁰³ Lee 2 ¶ 99.

¹⁰⁴ Hearing Day 2, Tr. 485:5-8.

¹⁰⁵ Exhibit C-0164, p. 64.

¹⁰⁶ Lee 2 ¶ 103.

Decision on Annulment in that case.¹⁰⁷ There, the claimants argued that the tribunal's decision concerned a question that was not adequately canvassed in argument. In the paragraph cited by Professor Paulsson, the annulment committee said that even if this were true, *“this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention.”*¹⁰⁸

48. But it is useful to look at the next paragraph, which Professor Paulsson does not quote:

*“From the record, it is evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal’s analysis of issues was clearly based on the materials presented by the parties and was no sense ultra petita. For these reasons, the Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.”*¹⁰⁹

49. None of the reasons identified by the Annulment Committee for its decision are true of the proceedings before the Supreme Court:

- (a) The parties did not present written or oral submissions on Article 217 because it was not raised by Muresa.
- (b) There are no oral submissions before the Supreme Court, even though the Supreme Court turned itself into a court of first instance.
- (c) There was no hearing before the Supreme Court.

¹⁰⁷ Paulsson ¶ 55; RLA-00183 ¶ 84.

¹⁰⁸ RLA-00183 ¶ 84.

¹⁰⁹ RLA-00183 ¶ 85.

(d) The Supreme Court’s analysis is based solely on the evidence that Muresa said had been ignored by earlier courts.

B. Causation

i. The trademark opposition proceedings, the Foley Letter and the threat of seizure caused Muresa/TGFL to sell fewer RIVERSTONE tires and begin selling lower quality tires, resulting in reduced profits

50. The Supreme Court’s findings on causation appear at pages 14 and 15 of the Judgment: “*legal action by [BSLS and BSJ] caused damages to [Muresa]*”, and “*The situation is also verified by witness statements made by Plaintiffs’ employees. Such statements clearly and coincidentally show a sales crisis, reflected in the Plaintiffs’ earnings which, despite the implementation of contingency plans, could not prevent the loss of sales or market position of the RIVERSTONE brand*”.
51. As to witness evidence, the Supreme Court relied on the evidence of Mr. Samaniego, who said that the opposition caused Riverstone sales to fall, but he gave no explanation, and there was no documentary or other evidence offered in support.¹¹⁰
52. In *U.S. v Mexico (The Orient)*, the court based its determination on the evidence of a single witness, whose evidence was directly contradicted by four others. The commission in that case held, “*A decision thus given in direct opposition to so strong a preponderance of the testimony cannot be entitled to respect. It indicates strongly a predetermination on the part of the judge to confiscate the property without reference to the testimony.*”¹¹¹
53. The same is true here. One witness made a statement purporting to explain why RIVERSTONE sales had decreased, but he did not provide any explanation as to how

¹¹⁰ Exhibit R-0034, p. 10.

¹¹¹ CLA-0085, at p. 3231.

actions by BSLS/BSJ were said to have affected these sales. There are numerous problems with this alleged causation, such as the fact that (i) a trademark opposition action cannot prevent sales of tires on its own; (ii) no injunction had ever been sought preventing sales of RIVERSTONE tires; (iii) the loss that Muresa claimed to have suffered was from sales stopping throughout Central and South America and the Caribbean,¹¹² even though the only trademark opposition action complained of was in Panama. There was no attempt at all by the Supreme Court to understand or analyze any of these issues. Thus it was absurd for it to find that causation had been made out on this basis.

54. The Supreme Court also relied on the evidence of Muresa/TGFL's experts on valuation, but failed to consider the two other expert reports on the same discipline, from BSLS/BSJ and the court's own expert. Professor Paulsson acknowledges that this could constitute a denial of justice based on an absence of due process.¹¹³ He was asked to consider the matter based on the following assumed facts:

(a) Muresa argued that the First Superior Court had ignored evidence that Muresa had submitted;

(b) BSLS/BSJ asserted that the First Superior Court had fully analyzed all of the evidence;

(c) The Supreme Court stated that it had "fully verified the body of evidence."

55. But these facts are wrong. It is true that Muresa argued that the First Superior Court had ignored evidence that it had submitted. BSLS and BSJ did assert that the First Superior Court had analyzed all of the evidence, but more importantly, it is plain from

¹¹² Exhibit C-0317, p. 1.

¹¹³ Paulsson ¶ 71

the judgment itself that the First Superior Court had looked at the specific items of evidence Muresa was complaining about (to the extent they were raised before it), as discussed above.

