INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

and

REPUBLIC OF PANAMA
Respondent

ICSID Case No. ARB/16/34

AWARD

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

Secretary of the Tribunal
Ms. Luisa Fernanda Torres

Date of dispatch to the Parties: 14 August 2020

REPRESENTATION OF THE PARTIES

Representing the Claimants

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Representing the Respondent

H. E. Héctor Ernesto Alexander Hansell
Mr. Eloy Fisher
Mr. Miguel Clare
Mr. Fernán Adames
Mr. Aristides Valdonedo
Mr. Aristides Barnett
Ms. Anais Guerra
Ms. Germaine Perret
Ministry of Economy and Finances
Vía España y Calle 52E
Edificio OGAWA
Panama 3
Republic of Panama
and
Mr. Whitney Debevoise
Ms. Gaela Gehring Flores
Ms. Mallory Silberman
Ms. Amy Endicott
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TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BSAM	Bridgestone Americas, Inc.
BSJ	Bridgestone Corporation
BSLS	Bridgestone Licensing Services, Inc.
Cl. Reg. Letter	Claimants' Letter during Registration of Request for Arbitration, dated 25 October 2016
Cl. Res. Exp. Obj.	Claimants' Response on Expedited Objections, dated 24 July 2017
Cl. Rej. Exp. Obj.	Claimants' Rejoinder on Expedited Objections, dated 14 August 2017
Cl. PHB Exp. Obj.	Claimants' Post-Hearing Brief on Expedited Objections, dated 11 October 2017
Cl. Costs Exp. Obj.	Claimants' Statement of Costs, dated 6 November 2017
Cl. Mem.	Claimants' Memorial, dated 11 May 2018
Cl. Reply	Claimants' Reply, dated 22 March 2019
Cl. Reply Supp.	Claimants' Supplemental Reply, dated 30 April 2019
Cl. PHB	Claimants' Post-Hearing Brief, dated 16 October 2019 (and corrected 30 October 2019)
Cl. Costs	Claimants' Statement of Costs, dated 8 November 2019
C-[#]	Claimants' Exhibit
CER	Claimants' Expert Report
CER-Arjona First	Expert Report of Mr. Adán A. Arjona, dated 6 May 2018
CER-Arjona Second	Second Expert Report of Mr. Adán A. Arjona, dated 22 March 2019

CER-Arjona Third	Third Expert Report of Mr. Adán A. Arjona, dated 30 April 2019
CER-Daniel First	Expert Report of Mr. Brian M. Daniel, dated 11 May 2018
CER-Daniel Second	Second Expert Report of Mr. Brian M. Daniel, dated 22 March 2019
CER-Jacobs-Meadway First	Expert Report of Ms. Roberta Jacobs-Meadway, dated 11 May 2018
CER-Jacobs-Meadway Second	Second Expert Report of Ms. Roberta Jacobs-Meadway, dated 22 March 2019
CER-Molino	Expert Report of Mr. Edwin Molino, dated 22 March 2019
CLA-[#]	Claimants' Legal Authority
CWS	Claimants' Witness Statement
CWS-Akey	Witness Statement of Mr. Steven Akey, dated 30 April 2018
CWS-Calderon	Witness Statement of Mr. Erick Calderon, dated 22 July 2017
CWS-Hidalgo	Witness Statement of Mr. Roger Hidalgo, dated 22 July 2017
CWS-Hyman First	Witness Statement of Ms. Katie Hyman, dated 29 October 2018
CWS-Hyman Second	Second Witness Statement of Ms. Katie Hyman, dated 16 November 2018
CWS-Kingsbury First	Witness Statement of Mr. Thomas R. Kingsbury, dated 21 July 2017
CWS-Kingsbury Second	Second Witness Statement of Mr. Thomas R. Kingsbury, dated 14 August 2017
CWS-Kingsbury Third	Third Witness Statement of Mr. Thomas R. Kingsbury, dated 11 May 2018
CWS-Lightfoot	Witness Statement of Mr. Jeffrey Lightfoot, dated 9 May 2018

CWS-Williams	Witness Statement of Ms. Audrey Williams, dated 13 August 2017
Hearing Exp. Obj.	Hearing on Expedited Objections, held on 3-6 September 2017
Hearing	Hearing on the Merits, held from 29 July to 2 August 2019, and 28 August 2019
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Muresa	Muresa Intertrade, S.A.
Request for Arbitration	Claimants' Request for Arbitration, dated 7 October 2016
Resp. Exp. Obj.	Respondent's Expedited Objections, dated 30 May 2017
Resp. Reply Exp. Obj.	Respondent's Reply on Expedited Objections, dated 7 August 2017
Resp. PHB Exp. Obj.	Respondent's Post-Hearing Brief on Expedited Objections, dated 11 October 2017
Resp. Costs Exp. Obj.	Respondent's Statement of Costs, dated 6 November 2017
Resp. C-Mem.	Respondent's Counter-Memorial, dated 14 September 2018
Resp. Rej.	Respondent's Rejoinder, dated 17 June 2019
Resp. PHB	Respondent's Post-Hearing Brief, dated 16 October 2019 (and corrected 30 October 2019)
Resp. Costs	Respondent's Statement of Costs, dated 8 November 2019
R-[#]	Respondent's Exhibit
RER	Respondent's Expert Report

RER-Fried	Expert Report of Mr. Gabriel Fried, dated 17 June 2019
RER-Jacobson First	First Expert Report of Ms. Nadine H. Jacobson, dated 14 September 2018
RER-Jacobson Second	Second Expert Report of Ms. Nadine H. Jacobson, dated 17 June 2019
RER-Lasso First	First Expert Report of Ms. Marissa Lasso de la Vega Ferrari, dated 14 September 2018
RER-Lasso Second	Second Expert Report of Ms. Marissa Lasso de la Vega Ferrari, dated 14 June 2019
RER-Lee First	First Expert Report of Mr. Jorge F. Lee, dated 14 September 2018
RER-Lee Second	Second Expert Report of Mr. Jorge F. Lee, dated 17 June 2019
RER-Paulsson	Expert Report of Mr. Jan Paulsson, dated 17 June 2019
RER-Shopp First	First Expert Report of Mr. Matthew D. Shopp, dated 14 September 2018
RER-Shopp Second	Second Expert Report of Mr. Matthew D. Shopp, dated 17 June 2019
RLA-[#]	Respondent's Legal Authority
RWS	Respondent's Witness Statement
RWS-Gonzalez-Revilla	Witness Statement of Ambassador Emanuel Gonzalez-Revilla, dated 10 September 2018
RWS-Lee First	Witness Statement of Mr. Jorge F. Lee, dated 9 November 2018
RWS-Lee Second	Second Witness Statement of Mr. Jorge F. Lee, dated 27 November 2018
Supreme Court Judgment	Judgment of the Civil Chamber of the Supreme Court of Justice of the Republic of Panama (28 May 2014) (**C-027/R-034**)
TGFL	Tire Group of Factories Ltd., Inc.

TPA	United States-Panama Trade Promotion Agreement signed on 28 June 2007, in force on 31 October 2012
Tr. Exp. Obj., Day [#], [page:line] (Speaker(s))	Transcript of the Hearing on Expedited Objections held on 3-6 September 2017 (as revised by the Parties on 6 October 2017)
Tr., Day [#], [page:line] (Speaker(s))	Transcript of the Hearing on the Merits 29 July to 2 August 2019 and 28 August 2019 (as revised by the Parties on 23 October 2019)
Tribunal	Arbitral tribunal constituted on 27 April 2017
U.S. First Sub.	United States Written Submission, pursuant to Article 10.20.2 of the TPA, dated 28 August 2017
U.S. Second Sub.	United States Supplemental Written Submission, pursuant to Article 10.20.2 of the TPA, dated 25 September 2017
U.S. Third Sub.	United States Third Written Submission, pursuant to Article 10.20.2 of the TPA, dated 7 December 2018

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the United States-Panama Trade Promotion Agreement signed on 28 June 2007, in force on 31 October 2012 (the "**TPA**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimants are Bridgestone Licensing Services, Inc. ("**BSLS**"), a company incorporated in the State of Delaware, United States; and Bridgestone Americas, Inc. ("**BSAM**"), a company incorporated in the State of Nevada, United States (together, the "**Claimants**").[1]

3. The Respondent is the Republic of Panama ("**Panama**" or the "**Respondent**").

4. The Claimants and the Respondent are collectively referred to in this ruling as the "**Parties**," and the term "**Party**" is used to refer to either the Claimants or the Respondent.[2] The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

A. Registration and Constitution of the Tribunal

5. On 7 October 2016, ICSID received a request for arbitration dated 7 October 2016 from the Claimants against the Respondent (the "**Request for Arbitration**"). The Request for Arbitration was accompanied with Exhibits C-001 to C-043.

[1] Request for Arbitration, ¶ 4. Both are wholly-owned subsidiaries of Bridgestone Corporation ("**BSJ**"), a Japanese incorporated company. *Id*., ¶ 1.

[2] The Tribunal is mindful that Chapter 10 also refers to the States signatories to the TPA as "*Party*." For the clarity of the Award, the State signatories of the TPA (Panama and the United States) will be referred to as the "*TPA Party*" or the "*TPA Parties*." The Tribunal is also aware that Article 10.29 of the TPA refers to the Claimants and the Respondent together as the "*disputing parties*" and to either of them as a "*disputing party*."

6. On 19 October 2016, the ICSID Secretariat requested the Claimants to provide certain additional information and clarifications concerning the Request for Arbitration.

7. On 25 October 2016, the Claimants filed a communication in response to the ICSID Secretariat's request of 19 October 2016. This submission was accompanied by Exhibits C-044 to C-050.

8. On 28 October 2016, the Acting Secretary-General of ICSID registered the Request for Arbitration, as supplemented by letter of 25 October 2016, in accordance with Article 36(3) of the ICSID Convention, and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**Institution Rules**").

9. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed to constitute the Tribunal as follows: three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the two co-arbitrators.