56. The Supreme Court's statement that it had "fully verified the body of evidence" is part of a longer sentence. The Supreme Court actually says, at page 14 of the Judgment: *"This Chamber fully verified the body of evidence, on which the notion of factual error is based about the existence of evidence. These are items that the Chamber addressed in detail when verifying the respective Reasons."*¹¹⁴
57. In other words, the Supreme Court did not say that it had looked at all of the evidence at all. It said that it had verified the body of evidence that Muresa had asked it to look at, in the six categories of evidence that it said the First Superior Court had ignored.
58. There were three expert reports on the record. Of course it was open to the Supreme Court to review all three reports and decide that it preferred the evidence of Muresa's experts. But the Supreme Court did not consider the other two reports at all, it just took the evidence in Muresa's report at face value even though the other two experts shared the same opposing view. Justice Mitchell referred to the other expert evidence in his dissent, so it cannot have been that the Supreme Court forgot about the other experts. Therefore, the Supreme Court made a conscious decision to rely only on one party's expert evidence and to disregard the other party's. This, according to Professor Paulsson, could constitute an absence of due process sufficient to be an element of proof for denial of justice.¹¹⁵ It is submitted that in the present case this does indeed amount to an absence of such due process.

¹¹⁴ Exhibit R-0034, p. 14. (emphasis added).

¹¹⁵ Paulsson ¶ 71.

59. The Supreme Court’s findings on causation were contrary to the allegations made in Muresa’s own pleadings. The Supreme Court found that damages were caused by a decrease in sales, whereas Muresa’s claim alleged that sales had ceased.¹¹⁶ Mr. Lee said that this was not inconsistent “*because it’s not incompatible*”.¹¹⁷ But even if this statement made any sense, it does not explain how it was that Muresa was able to claim USD \$5 million when it thought its sales had stopped entirely, but still to claim the same amount when it realized that its sales hadn’t stopped but had merely decreased. In any case, there was no discussion of this or explanation of why the Supreme Court made the findings that it did, and therefore the Supreme Court Judgment was incoherent and impossible to understand.

C. Loss

i. “[BSJ] and [BSLS] are ordered to jointly pay [Muresa] and [TGFL] the sum of FIVE MILLION DOLLARS”

60. The Supreme Court made no attempt whatsoever to explain how it arrived at its finding on loss. Mr. Arjona has explained that the Supreme Court is required to justify its findings on loss.¹¹⁸ Mr. Lee says that there is an “*implicit*” explanation, arising out of the references in the judgment to witness and expert evidence.¹¹⁹ The damages analysis must be explicit, not implicit,¹²⁰ but even if an implicit explanation sufficed, there is not one. The only reference to the alleged quantum of loss in the judgment is to Muresa’s alleged loss of 3.3 million balboas (USD \$3.3 million), on page 11. How Muresa and TGFL are said to have suffered loss of USD \$5 million is not explained

¹¹⁶ C-0016, p. 7.

¹¹⁷ Hearing Day 2, Tr. 536:19-20.

¹¹⁸ Arjona 2 ¶¶ 67-92.

¹¹⁹ Lee 1 ¶ 161; Lee 2 ¶¶ 87-88.

¹²⁰ Article 990 of the Judicial Code, at Exhibit R-0067, p16-17.

anywhere. The Respondent was unable to explain where USD \$5 million came from, and the Supreme Court Judgment in this respect is impossible to understand.

VI. CORRUPTION

61. The findings of the Supreme Court, on their own and taken together, amount to a judicial decision that is so egregiously wrong that no honest or competent court could possibly have given it. The Tribunal does not need to go further to find denial of justice.

62. But in the present case there is circumstantial evidence that points to corruption:

(a) The fact that Panama's Ambassador to the U.S. admitted that this judgment was procured through corruption;

(b) That the Respondent delayed conducting searches for documents which may evidence corruption in this case until Justice Ortega had left office and was no longer contactable. When the Claimants made this point in correspondence, the Tribunal noted that "*there may well be force in that submission.*"¹²¹

(c) The large quantity of circumstantial evidence on corruption relating to Justice Ortega in particular and the Panamanian judiciary in general, together with the ineffective system for investigating corrupt Supreme Court judges; and

(d) It would be surprising if two Supreme Court judges could be so incompetent as to produce a judgment as bad as the one in issue. Corruption seems more likely than incompetence.

¹²¹ Procedural Order No. 10 ¶ 5.

63. These facts should assist the Tribunal in understanding how this egregious judgment came about.
64. As Constantine Partasides said, in his article on proving corruption in investor-state arbitration published in ICSID Review, “*where an inference is a reasonable conclusion to draw from the known or assumed facts, Tribunals should be willing to draw the inference to determine allegations of illegality as they would any other allegation – indeed more so given the often deliberately concealed nature of an illegality.*”¹²²
65. Tribunals in other cases have accepted that corruption is rarely proven by “*direct cogent evidence, but rather, it usually depends upon an accumulation of circumstantial evidence.*”¹²³ It is of course true, as the Respondent notes, that the Tribunal must be satisfied that each of the elements of the claim are proven, but such proof, in the case of corruption, may not be direct and may include inferences and circumstantial evidence. In this case, we have circumstantial evidence, as well as the direct admission of the Ambassador, that point to corruption.

A. The Environment of Corruption

66. The starting point is the established prevalence of corruption in Panama:
- (a) Various NGOs have reported that such corruption extends to the judiciary, where there is a serious issue.¹²⁴
- (b) Those allegations of corruption extend to the Supreme Court. Complaints and any resulting decisions or investigations are not made public, so the Claimants are only aware of those that they have discovered through press searches. However, only

¹²² CLA-0153 ¶ 77

¹²³ CLA-0137, *UFG v Egypt* ¶ 7.52

¹²⁴ Memorial ¶¶ 116-130; Reply ¶¶ 7-9, 40-48; Supplemental Reply (all).

two complaints appear to have been investigated by the National Assembly,¹²⁵ and Ambassador Gonzalez-Revilla explained that this was the first time a Supreme Court Justice had ever been charged with any crimes.¹²⁶

(c) Mr. Arjona, a former Chief Justice of the Panamanian Supreme Court explained that in the vast majority of cases complaints against Supreme Court Justices are dismissed,¹²⁷ and very few are investigated: “*The political composition of the Credentials Committee, the system of reciprocal judgment among justices and deputies, and the lack of ethical or disciplinary consequences for these decisions are some of the reasons that may, to varying degrees, explain why these charges have not been admitted.*”¹²⁸ He further stated at the hearing that allegations of corruption against Supreme Court Justices have not been dealt with “*in the appropriate manner,*”¹²⁹ and referred to the constitutional reform project that is being undertaken in Panama to address this.¹³⁰

(d) There have been specific corruption allegations made against the drafting justice in the Muresa case, Justice Ortega. These involve his son and his assistant.¹³¹

B. Admission by Ambassador Gonzalez-Revilla

67. Ambassador Gonzalez-Revilla took office in August 2014,¹³² shortly after Juan Carlos Varela was elected President of Panama in May 2014. Ambassador Gonzalez-Revilla was a close friend and supporter of President Varela.¹³³ One of the pillars in President

¹²⁵ Arjona 3 ¶¶ 19-26, Rejoinder ¶¶ 207-211.

¹²⁶ Hearing Day 6, Tr. 1380:11-13.

¹²⁷ Arjona 3 ¶ 18.

¹²⁸ Arjona 3 ¶ 21.

¹²⁹ Hearing Day 2, Tr. 433:7-8.

¹³⁰ Hearing Day 2, Tr. 433:10-17.

¹³¹ Exhibit C-0230.

¹³² Gonzalez-Revilla ¶ 1,

¹³³ Hearing Day 6, Tr. 1366:12-22.

Varela's presidential campaign was transparency and corruption¹³⁴ due to corruption in the previous administration of President Martinelli.¹³⁵ President Varela's administration brought a large number of corruption investigations into former government officials,¹³⁶ including two Supreme Court Justices.¹³⁷

68. Representatives of the Bridgestone group made contact with the Panamanian Embassy in Washington D.C. first in December 2014,¹³⁸ and thereafter in January and March 2015.¹³⁹ A short description of the issue the Bridgestone representatives wanted to discuss was attached to one of the emails,¹⁴⁰ but Ambassador Gonzalez-Revilla confirmed that he had not seen this before the meeting with Bridgestone representatives.¹⁴¹ Instead, before the meeting with Bridgestone representatives, Ambassador Gonzalez-Revilla received a short oral briefing from his staff.¹⁴²
69. The meeting took place on 13 March 2015. At the very beginning of this meeting, while Mr. Kho of Akin Gump was describing the circumstances of this case, Mr. Gonzalez-Revilla interrupted the explanation and said, "*You know what this is, right? It's corruption.*" This admission was astonishing to the Bridgestone representatives at the meeting who recalled his words and described them in their witness statements.¹⁴³
70. Ambassador Gonzalez-Revilla denied saying this in his witness statement, so there is now a question as to who is to be believed. The Respondent chose not to question Mr.

¹³⁴ Exhibit C-0259; Hearing Day 6, Tr. 1367:5-6.

¹³⁵ Hearing Day 6, Tr. 1367:15.

¹³⁶ Hearing Day 6, Tr. 1368:10.

¹³⁷ Hearing Day 6, Tr. 1369:16-17; Reply ¶¶ 3, 77

¹³⁸ Exhibit R-0032.

¹³⁹ Exhibit R-0032.

¹⁴⁰ Exhibit R-0033.

¹⁴¹ Hearing Day 6, Tr. 1376:10.

¹⁴² Hearing Day 6, Tr. 1377:4-9.

¹⁴³ Witness Statement of Steven Akey dated 30 April 2018, ¶ 8; Witness Statement of Jeffrey Lightfoot dated 9 May 2018 ¶ 11.