10. The Tribunal is composed of Lord Nicholas Phillips Baron of Worth Matravers, a British national, President, appointed by the co-arbitrators; Mr. Horacio A. Grigera Naón, an Argentine national, appointed by the Claimants; and Mr. J. Christopher Thomas, QC, a Canadian national, appointed by the Respondent.

11. On 27 April 2017, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Luisa Fernanda Torres, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. The Expedited Objections Phase

1. The First Session, the Parties' Written Submissions and Procedural Applications on Expedited Objections

12. On 30 May 2017, the Respondent filed Expedited Objections pursuant to Article 10.20.5 of the TPA (the "**Expedited Objections**"). The objections were accompanied by Exhibits R-001 to R-014; and Legal Authorities RLA-001 to RLA-044. On 5 June 2017, the Respondent transmitted Annex A to its Expedited Objections and its supporting materials.

13. In accordance with ICSID Arbitration Rule 13(1), on 6 June 2017, the Tribunal held a first session with the Parties by videoconference.

14. Following the first session, the Tribunal and the Parties exchanged various communications concerning the procedural calendar for the expedited phase. The Tribunal received: communications from each Party, respectively, on 22 June 2017; communications from each Party, respectively, on 26 June 2017; a communication from the Claimants on 29 June 2017, and a communication from the Respondent on 30 June 2017. The Tribunal sent to the Parties communications dated 20, 23, 28 June 2017 and 2 July 2017. In this last communication of 2 July 2017, the Tribunal notified the Parties of its decision regarding the procedural calendar.

15. On 11 July 2017, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 1** embodying the agreement of the Parties on procedural matters and the decision of the Tribunal on the disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006 except to the extent modified by the TPA, that the procedural language would be English, and that the place of proceeding would be Washington, DC, United States. Procedural Order No. 1 also included the schedule for the Expedited Objections phase of the proceedings.

16. On 24 July 2017, the Claimants filed their Response to the Expedited Objections pursuant to Article 10.20.5 of the TPA (the "**Response on Expedited Objections**"), accompanied by: three witness statements, by Mr. Erick Calderón, Mr. Roger Hidalgo and Mr. Thomas

R. Kingsbury, respectively; Exhibits C-051 to C-118;[3] and Legal Authorities CLA-001 to CLA-037. The Response on Expedited Objections included an application for a stay of the expedited proceeding until the Respondent paid the first advance of funds requested in this case; but following a letter dated 25 July 2017 confirming that the Respondent's payment had been received by ICSID on 21 July 2017, the Claimants' application was withdrawn by letter dated 26 July 2017.

17. Having previously consulted with the Parties, on 4 August 2017, the Tribunal (i) informed the TPA "*non-disputing Party*," *i.e.*, the United States of America ("**United States**" or "**U.S.**")[4] of the scheduled date for the Hearing on Expedited Objections (the "**Hearing on Expedited Objections**"), and (ii) invited the United States to indicate whether it intended to make any written or oral submission pursuant to Article 10.20.2 of the TPA, setting a deadline for such submission.

18. On 7 August 2017, the Respondent filed its Reply on Expedited Objections pursuant to Article 10.20.5 of the TPA (the "**Reply on Expedited Objections**"), accompanied by: Exhibits R-015 to R-018; and Legal Authorities RLA-001 (REV) and RLA-002 (REV), and RLA-045 to RLA-068.

19. On 14 August 2017, the Claimants filed their Rejoinder on Expedited Objections pursuant to Article 10.20.5 of the TPA (the "**Rejoinder on Expedited Objections**"), accompanied by: two witness statements, by Ms. Audrey Williams, and Mr. Thomas R. Kingsbury, respectively; Exhibits C-119 to C-126; and Legal Authority CLA-038.

20. On 14 August 2017, the Tribunal invited the Parties to make certain submissions in anticipation of the Pre-Hearing Call.

21. On 17 August 2017, the Parties made joint and individual submissions in anticipation of the Pre-Hearing Call.

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[3] As submitted on 24 July 2017, the pleading was accompanied by Exhibits C-051 to C-097. On 28 July 2017, the Claimants submitted an amended version, observing that a subset of Exhibits, designated C-098 to C-118, had been inadvertently omitted in their 24 July 2017 filing. Following a query from the Tribunal, on 2 August 2017, the Respondent confirmed that it had no objections to these amendments.

[4] The United States are referred to as the "*non-disputing Party*" in the sense of Article 10.29 of the TPA.

22. On 18 August 2017, pursuant to Section 20.1 of Procedural Order No. 1, a pre-Hearing organizational call between the Parties and the President of the Tribunal was held by telephone conference (the "**Pre-Hearing Call**"), in preparation for the Hearing on Expedited Objections. During the Pre-Hearing Call, a matter was raised by the President and discussed with the Parties concerning the timing for oral submissions regarding certain procedural evidentiary issues arising out of the Parties' written submissions, and for a determination by the Tribunal regarding the impact of those issues on the conduct of the Hearing on Expedited Objections.

23. On 21 August 2017, following the Pre-Hearing Call, the Respondent submitted (i) an application under Section 5.2 of Procedural Order No. 1, for reconsideration by the full Tribunal of the Respondent's procedural request made during the Pre-Hearing Call that the session between the Parties and the full Tribunal to resolve the procedural evidentiary issues and their impact on the conduct of the Hearing on Expedited Objections be held before the first day of the Hearing (the "**Request for Reconsideration**"); and (ii) a request for a formal order from the full Tribunal identifying the specific questions that the Tribunal wanted the Parties to address before opening arguments at the Hearing on Expedited Objections (the "**Request for Questions**").

24. On 24 August 2017, the full Tribunal issued **Procedural Order No. 2**, addressing the Respondent's Request for Questions. In the same order, the Claimants were invited to file observations on the Respondent's Request for Reconsideration.

25. On 24 August 2017, the United States confirmed their intent to file a written submission, pursuant to Article 10.20.2 of the TPA; and it informed the Tribunal that it was still considering whether it would make an oral submission at the Hearing on Expedited Objections as well.

26. On 25 August 2017, the Claimants filed observations on the Respondent's Request for Reconsideration of 21 August 2017.

27. On 28 August 2017, in accordance with the deadline established by the Tribunal, the United States filed a written submission, pursuant to Article 10.20.2 of the TPA ("**U.S. First Written Submission**").

28. On 29 August 2017, the full Tribunal issued **Procedural Order No. 3**, concerning the Respondent's Request for Reconsideration of 21 August 2017, and the organization of the Hearing on Expedited Objections.

29. Also on 29 August 2017, the Claimants asked the Tribunal to order the Respondent to provide a supplementary translation of Legal Authority RLA-013. The Claimants' application attached a supplementary translation of RLA-013 already provided by the Respondent voluntarily, and requested an order for a further translation. The Respondent filed observations on this application also on 29 August 2017.

30. On 30 August 2017, the Tribunal ruled on the Claimants' application of 29 August 2017. That same day, the Respondent sent a further communication in response to the Tribunal's ruling.

31. On 1 September 2017, each Party filed observations on the tentative Agenda for the Hearing on Expedited Objections, and on a few logistical and procedural matters pertaining to the organization of that Hearing.

32. On 2 September 2017, the Tribunal approved the Parties' agreements of 1 September 2017, and indicated that it would resolve the limited areas of disagreement at the start of the Hearing on Expedited Objections.

2. The Oral Procedure on Expedited Objections

33. A Hearing on Expedited Objections was held in Washington, DC from 3 to 6 September 2017 (the "**Hearing on Expedited Objections**"). The following persons were present:

Tribunal:	
Lord Nicholas Phillips	President
Mr. Horacio A. Grigera Naón	Arbitrator
Mr. J. Christopher Thomas, QC	Arbitrator

ICSID Secretariat:	
Ms. Luisa Fernanda Torres	Secretary of the Tribunal
For the Claimants:	
Mr. Justin Williams	Akin Gump Strauss Hauer & Feld
Mr. Stephen Kho	Akin Gump Strauss Hauer & Feld
Ms. Katie Hyman	Akin Gump Strauss Hauer & Feld
Mr. Johann Strauss	Akin Gump Strauss Hauer & Feld
Ms. Katherine Afzal	Akin Gump Strauss Hauer & Feld
Mr. Kevin McClintock-Batista	Akin Gump Strauss Hauer & Feld
Mr. Thomas R. Kingsbury (*)	BSAM and BSLS, Witness
Ms. Audrey Williams (*via video link*) (*)	Benedetti & Benedetti, Witness
For the Respondent:	
Mr. E. Whitney Debevoise	Arnold & Porter Kaye Scholer LLP
Ms. Gaela Gehring Flores	Arnold & Porter Kaye Scholer LLP
Ms. Mallory Silberman	Arnold & Porter Kaye Scholer LLP
Ms. Amy Endicott	Arnold & Porter Kaye Scholer LLP
Ms. Katelyn Horne	Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena	Arnold & Porter Kaye Scholer LLP
Ms. Bailey Roe	Arnold & Porter Kaye Scholer LLP
Ms. Sara Ureña	Arnold & Porter Kaye Scholer LLP
Ms. Karla González	Embassy of Panama in the U.S.
Ms. Geniva Escobar (*via video link*)	Ministry of Economy and Finances
Mr. Norman Harris	Ministry of Commerce and Industry
Mr. Francisco Olivardia	Embassy of Panama in the U.S.
Ms. Marissa Lasso de la Vega Ferrari	Alfaro, Ferrer & Ramírez, non-testifying independent Panamanian Law Expert
For the United States:[5]	
Ms. Nicole Thornton	U.S. Department of State
Mr. Matthew Olmsted	U.S. Department of State
Mr. John Blanck	U.S. Department of State
Ms. Amanda Blunt	Office of the U.S. Trade Representative
Court Reporter(s):	
Mr. David Kasdan	B&B Reporters

(*) present during his/her examination

34. The following persons were examined during the Hearing on Expedited Objections:

On behalf of the Claimants:

[5] Both Parties confirmed their agreement to the presence of representatives of the United States in the Hearing Room on 9 August 2017.

Mr. Thomas R. Kingsbury	Witness
Ms. Audrey Williams (*via video link*)	Witness

35. In accordance with Article 10.21.2 of the TPA, and Section 21.6 of Procedural Order No. 1, the Hearing on Expedited Objections was made public via real-time streaming on the ICSID Website.

36. On 3 September 2017, having heard the Parties' oral arguments on the preliminary evidentiary issues, the full Tribunal issued **Procedural Order No. 4**.

37. On 5 September 2017, the Tribunal communicated in writing to the Parties certain questions to be addressed during closing arguments at the Hearing on Expedited Objections.

38. During the Hearing on Expedited Objections, the Parties introduced the following materials into the record:

- **Claimants**: Demonstrative Exhibits CD-001 to CD-002; Exhibits C-127 to C-129; Legal Authorities CLA-039 to CLA-047.
- **Respondent**: Demonstrative Exhibits RD-001 to RD-003.

3. The Post-Hearing Procedure on Expedited Objections

39. On 13 September 2017, following an invitation from the Tribunal during the Hearing on Expedited Objections, the United States confirmed their intent to file a supplementary written submission.

40. On 25 September 2017, within the deadline set forth by the Tribunal, the United States filed a supplementary written submission, pursuant to Article 10.20.2 of the TPA ("**U.S. Second Written Submission**").

41. On 28 September 2017, following communications from both Parties, the Tribunal amended the deadline for the Post-Hearing Briefs, and confirmed the due dates for other post-Hearing procedural steps. In that same communication, the Tribunal provided further guidance concerning the statements of costs.

42. On 6 October 2017, the Parties filed agreed corrections to the transcript of the Hearing on Expedited Objections.

43. On 11 October 2017, the Parties filed their respective Post-Hearing Briefs on the Expedited Objections.

44. On 6 November 2017, the Parties filed their respective Statements of Costs for the Expedited Objections phase.

45. On 20 November 2017, the Tribunal inquired whether the Parties would agree to application of the "*extraordinary cause*" provision of Article 10.20.5 of the TPA authorizing extension of the 180-day deadline for issuance of the ruling on the Expedited Objections, for an additional brief period no longer than 30 days. Both Parties confirmed their agreement on the same day.

46. On 13 December 2017, the Tribunal issued its **Decision on Expedited Objections**, which constitutes an integral part of this Award and is hereby incorporated by reference.

C. The Merits Phase

1. The Parties' Written Submissions and Procedural Applications

47. On 5 January 2018, following an invitation from the Tribunal, the Parties filed a joint proposal for the Procedural Calendar for the remainder of the proceeding, which also identified certain areas of disagreement and set forth the Parties' respective positions on such areas.

48. On 8 January 2018, the Tribunal ruled on the areas of disagreement concerning the Procedural Calendar, and it invited the Parties to confirm their availability for the Hearing.

49. On 30 January 2018, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 5**, memorializing the Tribunal's prior ruling concerning the Procedural Calendar for the remainder of the proceeding, and establishing the Hearing dates.

50. On 6 February 2018, following a joint communication from the Parties, the Tribunal issued an amended Procedural Calendar (**Amendment No. 2**). On that same day, the Tribunal informed the United States of the Hearing dates, as well as of the deadline for the United States to submit an eventual written submission for the merits phase pursuant to Article 10.20.2 of the TPA.

51. On 6 May 2018, the Claimants filed an application seeking an extension for the deadline to file their Memorial originally due on 7 May 2018. On 7 May 2018, the Respondent filed its observations regarding the Claimants' application. On that same day, the Tribunal granted the extension and fixed the deadline to file the Claimants' Memorial on 11 May 2018. Thereafter, on 9 May 2018, the Tribunal invited the Parties to provide a joint proposal for further required modifications to the Procedural Calendar.

52. On 11 May 2018, the Claimants filed their Memorial (the "**Memorial**") accompanied by: three witness statements, by Mr. Steven Akey, Mr. Jeffrey Lightfoot and Mr. Thomas R. Kingsbury, respectively; three expert reports by Mr. Adán A. Arjona, Mr. Brian M. Daniel, and Ms. Roberta Jacobs-Meadway, respectively; Exhibits C-128 to C-261; and Legal Authorities CLA-048 to CLA-131.

53. On 18 May 2018, following a joint proposal by the Parties, the Tribunal issued an amended Procedural Calendar (**Amendment No. 3**).

54. On 27 August 2018, the United States requested an extension of the deadline for their written submission pursuant to Article 10.20.2 of the TPA. That same day, both Parties confirmed their agreement with the request. Accordingly, on 28 August 2018, the Tribunal approved the extension and issued an amended Procedural Calendar ("**Amendment No. 4**").

55. On 14 September 2018, the Respondent filed its Counter-Memorial (the "**Counter-Memorial**") accompanied by: one witness statement by Ambassador Emanuel Gonzalez-Revilla; four expert reports by Mr. Jorge F. Lee, Ms. Marissa Lasso de la Vega Ferrari, Ms. Nadine H. Jacobson, and Mr. Matthew D. Shopp of Versant Partners, LLC, respectively, the latter accompanied by Exhibits VP-001 to VP-023; Exhibits R-019 to R-

086, and Legal Authorities RLA-001, RLA-027, RL-069 to RLA-168. In the Counter-Memorial, *inter alia*, the Respondent asked the Tribunal to exercise its discretion under ICSID Arbitration Rule 41(2) to dismiss all of BSAM's claims, as well as BSLS's claims under Articles 10.3 and 10.4 of the TPA, should the Claimants fail to withdraw those claims within 30 days.[6]

56. On 21 September 2018, the Parties jointly proposed certain amendments to the filing procedures established in Procedural Order No. 1. On 24 September 2018, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 6** approving the proposed amendments.

57. On 15 October 2018, the Claimants filed observations to the Respondent's request in the Counter-Memorial that the Tribunal exercise its discretion under ICSID Arbitration Rule 41(2) to dismiss all of BSAM's claims and certain of BSLS's claims. The Claimants refused to withdraw any of their claims, and argued that the Tribunal was not required to make any immediate determination, given that the Respondent had not presented an objection under ICSID Arbitration Rule 41(1) or Article 10.20.4 of the TPA. The Claimants further opposed the Respondent's request that the Tribunal exercise its discretion under ICSID Arbitration Rule 41(2) to consider whether certain claims where within the Tribunal's jurisdiction, and argued that "*the Respondent's new objections should* […] *be dealt with at th*[e] *merits hearing* […]."[7]

58. On 22 October 2018, the Respondent filed a reply to the Claimants' letter of 15 October 2018, reiterating its request that the Tribunal "*dismiss Claimants' national treatment and most-favored-nation treatment claims and* [BSAM]*'s denial of justice claim in accordance with ICSID Rule 41(2).*"[8]

59. On 29 October 2018, the Claimants filed an Application to Remove the Respondent's Expert Witness as to Panamanian Law, Mr. Jorge F. Lee ("**Application to Remove Mr.**

[6] Resp. C-Mem., ¶ 300 (a) and (b).
[7] Cl. Letter (15 October 2018).
[8] Resp. Letter (22 October 2018).

Lee"), accompanied by: a witness statement by Ms. Katie Hyman; Exhibits C-262 to C-264; and Legal Authorities CLA-132 to CLA-136.

60. On 9 November 2018, the Respondent filed its Response to the Claimants' Application to Remove Mr. Lee, accompanied by: Appendix A; a witness statement by Mr. Jorge F. Lee; Exhibits R-087 to R-093; and Legal Authority RLA-169.

61. On 16 November 2018, the Claimants filed their Reply on the Application to Remove Mr. Lee, accompanied by: a second witness statement by Ms. Katie Hyman; and Exhibits C-265 to C-267.

62. On 27 November 2018, the Respondent filed its Rejoinder on the Application to Remove Mr. Lee, accompanied by: a second witness statement by Mr. Jorge F. Lee; and Legal Authorities RLA-170 and RLA-171.

63. On 29 November 2018, pursuant to Section 16.2.4 of Procedural Order No. 1, the Claimants filed their complete Production of Documents Redfern Schedule (including Requests, Objections, and Replies) accompanied by Legal Authorities CLA-137 to CLA-141. On that same day, the Respondent filed its complete Production of Documents Redfern Schedule (including Requests, Objections, Replies) accompanied by Annexes A to M.

64. On 7 December 2018, in accordance with the deadline established by the Tribunal, the United States filed their third written submission, pursuant to Article 10.20.2 of the TPA ("**U.S. Third Written Submission**").

65. On 13 December 2018, the Tribunal issued its Ruling on the Application to Remove Mr. Lee as an Expert Witness. The Tribunal dismissed the application. It further decided that "*the Claimants should pay the Respondent its reasonable costs in relation to the Application*," but left the assessment of these costs to be made at the time of the Award.[9]

[9] Ruling on the Claimants' Application to Remove the Respondent's Expert Witness as to Panamanian Law (13 December 2018), ¶ 41.

66. On 11 January 2019, the Respondent submitted a communication concerning its Document Production Request No. 6. On 15 January 2019, the Claimants filed a response; and on 16 January 2019, the Respondent filed a reply. In its reply of 16 January 2019, the Respondent indicated that it was considering the proposal made by the Claimants in connection with this issue, and that it would return to the Tribunal for assistance should it conclude that the proposal was not acceptable. On 17 January 2019, the Tribunal informed the Parties that in light of the Respondent's reply of 16 January 2019, the Tribunal would await further communication from the Parties in connection with this matter.

67. On 15 January 2019, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 7** with its respective Annexes A and B, containing the Tribunal's decisions on the Parties' respective Requests for Production of Documents.

68. On 29 January 2019, in response to Procedural Order No. 7, the Claimants filed a communication concerning the Respondent's Requests for Production of Documents No. 5(e), 8 and 9.

69. On 14 and 19 February 2019, in response to Procedural Order No. 7, the Respondent filed communications concerning the Claimants' Requests for Production of Documents No. 2, 6, 7 and 9.