Akey and Mr. Lightfoot, so their recollections have not been tested and their evidence should stand as it is. On the other hand, at the hearing, the Ambassador admitted that he did not recall much of the meeting at all. He could not remember who was there,¹⁴⁴ or how many people were there.¹⁴⁵ He could not remember whether or not corruption was discussed.¹⁴⁶ Indeed, the Ambassador's admission that he could not recall if corruption was discussed is inconsistent with his suggestion that he did not say "*You know what this is, right? It's corruption.*"

71. As described above, Ambassador Gonzalez-Revilla took up his position at a time when the President of Panama was making very public attempts to end corruption in Panama. The meeting took place just after a former President of the Supreme Court pleaded guilty to criminal charges of corruption,¹⁴⁷ and corruption charges had been brought against former President Martinelli.¹⁴⁸ The Ambassador stated that there was a general pitch that he made at many meetings at that time about corruption as one of the "*five pillars*" of President Varela's agenda, and he thought it was possible that he had said this at the meeting with Bridgestone.¹⁴⁹ While Ambassador Gonzalez-Revilla may not have known much about the Bridgestone and Muresa case, when he heard about what had happened, given his knowledge of the problems of corruption in Panama generally and in the Supreme Court in particular, it would be unsurprising if his immediate reaction was to say that it was obviously the result of corruption.

¹⁴⁴ Hearing Day 6, Tr. 1385:12-14.

¹⁴⁵ Hearing Day 6, Tr. 1385:21-22.

¹⁴⁶ Hearing Day 6, Tr. 1391:20-22.

¹⁴⁷ Exhibit C-0312.

¹⁴⁸ Exhibit C-0258.

¹⁴⁹ Hearing Day 6, Tr. 1362:13-19.

72. In light of the above, the unchallenged evidence of Messrs. Akey and Lightfoot that the Ambassador did make the relevant admission is to be preferred over the Ambassador's suggestion, based on what he accepted is an imperfect recollection, that he did not.

C. Document Production

73. The Tribunal should draw adverse inferences from the Respondent's failure to conduct proper searches and produce relevant evidence.

74. The Claimants' document Request No. 2 asked for all documents and communications between the three Supreme Court Justices who issued the Supreme Court Judgment and any third party created in relation to the Supreme Court Judgment. The Respondent objected to this arguing (i) that the Claimants had provided no evidence that such documents existed; (ii) that such documents were irrelevant; and (iii) that the request was too broad.¹⁵⁰ Notably, the Respondent did not state that such documents did not exist. However, following the Tribunal's order that documents in this category be produced, the Respondent wrote to the Tribunal on 14 February, stating, "*With regard to this request, Panama has requested such documents of the Supreme Court of Panama, and the latter has confirmed that no responsive documents exist.*"¹⁵¹

75. The Claimants then applied for an order that the Respondent be required to clarify its response to Request No. 2. The Tribunal agreed with the Claimants that the response was unsatisfactory. Procedural Order No. 8 stated: "*the Claimants are justified in seeking clarification as to the identity of the individuals personified in the expression "the Supreme Court of Panama" and the basis on which they have been able to say that*

¹⁵⁰ Claimants' Request for Production of Documents.

¹⁵¹ Letter from Arnold & Porter to Tribunal dated 14 February 2019.

no responsive documents exist.” Accordingly, the Respondent was ordered to provide particulars of:

(i) the individuals who were requested to produce such documents and the responses made by those individuals; (ii) the searches that were made of hard copy files and computer records in order to identify whether such hard documents existed; (iii) confirmation that any communications between the Magistrates and Court staff in relation to this case were purely administrative.

76. The Respondent wrote to the Tribunal on 12 April 2019 and explained that the only individual that it had asked was Chief Justice Hernan De León. Chief Justice De León stated that all case-related documents are included in a hard copy case file (the “*expediente*”) which is circulated among the Justices for review, comment and approval, and that no documents exist outside of this *expediente*. When asked to search for documents between the Justices and third parties, Chief Justice De León said that “*third parties are not consulted in connection with cases.*”¹⁵²
77. These responses are unsatisfactory for two reasons. First, only one Justice was consulted in respect of this enquiry. The Claimants understand that Justice Mitchell’s term as Justice of the Supreme Court ended on 31 December 2015,¹⁵³ but Justice Ortega was on the Supreme Court at the time the document requests were made and at the time of Procedural Order No. 7 (he retired from the Supreme Court on 13 March 2019).¹⁵⁴ Justice Ortega could therefore have been asked to search for documents responsive to the Claimants’ request, but he was not.
78. Second, Chief Justice De León answered the questions by reference to standard court practice, and no searches (other than within the *expediente*) were undertaken. It may

¹⁵² Letter from Arnold & Porter to Tribunal dated 12 April 2019.

¹⁵³ Arjona 3 ¶ 27.