70. On 27 February 2019, the Claimants filed a communication alleging delays and deficiencies in the Respondent's compliance with Procedural Order No. 7, and anticipating a possible request for modification of the Procedural Calendar as a result. Thereafter, on 12 March 2019, the Claimants filed an application regarding the Respondent's compliance with Procedural Order No. 7, accompanied by Appendix A ("**Application of 12 March 2019**"). The Application sought several orders from the Tribunal in connection with Requests No. 2, 6, 7 and 9, and an extension of time for the filing of the Claimants' Reply.

71. On 14 March 2019, the Tribunal (i) invited the Respondent to file observations on the Claimants' Application of 12 March 2019; (ii) directed the Claimants to file their Reply no later than 22 March 2019, and (iii) granted the Claimants leave to apply to the Tribunal for

authorization to file a Supplementary Reply if necessary to address any potential further document production by the Respondent.

72. On 21 March 2019, the Respondent filed its Response to the Claimants' Application of 12 March 2019 accompanied by Annexes A, B and C.

73. On 22 March 2019, the Claimants filed their Reply (the "**Reply**") accompanied by: four expert reports by Mr. Adán A. Arjona, Mr. Brian M. Daniel, Ms. Roberta Jacobs-Meadway, and Mr. Edwin Molino, respectively; Exhibits C-268 to C-281, C-285, C-287, C-289, C-291 to C-296 and C-298; and Legal Authorities CLA-142 to CLA-166.

74. On 29 March 2019, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 8** addressing the Respondent's compliance with Procedural Order No. 7, particularly, in connection with the Claimants' Document Production Requests No. 2, 6, 7 and 9. Among others, the Tribunal invited the Parties to agree on the terms for the disclosure to the Claimants' counsel of certain documents in connection with Requests No. 6, 7 and 9.

75. On 4 April 2019, following communications from both Parties, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 9** endorsing the Parties' agreement regarding the terms for the disclosure and the confidentiality regime applicable to the production of the documents ordered by Procedural Order No. 8, which were designated as "Restricted Information."

76. On 11 April 2019, the United States filed a communication seeking an extension of the deadline to inform the Tribunal of their intention to make an oral submission at the Hearing pursuant to Article 10.20.2 of the TPA. On 14 April 2019, the Tribunal granted the extension.

77. On 12 April 2019, the Claimants filed an application seeking (i) a modification of the terms of Procedural Order No. 9 to broaden access to the Restricted Information to two additional individuals (Mr. Thomas R. Kingsbury and Mr. Adán A. Arjona); and (ii) asking for leave to file a Supplemental Reply to address the Restricted Information produced by the Respondent on 4 April 2019. On 18 April 2019, the Respondent filed a response to this

application, accompanied by Annexes A to J. On 23 April 2019, the Claimants filed a communication related to this application, confirming Mr. Arjona's role as the Claimants' expert on Panamanian law.

78. Also on 12 April 2019, the Respondent filed a communication in response to information requested by the Tribunal in Procedural Order No. 8, in connection with the Claimants' Document Production Request No. 2. The communication was accompanied by Annexes A to C. On 17 April 2019, the Claimants reacted by filing an application concerning the Respondent's compliance with Procedural Order No. 8. The Claimants asked that the Tribunal gave further orders in relation to the Claimants' Document Production Request No. 2.

79. On 23 April 2019, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 10** addressing the differences between the Parties in relation to the implementation of Procedural Orders No. 8 and 9. The Tribunal granted to the Claimants leave to file a Supplemental Reply, which would be subject to the same confidentiality regime as the Restricted Information; authorized access to the Restricted Information to Mr. Kingsbury and Mr. Arjona; and gave directions regarding further necessary amendments to the Procedural Calendar.

80. Thereafter, on 26 April 2019, the Respondent submitted a further communication addressing the Claimants' communication of 17 April 2019 and the terms of Procedural Order No. 10. The Tribunal provided a response on 29 April 2019.

81. On 30 April 2019, the Claimants filed a Supplemental Reply (the "**Supplemental Reply**") accompanied by: one expert report by Mr. Adan A. Arjona; and Exhibits C-299 to C-312.

82. On 6 May 2019, and pursuant to Procedural Order No. 10, the Respondent filed a communication proposing amendments to the Procedural Calendar. The communication also recalled that Ambassador Gonzalez-Revilla was not available to appear to testify on the scheduled dates of the Hearing as he had informed in his witness statement of 10 September 2018, and asked the Claimants to confirm whether the Ambassador would be called to give oral testimony, in order to make the appropriate alternative arrangements.

On 8 May 2019, the Claimants filed a response. Following an invitation from the Tribunal, on 14 May 2019, the Respondent filed reply observations on these two subjects. In response to an inquiry from the Tribunal, on 17 May 2019, the Respondent filed further clarifications concerning the dates of unavailability of the Ambassador. On 20 May 2019, the Claimants filed a rejoinder on the issue of the Ambassador's oral testimony. On 24 May 2019, the Respondent filed a further communication addressing, *inter alia*, the availability of Ambassador Gonzalez-Revilla in late July and early August 2019.

83. On 10 May 2019, the Respondent filed an application seeking the partial redaction of Procedural Order No. 10 prior to its publication pursuant Section 25 of Procedural Order No. 1. On 14 May 2019, the Claimants filed a response, asking the Tribunal to dismiss the Respondent's application. On 16 May 2019, the Respondent filed a reply on this subject; on 17 May 2019, the Claimants filed a rejoinder. On 20 May 2019, the Tribunal wrote to the Parties observing that there was an agreement in principle between the Parties concerning the deferral publication of Procedural Order No. 10, and it invited the Parties to confer and inform the Tribunal of the length of the deferral. On 24 May 2019, the Respondent filed a communication clarifying its position on the matter of publication of Procedural Order No. 10.

84. On 21 May 2019, having considered the Parties' positions, the Tribunal decided to grant the Respondent an extension to file its Rejoinder, and it issued an amended Procedural Calendar ("**Amendment No. 5**").

85. On 30 May 2019, the Tribunal ruled on the matters of (i) Ambassador Gonzales-Revilla's oral testimony; and (ii) the publication of Procedural Order No. 10. The Tribunal authorized that Ambassador Gonzales-Revilla's oral testimony be conducted in a separate day after the scheduled Hearing dates, and proposed alternatives to the Parties asking them to confer and attempt to agree on the way forward. The Tribunal further directed that Procedural Order No. 10 be redacted partially prior to publication, adding that either Party was free to apply to the Tribunal to lift the redactions at a later stage.

86. On 14 June 2019, each Party filed a further communication on the issue of the oral testimony of Ambassador Gonzalez-Revilla. On 21 June 2019, the Tribunal confirmed

that the examination would be conducted by videoconference on 28 August 2019, and provided further directions concerning the arrangements for the Ambassador's oral testimony. On 25 June 2019, the Parties submitted further communications on this matter, and on 28 June 2019, the Tribunal provided further directions. On 5 July 2019, both Parties filed further communications regarding the arrangements for this testimony.

87. On 17 June 2019, the Respondent filed its Rejoinder (the "**Rejoinder**") accompanied by: Annex A; six expert reports by Mr. Gabriel Fried, Ms. Nadine H. Jacobson, Ms. Marissa Lasso de la Vega Ferrari, Mr. Jorge F. Lee, Prof. Jan Paulsson, and Mr. Matthew D. Shopp of Versant Partners LLC, respectively, the latter accompanied by Exhibits VP-025 to VP-049; Exhibits R-066, R-069, and R-094 to R-208; and Legal Authorities RLA-172 to RLA-223. On 3 July 2019, the Respondent submitted certain *errata* in connection with the Rejoinder, adding *inter alia*, a revised translation of Exhibit R-040.

88. On 19 June 2019, in accordance with the Procedural Calendar, the Respondent notified the Tribunal and the Claimants of the witnesses and experts called for cross-examination at the Hearing.

89. On 20 June 2019, the Claimants filed an application asking the Tribunal to (i) deem Prof. Paulsson's report as a submission by co-counsel, and not evidence, or in the alternative, to exclude the report from the record; and (ii) to exclude Mr. Fried's expert report from the record. On 25 June 2019, the Respondent filed a response to this application.

90. On 28 June 2019, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 11** concerning the Claimants' application of 20 June 2019. The Tribunal dismissed the application to exclude Mr. Fried's report, and decided that Prof. Paulsson's expert report would *not* be treated as a submission by co-counsel, and it would remain on the record.

91. On 2 July 2019, in accordance with the Procedural Calendar, the Claimants notified the Tribunal and the Respondent of the witnesses and experts called for cross-examination at the Hearing.

92. Also on 2 July 2019, the United States notified the Tribunal and the Parties of their intention to make an oral submission at the Hearing, pursuant to Article 10.20.2 of the TPA.

93. On 8 July 2019, pursuant to Section 20.1 of Procedural Order No. 1, a pre-Hearing organizational call between the Parties and the President of the Tribunal was held by telephone conference (the "**Pre-Hearing Call**"), in preparation for the Hearing scheduled for 29 July to 2 August 2019.

94. On 11 July 2019, on behalf of the Tribunal, the President of the Tribunal issued **Procedural Order No. 12** embodying the Parties' agreements on procedural matters pertaining to the organization of the Hearing and the Tribunal's decisions on the disputed issues.

95. On 16 July 2019, pursuant to Procedural Order No. 12, the United States were informed of the agenda for the Hearing, and of the additional videoconference session scheduled to conduct the witness examination of Ambassador Gonzalez-Revilla.

96. On 16 July 2019, pursuant to Procedural Order No. 12, the Parties submitted a Joint Electronic Core Bundle for use at the Hearing. On 19 July 2019, the Parties submitted a corrected version of the Electronic Core Bundle.

97. On 26 July 2019, the Parties informed the Tribunal of their agreement to replace certain Exhibits on the record with new versions, and to submit further Exhibits and Legal Authorities into the record inadvertently omitted from the Parties' previous submissions. Accordingly, on 27 July 2019, the Tribunal approved the submission of the following to the record:

- Revised Exhibits: C-271-REV (ENG); R-095-REV (ENG); VP-042-REV (ENG).
- New Exhibits: C-313 to C-316; R-209 to R-210.
- New Legal Authorities: RLA-224.