¹⁵⁴ Arjona 3 ¶ 28.

be true that third parties are not typically consulted in connection with cases, and that emails and documents outside of the *expediente* are not usually created; but the question the Respondent was required to ask of the Supreme Court Justices was whether, despite usual practice, there were any communications with third parties or documents created outside of the *expediente* in the Muresa proceedings.

79. It is not good enough for one of the three judges involved simply to say that there are no computer records or documents or files to be searched. In one of the complaints that was made against Justice Ortega that reached the National Assembly, it was alleged that Justice Ortega had an assistant named Claudia, who attended meetings with the complainant (Mr. Alvarado Taylor) and Justice Ortega's son in which bribes were paid by Mr. Taylor to Justice Ortega, via his son, in order to achieve the desired outcome in Mr. Taylor's case.¹⁵⁵ If Justice Ortega had any communications with his assistant Claudia or with his son regarding a similar transaction in relation to the Bridgestone case, Chief Justice De León is unlikely to have been aware of them.
80. As Mr. Partasides said in his recent article in the ICSID Review, "*once a certain prima facie threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate – given the nature of the allegation – for the defendant to sit back and not contribute to the evidentiary exchange on the issue.*"¹⁵⁶ The Claimants reached that prima facie threshold of evidence, but the Respondent has indeed sat back and failed to make proper searches or to contribute to the evidentiary exchange.

¹⁵⁵ Exhibit C-0230.

¹⁵⁶ CLA-0153 ¶ 63.

81. In light of the fact that the Respondent refused to actually carry out any searches of any hard copy or electronic documents, or to ask two out of three of the Justices that issued the Supreme Court Judgment to conduct any searches, the Tribunal should adversely infer that there *were* communications between one or more of the Justices and a third party, and that such communications would support a finding of corruption in relation to the Supreme Court Judgment.

VII. BSLS'S CLAIM For Damages of USD \$5.4 million

82. As a result of the denial of justice, BSLS was held jointly and severally liable to pay Muresa and TGFL the sum of USD \$5,431,000. BSLS paid this sum in full on 19 August 2016.¹⁵⁷ The Respondent spent a great deal of time at the hearing trying to prove that BSLS did not really pay this sum, and therefore did not incur any loss. But as the Tribunal noted, “*it's a startling proposition that if A incurs liability and is assisted to discharge that liability by a relative or an associated company, it loses the right to claim compensation in relation to that liability from the Party that caused it.*”¹⁵⁸

83. In any case, Mr. Kingsbury explained that BSLS did pay the whole judgment debt and he explained why.¹⁵⁹ BSLS borrowed money from its sister company, BSAM, to make these payments.¹⁶⁰ BSLS pays interest on the loan,¹⁶¹ and the loan rolls over each year and will do so until the conclusion of this arbitration.¹⁶² The Respondent stated in its Closing Submissions that the Claimants had “*conceded*” that the loan was “*contingent on the outcome of this arbitration.*”¹⁶³ No such thing was conceded by the Claimants.

¹⁵⁷ Exhibit C-0126.

¹⁵⁸ Hearing Day 1, Tr. 229:6-10.

¹⁵⁹ Hearing Day 1, Tr. 267:10-268:7.

¹⁶⁰ Hearing Day 1, Tr. 268:8-11.

¹⁶¹ Hearing Day 1, Tr. 271:14.

¹⁶² Hearing Day 1, Tr. 269:21-270:2.

¹⁶³ Hearing Day 5, Tr. 1323:16-18.

Mr. Kingsbury was clear that the loan will be repayable to BSAM, whatever the result of this arbitration.¹⁶⁴ The assertion that this is a sham loan is unsupported by evidence.

84. The Respondent also argued that BSLS “*failed to mitigate its loss*”¹⁶⁵ because it did not seek to recover half of the amount payable from BSJ. But there is no evidence that BSLS had any right to seek contribution from BSJ.

85. The Respondent highlighted an agreement between BSLS and BSJ made in January 2010, but this is clearly limited to a sharing of the “*disbursement cost of all trademark actions*” (at Clause 1), which means sharing of “*fees due under the invoices from law firms, investigation companies*”¹⁶⁶ There is no agreement here under which BSLS has any right of contribution from BSJ in respect of any damages liability.

86. Next, the Respondent argues that a board resolution issued by BSLS in 2016 changes the effect of the agreement in 2010, because of the fourth recital, which provides:

WHEREAS, in connection with the payment of the Judgment Amount, the Corporation and the Parent propose to agree that (i) despite the 2010 Agreement the Corporation will pay, and bear the entire financial burden of, such payment, and (ii) the Corporation will be entitled to initiate, and keep the entire financial benefit of any recovery from, any investor-state arbitration or any other actions against the Republic of Panama (the “2016 Agreement”).