98. On 28 July 2019, the Parties informed the Tribunal of their agreement to add new Exhibits C-317 and C-318 into the record. The Parties further agreed that the Respondent would be permitted to submit into the record as Exhibits any documents related to C-318 that it had

received from the Claimants during document production. The Tribunal confirmed the admission of Exhibits C-317 and C-318 into the record during Day 1 of the Hearing.[10]

2. The Oral Procedure

99. A Hearing on the Merits was held in Washington, DC from 29 July to 2 August 2019 (the "**Hearing**"). The following persons were present:

Tribunal:	
Lord Nicholas Phillips	President
Mr. Horacio A. Grigera Naón	Arbitrator
Mr. J. Christopher Thomas, QC	Arbitrator
ICSID Secretariat:	
Ms. Luisa Fernanda Torres	Secretary of the Tribunal
For the Claimants:	
Counsel:	Akin Gump Strauss Hauer & Feld
Ms. Karol Kepchar	Akin Gump Strauss Hauer & Feld
Mr. Stephen Kho	Akin Gump Strauss Hauer & Feld
Mr. Justin Williams	Akin Gump Strauss Hauer & Feld
Ms. Katie Hyman	Akin Gump Strauss Hauer & Feld
Mr. Johann Strauss	Akin Gump Strauss Hauer & Feld
Ms. Adriana Ramirez Mateo (paralegal)	Akin Gump Strauss Hauer & Feld
Parties:	
Mr. Michinobu Matsumoto	Bridgestone Licensing Services, Inc.
Ms. Akane Mori	Bridgestone Licensing Services, Inc.
Witness:(*)	
Mr. Thomas R. Kingsbury	Bridgestone Licensing Services, Inc.
Experts:	
Mr. Adán A. Arjona	Galindo, Arias & Lopez
Mr. Edwin Molino	Jimenez, Molino y Moreno
Ms. Roberta Jacobs-Meadway	
Mr. Brian M. Daniel	Charles River Associates
For the Respondent:	
Counsel:	
Mr. E. Whitney Debevoise	Arnold & Porter Kaye Scholer LLP
Ms. Gaela Gehring Flores	Arnold & Porter Kaye Scholer LLP
Ms. Mallory Silberman	Arnold & Porter Kaye Scholer LLP
Ms. Katelyn Horne	Arnold & Porter Kaye Scholer LLP
Mr. Brian Vaca	Arnold & Porter Kaye Scholer LLP

[10] Tr., Day 1, 9:20-10:2 (President of the Tribunal).

Mr. Michael Rodriguez	Arnold & Porter Kaye Scholer LLP
Ms. Natalia Giraldo-Carrillo	Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena (paralegal)	Arnold & Porter Kaye Scholer LLP
Ms. Gabriela Guillen (paralegal)	Arnold & Porter Kaye Scholer LLP
Experts:	
Ms. Marissa Lasso de la Vega Ferrari	Alfaro, Ferrer & Ramírez
Mr. Gabriel Fried	Hilco Streambank
Ms. Nadine H. Jacobson	Fross Zelnick Lehrman & Zissu, P.C.
Mr. Jorge F. Lee	Alemán, Cordero, Galindo & Lee
Mr. Matthew D. Shopp	Versant Partners
Ms. Yelena Aleksandrovich	Versant Partners

<u>For the United States</u>:	
Ms. Lisa Grosh[11]	U.S. Department of State
Ms. Nicole Thornton	U.S. Department of State
Mr. John Blanck	U.S. Department of State
Ms. Amanda Blunt	Office of the U.S. Trade Representative
Mr. Khalil Gharbieh	Office of the U.S. Trade Representative
Ms. Catherine Gibson	Office of the U.S. Trade Representative
Mr. Colin Halvey	U.S. Department of Treasury
Mr. Jonathan Liebman	U.S. Department of Treasury
Mr. John Rodriguez	U.S. Patent and Trademark Office

<u>Court Reporter(s) and Interpreters:</u>	
Mr. David Kasdan	B&B Reporters (English)
Ms. Elizabeth Cicorria	D-R Esteno (Spanish)
Ms. Silvia Colla	Interpreter
Mr. Daniel Giglio	Interpreter
Mr. Charles Roberts	Interpreter

(*) not present before his/her examination

100. The following persons were examined during the Hearing:

<u>On behalf of the Claimants:</u>	
Mr. Thomas R. Kingsbury	Witness
Mr. Adán A. Arjona	Expert
Mr. Edwin Molino	Expert
Ms. Roberta Jacobs-Meadway	Expert
Mr. Brian M. Daniel	Expert

<u>On behalf of the Respondent:</u>	
Ms. Marissa Lasso de la Vega Ferrari	Expert
Mr. Gabriel Fried	Expert

[11] Ms. Grosh did not attend.

Ms. Nadine H. Jacobson	Expert
Mr. Jorge F. Lee	Expert
Mr. Matthew D. Shopp	Expert

101. In accordance with Article 10.21.2 of the TPA, and Section 21.6 of Procedural Order No. 1, the Hearing was made public via real-time streaming on the ICSID Website.

102. During Day 1 of the Hearing, the Claimants applied for authorization to introduce two further Legal Authorities into the record, and the Respondent opposed.[12] Having heard both Parties' submissions on the application, the Tribunal authorized the submission of one Legal Authority,[13] which was later added to the record as CLA-171.

103. In addition, during the Hearing, the Parties introduced the following additional materials into the record:

- **Claimants**: Demonstrative Exhibits CD-003 to CD-007; corrections to Mr. Edwin Molino's First Expert Report.[14]
- **Respondent**: Demonstrative Exhibits RD-004 to RD-010; corrections to Mr. Mathew D. Shopp's Second Expert Report.[15]

104. A further session was held by videoconference on 28 August 2019 (the "**VC Hearing**"), to conduct the examination of a witness (Ambassador Emanuel Gonzalez-Revilla). The following persons participated:

Tribunal:

Lord Nicholas Phillips	President (VC/London)
Mr. Horacio A. Grigera Naón	Arbitrator (VC/DC ICSID)
Mr. J. Christopher Thomas, QC	Arbitrator (VC/Vancouver)

ICSID Secretariat:

Ms. Celeste Salinas (in the absence of the Secretary)	ICSID Legal Counsel (VC/DC ICSID)

For the Claimants:
Counsel:

[12] Tr., Day 1, 10:22-18:12 (Mr. Williams; Ms. Gehring Flores).
[13] Tr., Day 1, 97:16-98:7 (President of the Tribunal).
[14] Tr., Day 3, 643:19-644:20 (Mr. Molino); 689:11-14 (President of the Tribunal).
[15] Tr., Day 5, 1144:3-1145:16 (Mr. Shopp).

Mr. Justin Williams	Akin Gump Strauss Hauer & Feld (VC/London)
Ms. Karol Kepchar	Akin Gump Strauss Hauer & Feld (VC/DC ICSID)
Mr. Stephen Kho	Akin Gump Strauss Hauer & Feld (VC/DC ICSID)
Ms. Katie Hyman	Akin Gump Strauss Hauer & Feld (VC/DC ICSID)
Ms. Adriana Ramirez (paralegal)	Akin Gump Strauss Hauer & Feld (VC/DC ICSID)

For the Respondent:

Counsel:	
Mr. E. Whitney Debevoise	Arnold & Porter Kaye Scholer LLP (VC/Panama)
Ms. Gaela Gehring Flores	Arnold & Porter Kaye Scholer LLP (VC/Panama)
Ms. Mallory Silberman	Arnold & Porter Kaye Scholer LLP (VC/DC ICSID)
Ms. Katelyn Horne	Arnold & Porter Kaye Scholer LLP (VC/DC ICSID)
Mr. Brian Vaca	Arnold & Porter Kaye Scholer LLP (VC/DC ICSID)
Mr. Michael Rodriguez	Arnold & Porter Kaye Scholer LLP (VC/DC ICSID)
Parties:	
Mr. Aristides Valdonedo	Ministry of Economy and Finance (VC/Panama)
Ms. Germaine Perret	Ministry of Economy and Finance (VC/Panama)
Witness:(*)	
Amb. Emanuel Gonzalez-Revilla	(VC/Panama)

(*) not present before his/her examination

3. The Post-Hearing Procedure

105. Following authorization of the Tribunal during the Hearing,[16] on 21 August 2019, the Respondent submitted an index of a Chronological Bundle of the Exhibits deriving from the Panama court proceedings at issue in this case; and on 26 August 2019, it dispatched copies of this Chronological Bundle.

106. On 27 August 2019, the Respondent filed an application arguing that after the Hearing the Claimants' merits case was unclear; and asking the Tribunal to instruct the Claimants to clarify their merits theory, and in particular, to provide a brief summary of the elements of their denial of justice claim. The application was further discussed at the conclusion of the VC Hearing on 28 August 2019, in the course of which the Claimants provided their observations to the Respondent's application.[17] Thereafter, by letter of 28 August 2019,

[16] Tr., Day 5, 1294:13-1295:3 (Ms. Silberman); 1344:5-10 (President of the Tribunal).

[17] Tr., Day 6, 1401:12-1406:12 (Mr. Williams, Ms. Silberman, President of the Tribunal).

the Tribunal communicated to the Parties its decision not to accede to the Respondent's application.

107. On 30 August 2019, the Parties filed agreed corrections to the transcript of the Hearing.

108. On 9 September 2019, the Parties filed agreed corrections to the transcript of the VC Hearing.

109. On 12 September 2019, the Respondent filed an application seeking leave to add two further legal authorities to the record, arguing that these were responsive to a new theory raised by the Claimants at the Hearing. On 19 September 2019, the Claimants provided a response opposing the application. On 23 September 2019, the Tribunal decided (i) to grant the Respondent's application; (ii) to afford the Claimants an opportunity to produce no more than two responsive legal authorities following receipt of the Respondent's new authorities; and (iii) to amend the due date of Post-Hearing Briefs to fall after receipt of the Claimants' additional authorities.