But of course a board resolution by BSLS obviously cannot operate to vary the effect of a prior agreement, and the Respondent has offered no legal explanation as to how this resolution changes the earlier agreement.

87. Therefore, there is no contractual basis for contribution. As to whether a right to contribution arises outside contract, that would presumably be a question of Japanese

¹⁶⁴ Hearing Day 1, Tr. 271:11-12.

¹⁶⁵ Hearing Day 1, Tr. 237:9-11; Hearing Day 5, Tr. 1324:6.

¹⁶⁶ Exhibit C-0318.

law, or possibly U.S. or Panamanian law. However, the Respondent has offered no legal authority to support the existence of any such right, and there is no evidence on the record to that effect. Certainly, the Claimants are not aware that any such right exists.

88. The Claimants have also not been able to identify any public international law authority as to whether BSLS's right to recover the USD \$5.4 million should be reduced to reflect the unsubstantiated alleged right for which the Respondent contends. No sources of international law have been identified that assist on this point. Likewise the TPA is silent on this.

89. Finally, even if there were a right of contribution and an obligation to mitigate, in an intra-group company situation, it does not make sense to suggest that BSLS should mitigate its loss by seeking to recover from BSJ.¹⁶⁷

90. In these circumstances, the Tribunal should simply assess whether BSLS has acted reasonably. Having been found jointly and severally liable, then for all of the reasons cited by Mr. Kingsbury,¹⁶⁸ it was reasonable for BSLS to pay the full USD \$5.4 million. If BSLS and BSJ agreed that BSLS would pay the full amount and then be entitled to retain all of the proceeds of the present arbitration, then that was a matter for them—but in the circumstances it was not unreasonable. Therefore BSLS should be awarded the full USD \$5.4 million in accordance with standard articulated in *Factory at Chorzów*.

¹⁶⁷ Hearing Day 1, Tr. 238:12-15.

¹⁶⁸ Hearing Day 1, Tr. 267:15-268:7.

VIII. DAMAGES IN EXCESS OF USD \$5.4 MILLION

91. BSLS and BSAM also claim for the damage incurred to their trademark rights which resulted from the denial of justice outlined above.
92. Trademarks are an indicator of source, enabling consumers to make efficient and informed choices among products and services of different providers. But trademarks also embody the reputation of the business in the public sphere, to consumers, distributors, manufacturers and investors. The reputation, or goodwill, of the trademark can be enhanced, or it can be damaged by the trademark owner, licensees or external forces. The meaning of “goodwill” in this context is not the same as the meaning it has in an accounting context, when a business is being sold. There are certain variables that must be taken into account when trying to calculate the value of goodwill, such as marketplace analysis, but *“it’s a very difficult and amorphous concept, and putting a number on it outside the accounting sphere is very difficult.”*¹⁶⁹
93. The Respondent argued that only one entity, the trademark owner, “owns” the goodwill of a trademark.¹⁷⁰ But talking about “ownership” in relation to goodwill is unhelpful. As Ms. Jacobs-Meadway explained, the term “goodwill” is not well-defined,¹⁷¹ and it does not matter whether a trademark licensor or licensee “owns” goodwill, in the sense of having legal title to it.¹⁷² The key point is that BSAM enjoys the benefits of the goodwill associated with the famous BRIDGESTONE and FIRESTONE brands, but it also bears any negative repercussions of any damage to those brands.¹⁷³

¹⁶⁹ Hearing Day 4, Tr. 923:5-7.

¹⁷⁰ Hearing Day 1, Tr. 246:13.

¹⁷¹ Hearing Day 4, Tr. 857:1.

¹⁷² Hearing Day 4, Tr. 858:8-13.

¹⁷³ Hearing Day 4, Tr. 859:13-860:1

94. Trademarks can be damaged in a variety of ways. They can be legally invalidated or their scope of protection limited by judicial decisions or legislation,¹⁷⁴ or by failure of the trademark owner to adequately police against infringers and copycats, resulting in confusingly similar marks in the marketplace. Goodwill can likewise be damaged in various ways, both by quality issues with the goods and by external events such as a court judgment. The goodwill inherent in trademarks has an economic value, and that value can increase or decrease based on various contingencies.

95. It is worth clarifying here the terms “exclusive” and “non-exclusive” as they have been used by the Parties. They have been used in two distinct ways, but it has not always been made clear which applies in each circumstance:

(a) First, there is the concept of exclusive and non-exclusive trademark rights.