110. On 24 September 2019, the Respondent added Legal Authorities RLA-225 and RLA-226 to the record. On 9 October 2019, the Claimants informed the Tribunal that they had elected not to submit any additional Legal Authorities in response.

111. On 15 October 2019, following a joint request by the Parties, the Tribunal also extended the deadline for submission of the Parties' Statements of Costs.

112. On 16 October 2019, the Parties filed their respective Post-Hearing Briefs.

113. On 23 October 2019, following a request from the Tribunal, the Parties filed combined versions of their agreed corrections to the transcript of the Hearing and the VC Hearing.

114. On 30 October 2019, following authorization from the Tribunal, the Parties filed corrected versions of their respective Post-Hearing Briefs, which updated the citations to the Hearing and VC Hearing transcripts to refer to the final versions.

115. On 8 November 2019, the Parties filed their respective Statements of Costs.

116. On 29 January 2020, the Parties filed their agreed redacted versions of the transcripts for the Hearing and the VC Hearing.

117. On 27 July 2020, both Parties informed the Tribunal that they did not request the transmission of the draft Award pursuant to Article 10.20.9(a) of the TPA. The proceeding was closed on 4 August 2020.

III. FACTUAL BACKGROUND AND OVERVIEW

118. These proceedings put in issue the competence and the integrity of the Supreme Court of the Republic of Panama.

119. Many of the relevant background facts are set out in the Tribunal's Decision on Expedited Objections, dated 13 December 2017 ("the **Decision on Expedited Objections**"). This Award should be read with the Decision on Expedited Objections and what follows is a brief summary of those facts. The most relevant facts are set out in much greater detail later in this Award (see *infra*, Section VI.B).

120. The Claimants, BSLS and BSAM, are United States subsidiaries of a Japanese company, BSJ. As such they are part of the "Bridgestone Group" of companies. The major part of the business of the Bridgestone Group, which is carried on internationally, is the manufacture and sale of tires under the trademarks FIRESTONE and BRIDGESTONE. Those trademarks have been registered in Panama.

121. BSLS is the owner of those of the FIRESTONE trademarks that are registered outside the United States; and BSLS has granted to BSAM a license to use these trademarks.[18] Thus, BSAM has a license to use the FIRESTONE trademark in Panama that is owned by BSLS.

122. A wholly owned subsidiary of BSAM called Bridgestone/Firestone North American Tire LCC, subsequently Bridgestone American Tire Operations, LLC ("**BATO**"), has been

[18] Decision on Expedited Objections, ¶ 52.

granted by BSJ a license, *inter alia*, to sell tires bearing the BRIDGESTONE mark in Panama.[19]

123. In the Decision on Expedited Objections the Tribunal ruled that BSAM's ownership of a license to use the FIRESTONE trademark constituted an "*investment*" in Panama for the purposes of the TPA and the ICSID Convention.[20] There was no dispute during the Expedited Objections phase that BSLS's ownership of the FIRESTONE mark in Panama constituted an "*investment*" for the purposes of the TPA and the ICSID Convention.[21]

124. In the Decision on Expedited Objections the Tribunal further ruled that BATO's license to use the BRIDGESTONE trademark in Panama constituted an investment in Panama indirectly owned and controlled by BSAM for the purposes of the TPA.[22]

125. In or about 2001 the Luque Group of companies began to market in Panama and elsewhere tires manufactured in China bearing the mark RIVERSTONE. Panama appears to be the administrative centre for this Group, as evidenced by the fact that a number of the administrators of the group are Panamanian citizens living in Panama and sharing the name Luque.

126. On 6 May 2002, Muresa Intertrade S.A. ("**Muresa**"), a member of the Luque Group, applied to register the RIVERSTONE trademark for tires in Panama.[23] This application was not gazetted until some three years later,[24] whereupon BSJ and BSLS, as owners of the FIRESTONE and BRIDGESTONE trademarks registered in Panama, issued proceedings ("the **Trademark Opposition Proceeding**") opposing the registration of the

[19] Decision on Expedited Objections, ¶¶ 54, 211.
[20] Decision on Expedited Objections, ¶¶ 181-210.
[21] Decision on Expedited Objections, ¶¶ 159-160.
[22] Decision on Expedited Objections, ¶¶ 211-218.
[23] Cl. Mem., ¶ 34.
[24] Cl. Mem., ¶ 34; **C-0256**, Official Panamanian Gazette No. 162, MICI (4 February 2005).

RIVERSTONE mark, on the ground that the similarity between the rival trademarks would give rise to grave risk of confusion.[25]

127. The Trademark Opposition Proceeding was unsuccessful.[26] BSJ and BSLS filed an appeal against its rejection but then withdrew this on 5 September 2006.[27]

128. Just over a year later, on 12 September 2007, Muresa and Tire Group of Factories Ltd. Inc. ("**TGFL**"), a distributor of RIVERSTONE tires, filed in Panama against BSJ and BSLS a civil tort claim for US $5 million, being losses allegedly suffered in consequence of having to cease selling RIVERSTONE tires as a result of the Trademark Opposition Proceeding ("the **Civil Proceeding**").[28] This claim was dismissed at first instance,[29] and on appeal.[30] The decision in favour of BSJ and BSLS was then reversed by the Supreme Court, in a majority judgment dated 28 May 2014 ("the **Supreme Court Judgment**"), which awarded US $5 million in damages, plus legal costs, against BSJ and BSLS.[31]

129. In the Decision on Expedited Objections, the Tribunal summarised the Claimants' claims as they then stood.[32] The claims are brought in respect of the investments consisting of the FIRESTONE trademark, and the licences to use the FIRESTONE and BRIDGESTONE trademarks. The foundation of the claims is the Supreme Court Judgment. At the time of the Decision on Expedited Objections, the Claimants were advancing claims under Articles

[25] Cl. Mem., ¶ 36; Resp. C-Mem., ¶ 69; **C-0150**, Complaint in Opposition to the Registration of the Trademark RIVERSTONE and Design (5 April 2005).

[26] Cl. Mem., ¶¶ 40-41; Resp. C-Mem., ¶ 70; **C-0014 / R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006).

[27] Cl. Mem., ¶¶ 43-44; Resp. C-Mem, ¶ 71; **C-0151**, Notice of Appeal in Opposition to the Registration of the Trademark RIVERSTONE and Design (3 August 2006); **C-0152**, Withdrawal of Appeal in Opposition to the Registration of the Trademark RIVERSTONE and Design (5 September 2006).

[28] Cl. Mem., ¶ 46; Resp. C-Mem., ¶ 74; **C-0016**, Civil Complaint by Muresa Intertrade S.A. and Tire Group of Factories Ltd. Inc. v. Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 September 2007).

[29] Cl. Mem., ¶¶ 71-72; Resp. C-Mem., ¶¶ 102-105; **C-0021 / R-0036**, Judgment No. 70, Eleventh Civil Circuit Court, First Judicial Circuit (17 December 2010) ("the **Eleventh Civil Circuit Court Judgment**").

[30] Cl. Mem., ¶¶ 76-78; Resp. C-Mem., ¶¶ 110-113; **C-0024 / R-0037**, Decision, First Superior Court (23 May 2013) ("the **First Superior Court Decision**").

[31] Cl. Mem., ¶ 87; Resp. C-Mem., ¶ 133; **C-0027 / R-0034**, Judgment, Supreme Court, Civil Chamber (28 May 2014) ("the **Supreme Court Judgment**").

[32] Decision on Expedited Objections, ¶¶ 59-64.

10.3, 10.5 and 10.7 of the TPA.[33] Thereafter, with the Memorial, the Claimants advanced claims under Articles 10.3, 10.4 and 10.5 of the TPA.[34] In their Reply, the Claimants withdrew their claims under Articles 10.3 and 10.4, leaving as their sole claim to relief that advanced under Article 10.5 of the TPA.[35]

130. The relevant parts of Article 10.5 provide:

> "**Article 10.5: Minimum Standard of Treatment**.
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> > (a) 'fair and equitable treatment' includes the obligation 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; […]."[36]

131. The allegation advanced by the Claimants is that their investments were not accorded "*fair and equitable treatment*" in that the Supreme Court Judgment constituted a denial of justice in civil proceedings.[37] This was the way in which they summarised their case in their Post-Hearing Brief:[38]

> "[…] [T]he 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

[33] Request for Arbitration, ¶ 89.

[34] Cl. Mem., ¶ 241.

[35] Cl. Reply, ¶ 75.

[36] **R-0001**, TPA, Art. 10.5 (n. 1 to Art. 10.5 states "*Article 10.5 shall be interpreted in accordance with Annex 10-A*").

[37] **R-0001**, TPA, Art. 10.5.

[38] Cl. PHB, ¶ 3.

> 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. […]."

132. In short, it is the Claimants' case that the Supreme Court Judgment treated their investments in a manner that was not fair or equitable in that (i) the Judgment penalized BSLS for legitimate steps taken to protect its investment; (ii) the effect of the Judgment was to devalue the FIRESTONE and BRIDGESTONE trademarks; and (iii) the Judgment constituted a denial of justice in as much as the defects in the Supreme Court Judgment were so egregious that they lead inexorably to the conclusion that the Supreme Court was either incompetent or corrupt. As to the latter possibility, the Claimants have sought to rely upon a number of peripheral matters as rendering it plausible to conclude that the Supreme Court Judgment was procured by corruption. A more detailed summary of the Claimants' submissions is included below (see *infra*, Section VI.C.1.a).

133. The losses claimed by way of damages are:

(i) the award of US$ 5,431,000 made by the Supreme Court, which is claimed by BSLS alone;[39]

(ii) damage to the Claimants' respective "trademark rights" alleged to have been caused by the Supreme Court Judgment, in excess of the US$ 5,431,000 above.[40]

134. In short, Panama denies that it is under any liability to the Claimants. BSAM's standing to pursue a claim for denial of justice is challenged on the grounds that such a claim can only be brought by a party to the proceedings in which the alleged denial of justice occurred, and BSAM was not party to the proceedings before the Supreme Court. Quite apart from this, Panama contends that the claims advanced by the Claimants are totally without merit. Panama submits that no breach of duty to either Claimant has been established, nor has either Claimant established that it has sustained any loss. A more detailed summary of the Respondent's submissions is included below (see *infra*, Section VI.C.1.b).

[39] Cl. Mem., ¶ 223; Cl. Reply, § VII; Cl. PHB, § VII.

[40] Cl. Mem., ¶¶ 229-233; Cl. Reply, § VIII; Cl. PHB, § VIII.

IV. SUMMARY OF THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

135. As noted above, the Claimants ultimately only contend that the Respondent's actions constitute violations of Article 10.5 of the TPA.[41] In their Reply, the Claimants make the following request:

> "For the reasons set out above and in their Memorial, BSLS and BSAM 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 between USD 5,988,604 and 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 Arbitral Tribunal shall deem just and proper."[42]

136. As the Tribunal has previously observed, although the Request for Arbitration initially argued that Panama had committed violations of Article 10.3 (National Treatment), Article 10.5 (Minimum Standard of Treatment) and Article 10.7 (Expropriation) of the TPA;[43] later in the Memorial, the Claimants only argued that the Respondent's actions constituted a breach of Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment) and Article 10.5 (Minimum Standard of Treatment) of the TPA.[44] In the end, however, the claim for violation of Articles 10.3 and 10.4 of the TPA was withdrawn in the Reply.[45]

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[41] Cl. Reply, § II and III; Cl. PHB, ¶ 11.

[42] Cl. Reply, ¶ 119. The Claimants' Post-Hearing Brief maintained the same language above, but slightly amending the request for relief in item (b). *See*, Cl. PHB, ¶ 105 (slightly amending item (b) to read "[o]*rdering Panama to pay damages of USD$ 19,954,541*.")

[43] Request for Arbitration, ¶ 89.

[44] Cl. Mem., ¶ 241.

[45] Cl. Reply, ¶ 75.

137. In turn, in their Rejoinder, the Respondent makes the following request:

> "289. For all of the foregoing reasons, the Republic of Panama respectfully requests that the Tribunal:
>
> a. Dismiss [BSAM's] claim under Article 10.5 of the TPA for lack of standing, or in the alternative, reject such claim for lack of merit;
>
> b. Reject [BSLS's] claim under Article 10.5 of the TPA for lack of merit;
>
> c. In any event, reject (1) [BSLS's] claim to recover the USD 5.431 million in damages awarded to Muresa and [TGFL]; and (2) Claimants' claim for compensation in excess of USD 5.431 million; and
>
> 290. Award to Panama, with interest, all costs of the arbitration, including all attorneys' fees, and costs and expenses of Panama."[46]

138. In the Statement of Costs, the Respondent presented the following amended request for relief:

> "For the reasons set forth in Panama's written and oral submissions, Panama respectfully requests that the Tribunal grant the following relief:
>
> a. dismiss, for lack of standing or merit, [BSAM's] claim under Article 10.5 of the TPA;
>
> b. dismiss, for lack of merit, [BSLS's] claim under Article 10.5 of the TPA;
>
> c. in any event, reject both Claimants' damages claims (1) for being untethered from any genuine injury caused by the Supreme Court Judgment to Claimants' respective investments, and (2) for exceeding the TPA's territorial limits on damages;
>
> d. order Claimants, jointly and severally, to pay USD 600,000 to cover Panama's costs advances to ICSID, and USD 8,006,906.00 to cover the legal fees and expenses incurred by Panama during this proceeding, plus interest on these amounts at the Wall Street Journal

[46] Resp. Rej., ¶¶ 289-290. The Respondent's Post-Hearing Brief preserved these same requests, albeit with slightly different wording. *See*, Resp. PHB, ¶ 34.

> Prime Rate plus 2% per annum from the date of the Award to the date of full payment; and
>
> e. order Claimants to pay any additional costs, including legal fees and expenses, incurred by Panama after 31 October 2019, but before the Tribunal renders its Award, plus interest at the rate specified in sub-paragraph (d) above."[47]

139. The Parties' respective positions are summarized in the sections that follow. The Tribunal emphasizes that it has considered the Parties' arguments in their written and oral submissions in their entirety, irrespective of whether an argument is referred to expressly in the summary of the Parties' positions in this Award.

V. JURISDICTION

140. The Claimants contend that under the TPA, the Tribunal has jurisdiction over measures adopted or maintained by a TPA Party relating to investors of the other TPA Party and their covered investments;[48] and note that pursuant to Article 25 of the ICSID Convention, the Centre's jurisdiction extends to "*any legal dispute arising directly out of an investment.*"[49] According to the Claimants, these requirements are met by each BSLS and BSAM.[50]

141. The Claimants submit that BSLS (i) holds intellectual property rights in Panama (the FIRESTONE trademark registered in Panama) that qualify as an "*investment*" under the TPA;[51] (ii) qualifies as an "*investor*" of another TPA Party, namely the United States;[52] and (iii) has a dispute arising directly out of its investment as the Tribunal has already determined.[53] In turn, BSAM (i) holds intellectual property rights in Panama (the licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama) that qualify as an

[47] Resp. Costs, ¶ 3.
[48] Cl. Mem., ¶ 132 (citing **R-0001**, TPA, Art. 10.1).
[49] Cl. Mem., ¶ 134.
[50] Cl. Mem., ¶¶ 135-135.
[51] Cl. Mem., ¶¶ 137-140.
[52] Cl. Mem., ¶¶ 141-143 (observing that the Tribunal has already denied the denial of benefits objection, citing Decision on Expedited Objections, ¶ 302).
[53] Cl. Mem., ¶ 144 (citing Decision on Expedited Objections, ¶ 239).

"*investment*" under the TPA, as the Tribunal has already determined;[54] (ii) qualifies as an "*investor*" of another TPA Party, namely the United States;[55] and (iii) has a dispute arising directly out of its investment.[56]

142. In turn, the Respondent argues that the Tribunal's jurisdiction is derived from the terms of the Parties' consent to arbitration, which in this case is found in Article 10.17 of the TPA read together with Article 10.16 of the TPA.[57] Panama points out that under Article 10.17 of the TPA, consent refers to the "*submission of a claim to arbitration*," and Article 10.16 identifies the rules that govern the submission of a claim, three of which reveal "*threshold defects*" in the Claimants' case:[58]

- *First*, Panama submits that under Article 10.16 of the TPA only a "*claimant*" is permitted to advance a claim, and a "*claimant*" refers to "*an investor of a Party*" as the term is defined in Article 10.29 of the TPA.[59] It follows, the Respondent argues, that BSJ cannot advance any claims as it does not have the required nationality.[60]

- *Second*, the Respondent argues that "*a claimant may not assert a claim on behalf of another entity, or on the basis of another entity's investment*."[61] Accordingly, the Respondent says, claims made on behalf of the "*Bridgestone group*" are impermissible and the Tribunal must examine BSLS and BSAM's claim separately, as different entities with different investments that have different values.[62]

- *Third*, Panama contends that "*a claimant may not assert a claim in respect of an alleged investment outside of Panama*."[63] This is, the Respondent argues, because under the TPA, only a "*claimant*" might bring a claim, it can only do it on its own behalf, and the definition of "*claimant*" operates around the existence of an investment *in Panama*, as does the scope and coverage of Chapter 10 of the TPA.[64]

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[54] Cl. Mem., ¶ 145 (citing Decision on Expedited Objections, ¶¶ 210, 216).

[55] Cl. Mem., ¶ 146.

[56] Cl. Mem., ¶¶ 147-151.

[57] Resp. C-Mem., ¶ 6.

[58] Resp. C-Mem., ¶ 6.

[59] Resp. C-Mem., ¶¶ 7-8.

[60] Resp. C-Mem., ¶ 8.

[61] Resp. C-Mem., ¶ 9 (referring to **R-0001**, TPA, Art. 10.16.1(a) and Art. 10.29). The Respondent notes that the Claimants have confirmed that their claim was submitted under Art. 10.16.1(a) of the TPA. Resp. C-Mem., n. 26.

[62] Resp. C-Mem., ¶ 9.

[63] Resp. C-Mem., ¶ 10 (referring to **R-0001**, TPA, Art. 10.16.1 and Art. 10.29).

[64] Resp. C-Mem., ¶ 10 (referring to **R-0001**, TPA, Art. 10.16.1, Art. 10.29 and Art. 10.1)

143. The application of these rules, Panama says, leads to the conclusion that neither of the Claimants has "*advanced a cognizable claim.*"[65] More particularly, the Respondent submits that: (i) BSAM has failed to establish a *prima facie* case for a single breach of the TPA, in particular, because it cannot formulate a claim under Article 10.5 of the TPA for denial of justice on the basis of a proceeding to which it was not a party; (ii) BSAM has "*failed to satisfy the jurisdictional requirement of establishing loss*;" and (iii) BSLS "*has failed to establish that it has 'incurred' loss*" which is a "*threshold jurisdictional requirement.*"[66]

A. BSAM's Standing to Advance a Claim Founded on an Allegation of Denial of Justice

1. The Parties' Positions

a. The Respondent's Position

144. According to Panama, BSAM's claim under Article 10.5 fails "*at the threshold level*,"[67] because BSAM cannot assert a claim for denial of justice when it made no effort to participate in the proceeding that led to the Supreme Court Judgment.[68] On this basis, the Respondent asks the Tribunal to exercise its discretion under Rule 41(2) of the ICSID Arbitration Rules and dismiss BSAM's claim.[69]

145. The Respondent submits that according to Article 10.16 of the TPA each Claimant must prove that it "*has incurred loss or damage by reason of, or arising out of*" a breach by the Respondent of an obligation in Section A of Chapter 10 of the TPA.[70] More specifically,

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[65] Resp. C-Mem., ¶ 11.

[66] Resp. C-Mem., ¶¶ 44-45. The Respondent also argued that BSAM and BSLS had failed to establish a *prima facie* case for violation of Articles 10.3 and 10.4 of the TPA, but those claims have been withdrawn. Cl. Reply, ¶ 75.