Specifically here, if a trademark owner grants an exclusive trademark license to a licensee, the licensor cannot grant any other licenses to use the mark in the subject territory, nor can it use the mark itself. Under a non-exclusive license, the trademark owner can grant other licenses to the mark, and each licensee will be under the control of the licensor, as would a single, exclusive licensee. The trademark licenses at issue in these proceedings are (i) the trademark license granted by BSJ to Bridgestone/Firestone North American Tire, LLC (the “**BRIDGESTONE Trademark License**”)¹⁷⁵; and (ii) the trademark license granted by BSLS to Bridgestone/Firestone Americas Holding, Inc. (the “**FIRESTONE Trademark License**”¹⁷⁶) The **BRIDGESTONE Trademark License** and the **FIRESTONE Trademark License** are both non-exclusive, on their terms. But they are *de facto*

¹⁷⁴ CLA-0052; *see also* Daniel 1 ¶¶ 41-42.

¹⁷⁵ Exhibit C-0052.

¹⁷⁶ Exhibit C-0048.

exclusive, because the trademark owner has not and will not ever grant any other licenses.¹⁷⁷

(b) Second, there is the different concept of market exclusivity. This refers to the absence of any confusingly similar or infringing third party trademarks in the market for the specific goods. Generally, the trademark laws afford to a rights-holder marketplace exclusivity with respect to marks of third parties that are liable to confuse consumers. Responsible trademark owners police the markets in which they are active in order to try to maintain market exclusivity, so that the market is not flooded with competitors selling products under marks which are confusingly similar to their own. Similarly, if a court pronounces that a certain mark can coexist in the marketplace with the rights-holder despite the potential for confusion, or that legal action against opposing registration against a mark was reckless and without legal basis, such judicial action diminishes the rights-holder's marketplace exclusivity. The subject trademarks have a reduced scope of protection, and thus such trademark rightsholders have a reduced ability to protect their rights as compared with trademark rights holders that enjoy greater marketplace exclusivity.

96. With this context in mind, the effect of the Supreme Court Judgment was to impair the Claimants' ability to benefit from their trademark rights, and to limit the scope of protection of their trademarks:¹⁷⁸

(a) First, there is a chilling effect on the exercise of their trademark rights. Mr. Kingsbury explained that while the Bridgestone group generally has a strategy to oppose all marks for tires with a –STONE suffix, the effect of the Supreme Court

¹⁷⁷ Decision on Expedited Objections ¶ 184.

¹⁷⁸ Jacobs-Meadway 1 ¶ 53.

Judgment is that “we have to take a closer look at whether we enforce or not, just based on the possibility of in the event we were to lose an opposition in Panama or another, you know, small country, would we potentially face a similar damage award or potentially even greater? This one was \$5 million, but, you know, the next one could be \$25 million.”¹⁷⁹

(b) Second, because of the above-mentioned chilling effect, there is an increased likelihood that products bearing confusingly similar marks will enter the market, resulting in loss of exclusivity and erosion of the breadth of the trademark rights.

(c) Third, there may be an impact on all trademark rights holders in Panama. Despite the fact that there is no system of precedent in Panama, it is clear that the Panamanian courts do rely on previous decisions, and as Mr. Arjona noted, “it is not possible to rule out that in the future these criteria may be used for the resolution of other similar cases.”¹⁸⁰

97. The effect of this is that the Claimants’ trademark rights are impaired and it is as if they have become non-exclusive rights holders, from a market exclusivity perspective. A non-exclusive trademark right is obviously worth less than an exclusive right, because there are others either using the mark in the marketplace, or others have the potential to start using the mark. Third parties now have the benefit of the Supreme Court Judgment when deciding whether or not to enter the market, and so the value of the BRIDGESTONE and FIRESTONE marks is impaired as if they went from exclusive to non-exclusive licenses. Therefore, in order to value the impact of the Supreme Court Judgment on the trademark rights, Mr. Daniel adopted the best available economic

¹⁷⁹ Hearing Day 1, Tr. 275:17-276:2.

¹⁸⁰ Arjona 1 ¶ 14.

proxy for a loss of trademark exclusivity and calculated damages based on comparisons between the value of exclusive trademark licenses with the value of non-exclusive trademark licenses (in the sense identified at paragraph 95(b) above).

98. The Respondent's position is that valuing trademark rights is no more difficult than valuing any other kind of asset.¹⁸¹ Valuing BSLS's investment, as the trademark owner, is "*simply a matter of determining the income received by a trademark owner.*"¹⁸² BSAM's investment, as the trademark license holder, is simply "*revenue from sales, minus the royalty expense*".¹⁸³ The Respondent argues that the "*real world data demonstrates that there has been no damage*" because royalties have been paid and sales have continued, and have not decreased since the Supreme Court Judgment.¹⁸⁴
99. These facts are true, but do not fit in this case. What is not captured by the Respondent's analysis is the question of what the sales and royalties would have been but for the Supreme Court Judgment. It is not enough simply to say that there has been no decrease (in fact, even an increase) in sales since the Supreme Court Judgment. As the Claimants have always stated, consumers are unlikely to be aware of the Supreme Court Judgment and would not make purchasing decisions based on it. However, the Respondent did not perform any "but for" analysis of the data to determine what sales would have been absent the Supreme Court Judgment compared to what sales actually were. It simply saw that there had been no reduction in sales on a year over year basis and that was the end of its analysis.

¹⁸¹ Hearing Day 1, Tr. 247:1-3.

¹⁸² Hearing Day 1, Tr. 247:5-6.

¹⁸³ Hearing Day 1, Tr. 250:19-20.

¹⁸⁴ Hearing Day 1, Tr. 251:12-14.

100. But for the reasons outlined above, the valuation of trademarks is not simple, and it is not the same as valuing tangible assets. Mr. Daniel’s analysis captures the change in buyer expectations (the buyer being a potential acquirer of the Claimants’ trademark rights) before and after the Supreme Court Judgment based on sales, profitability and, importantly, risk.
101. Accordingly, Mr. Daniel calculated that the damages suffered by BSLs and BSAM with respect to their rights in the FIRESTONE and BRIDGESTONE trademarks (as applicable) within Panama is between USD \$557,604 and USD \$1,096,672. These figures include damages related to sales in the Colón Free Trade Zone. This is because (a) the Colón Free Trade Zone is in Panama;¹⁸⁵ (b) therefore Panamanian trademark law applies to entities and products in the Colón Free Trade Zone;¹⁸⁶ and (c) sales in the Colón Free Trade Zone are made in Panama and are therefore captured within Panama’s accounts.¹⁸⁷ With respect to damages in the BSCR Region (which includes Panama), the damages are between USD \$7,732,830 and USD \$14,523,541. Within this damages framework, the Respondent has offered no alternative damages value, and therefore it is submitted that the Tribunal should adopt the upper end of the damages calculated by Mr. Daniel: USD \$1,096,672 for Panama alone, or USD \$14,523,541 for the BSCR Region.
102. An issue that troubled the Respondent was why Mr. Daniel’s analysis was based on the date of the Supreme Court Judgment, when in the words of its expert, Mr. Shopp, “*nothing has occurred over the past five years.*”¹⁸⁸ The problem with this theory is that five years is not a very long period of time when compared to the time it would take a

¹⁸⁵ Exhibit C-0278.

¹⁸⁶ Hearing Day 3, Tr. 746:17-750:13.

¹⁸⁷ Respondent’s Document Production Request.

¹⁸⁸ Hearing Day 5, Tr. 1201:22-1202:1.

new market entrant to have its trademark application published, succeed in a trademark opposition action, and then bring a damages claim. Muresa applied for its trademark in 2002,¹⁸⁹ and the Supreme Court Judgment which assessed BSLS and BSJ for damages was issued in 2014—that is twelve years. The fact that there has not yet been a similar claim to Muresa’s does not mean that there will never be. It is simply too soon to say. BSLS and BSAM have not yet encountered another a trademark registration application in Panama in which the applicant was already using the trademark.¹⁹⁰ The Supreme Court Judgment is still extant. The risk today is the same as it was the day after the Supreme Court Judgment, and whether the risk actualizes does not depend on the Claimants’ actions, but whether there is a new entrant to the market that intends to pursue the Claimants in the way that Muresa did.

103. The Tribunal asked whether there was an issue as to “*whether we focus on the value of trademarks a day after the Supreme Court Decision or whether we’re looking at the position now.*”¹⁹¹ For the reasons set out above, the Claimants contend that the Tribunal should focus on the value of the trademarks the day after the Supreme Court Judgment – that is, an *ex ante* approach, but note that, because nothing has changed for the Claimants since the Supreme Court Judgment, if an *ex post* approach were taken, the result would be the same. The framework and methodology offered in Mr. Daniel’s report would be the same, but the calculations would move forward by five years.
104. The Tribunal’s approach to this aspect of the Claimants’ damages claim should therefore be the same as that for the loss of USD \$5.4 million suffered by BSLS, in

¹⁸⁹ Exhibit C-0256.

¹⁹⁰ Kingsbury 3 ¶ 8.

¹⁹¹ Hearing Day 5, Tr. 1214:21-1215:1.

other words, the standard set out in *Factory at Chorzów*: BSLS and BSAM are entitled to full compensation in order to wipe out the consequences of the illegal act.¹⁹²

IX. CONCLUSION

105. For the reasons explained above, and in their written and oral submissions, the Claimants respectfully reaffirm their request that the Tribunal render an award:

- (a) Declaring that Panama has violated its obligations under the TPA;
- (b) Ordering Panama to pay damages of USD \$19,954,541;
- (c) Ordering Panama to pay interest on any amount awarded to BSLS and BSAM;
- (d) Ordering Panama to pay attorney's fees and expenses arising from these proceedings; and
- (e) Granting any further or other relief to BSLS and BSAM that the Tribunal shall deem just and proper.

30 October 2019

¹⁹² CLA-0086 ¶ 125.