[67] Resp. C-Mem., ¶ 20. Panama made similar arguments with respect to the initial claims under Article 10.3 and 10.4 of the TPA, which were ultimately withdrawn. *See* Resp. C-Mem., ¶¶ 17-19; Cl. Reply, ¶ 75.

[68] Resp. C-Mem., ¶ 22. *See also*, Tr., Day 1, 211:5-7 (Ms. Silberman); 242:13-18 (Ms. Gehring Flores).

[69] Resp. C-Mem., ¶ 23 and n.70 (citing ICSID Arbitration Rule 41(2): "*The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.*") In the Counter-Memorial, Panama observed that, while it believed that this issue warranted a preliminary objection under Article 10.20.4 of the TPA, it would forego making that objection in the interest of judicial economy. This said, Panama asked for an award on costs in favour of Panama if the Claimants insisted in their "*frivolous claims.*" Resp. C-Mem., n. 70. *See also*, Resp. C-Mem., ¶¶ 295, 299.

[70] Resp. C-Mem., ¶ 14.

the Respondent submits that "*the TPA requires that each claimant must separately prove that (1) specific 'measure*[s] *adopted or maintained by* [Panama] *relating to' the claimant's investment in Panama (2) breached an obligation set forth in Section A of TPA Chapter Ten, and (3) that each claimant has already incurred loss, (4) as a result of that breach.*"[71]

146. According to Panama, BSAM has failed to establish that the Supreme Court Judgment (issued against two other entities) subjected BSAM to the breach of any standard of protection arising out of BSAM's investment in Panama.[72] Panama submits that the Claimants have entirely failed to distinguish their denial of justice claims for BSLS and BSAM.[73] For the Respondent, while the Claimants purport to present a section on BSAM's claim for denial of justice in their Reply, the argument shows that the denial of justice claim actually pertains to BSLS and BSJ.[74]

147. And even if BSAM had presented a claim for denial of justice, the Respondent argues, BSAM does not have standing to bring it.[75] Relying on Prof. Paulsson's expert report, the Respondent argues that, a party that has not participated or attempted to participate in the process, or presented any argument in the local proceeding cannot assert a denial of justice claim.[76] Panama further recalls that it is blackletter law that "*a person may not allege a denial of justice unless he has exhausted all available domestic avenues*," and submits that this rule is fatal for BSAM who neglected to even attempt to participate in the local proceedings.[77]

148. While the Respondent accepts that there are circumstances that might allow *certain* non-parties to claim a denial of justice (*e.g.* a parent that owns and controls a subsidiary that is a party to the local proceeding), it argues that those circumstances are not present here.[78]

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[71] Resp. Rej., ¶ 133 (citing **R-0001**, TPA, Arts. 10.1, 10.29, and 10.16).
[72] Resp. C-Mem., ¶ 14.
[73] Resp. Rej., ¶ 136.
[74] Resp. Rej., ¶ 137; Resp. PHB, ¶ 13.
[75] Resp. Rej., ¶ 137; Resp. PHB, ¶ 14. *See also*, Tr., Day 1, 210:16-211:7 (Ms. Silberman).
[76] Resp. Rej., ¶ 140.
[77] Resp. PHB, ¶ 14.
[78] Resp. Rej., ¶ 141.

Referring to the situation of a licensor and a licensee of a trademark at the Hearing, the Respondent argued that no exception could be made to allow the licensee who did not participate in the proceeding to bring a claim for denial of justice because (i) denial of justice is inherently procedural; and (ii) while in Panama it is the licensor who polices the mark and participates in the proceeding, the licensee can participate as well, and if it decides not to participate, it has waived its right to claim a procedural violation.[79]

149. The Respondent also accepts that the *Arif* tribunal determined that a denial of justice claim under an autonomous fair and equitable treatment ("**FET**") standard could be brought by a non-party to the local proceedings at issue, but it adds that the *Arif* tribunal also found that this was not the case if the claim for denial of justice was made under customary international law.[80] The Respondent observes that the Claimants have conceded that if BSAM were bringing a claim under customary international law, it would have no standing; although the Claimants then argue that BSAM's claim is under the FET standard in the TPA.[81] Panama contends that the distinction does not assist BSAM because under the TPA a denial of justice claim for breach of the FET is a claim under customary international law, as shown by the language in Article 10.5.1. and Article 10.5.2. of the TPA.[82]

150. Panama also submits that there are no grounds in this case to make an exception from the customary international law rule on standing, not only because Article 10.5 of the TPA prescribes the customary international law standard of treatment, but also because "*customary international law*" is the product of States' "*general and consistent practice* […] *that they follow from a sense of legal obligation*."[83] As such, only States have the power to develop exceptions whether through developing new customary international law

[79] Tr., Day 5, 1266:18-1267:4 (Ms. Silberman).

[80] Resp. Rej., ¶ 144 (referring to **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 ("***Arif***")). *See also*, Resp. PHB, ¶ 16.

[81] Tr., Day 5, 1271:10-21 (Ms. Silberman).

[82] Resp. Rej., ¶¶ 145-147. *See also,* Resp. PHB, ¶ 16; Tr., Day 1, 211:8-17 (Ms. Silberman); Tr., Day 5, 1271:21-1274:6 (Ms. Silberman).

[83] Resp. PHB, ¶ 16.

or by amending the TPA; and it would constitute an "*excess of powers*" for a tribunal to invent an exception.[84]

151. The Respondent also takes issue with the Claimants' allegation at the Hearing that there is no need for BSAM to have been personally denied justice, so long as the denial of justice has deprived BSAM of rights; and submits that this is an untenable theory.[85] Panama explains that the Claimants' allegation amounts to the contention that BSAM could prosecute a treaty breach suffered by somebody else, which is contrary to Article 10.16.1 of the TPA, which provides that BSAM may only assert a claim "*on its own behalf*" or "*on behalf of an enterprise* [of Panama] *that is a juridical person that* [BSAM] *owns or controls*;" but not on behalf of a parent or sister.[86]

b. The Claimants' Position

152. According to the Claimants, the only remaining jurisdictional question is whether BSAM has standing to bring a claim for denial of justice.[87]

153. The Claimants submit that BSAM is entitled to bring a claim for denial of justice under the FET standard in Article 10.5 of the TPA, even though it was not a party to the impugned local court proceeding. This is, the Claimants argue, because when the denial of justice claim is brought under a treaty's FET standard (as distinguished from a claim under customary international law), there is no need for the claimant to have been a party to the impugned local proceeding.[88]

154. Relying on *Arif*, the Claimants submit that a claim under a treaty's FET standard is capable of being pursued by those who have a covered investment under the treaty which has been the subject of a denial of justice;[89] and the protections in Article 10.5 of the TPA apply to

[84] Resp. PHB, ¶ 16.
[85] Resp. PHB, ¶ 15.
[86] Resp. PHB, ¶ 15.
[87] Cl. PHB, ¶ 4.
[88] Cl. Reply, ¶¶ 12, 25-26; Tr., Day 1, 37:1-6 (Ms. Hyman).
[89] Cl. PHB, ¶ 6 (citing **RLA-0063**, *Arif*, ¶ 438).

covered investments (not to investors).[90] Because BSAM's investment has a right to the protections under Article 10.5 of the TPA, the Claimants argue, if that standard is breached, BSAM has a right to be compensated for it, and "[t]*here is no need for BSAM to have been personally denied justice*" as "[i]*t's sufficient for denial of justice to have taken place which has deprive BSAM of its rights*."[91]

155. The Claimants' position is that during the Expedited Objections Phase the Tribunal already concluded that BSAM is able to submit a claim on the basis of the court proceedings that led to the Supreme Court Judgment.[92] This is, the Claimants argue, because the Tribunal found that BSAM has an investment in Panama which was the subject of the Supreme Court Judgment; and being "*an investor in the asset the subject of the Supreme Court Judgment, BSAM is entitled to the protections of Article 10.5 of the TPA, despite not being a party to the underlying court proceedings*."[93]

156. The Claimants take issue with the Respondent's contention that a denial of justice claim under Article 10.5 of the TPA is a claim under customary international law given the language of Article 10.5.2 of the TPA.[94]

157. *First*, according to the Claimants, on the language of Article 10.5. of the TPA, "*it appears that the standard of treatment in the TPA is not just the customary-international-law standard*," because the provision includes a modifier to the customary international law standard, namely "*the obligation* […] *not to deny justice in accordance with the principle of due process embodied in the principal legal systems of the world*."[95] This said, elsewhere, the Claimants submitted that the "*minimum standard under the TPA will be no greater than the minimum treatment under customary international law*."[96]

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[90] Cl. PHB, ¶ 6.
[91] Tr., Day 1, 39:18-40:3 (Ms. Hyman).
[92] Cl. Reply, ¶ 13 (citing Decision on Expedited Objections, ¶¶ 241-242); Cl. PHB, ¶ 8.
[93] Cl. Reply, ¶ 26.
[94] Cl. PHB, ¶¶ 7-9.
[95] Tr., Day 1, 35:1-11 (Ms. Hyman).
[96] Tr., Day 1, 39:4-6 (Ms. Hyman).

158. *Second,* in any event, the Claimants submit that the reference in Article 10.5.2 of the TPA to customary international law refers to the standard of treatment to be applied to covered investments, and it does not deal with whether an investor has standing to bring a claim (which is addressed in Articles 10.1, 10.29 and 10.16 of the TPA).[97]

159. *Third*, the Claimants submit that there are exceptions that allow a non-party to the litigation to bring a customary international law claim for denial of justice (for example, a parent company might bring a claim on behalf of the subsidiary where the parent was a non-party to the litigation), and suggest that such exception should be recognized in a situation involving the licensor and the licensee of a trademark.[98] This is, the Claimants argue, because "*a denial of justice affecting BSLS's trademark rights and BSJ's trademark rights directly affect BSAM because it's the licensee of those rights*," and as such, "*BSAM stands in the shoes of BSLS and BSJ as the party that enjoys the fruits of the exploitation of the trademarks owned by BSLS and BSJ* […]."[99]

160. Therefore, the Claimants argue, even if BSAM's denial of justice claim were a customary international law claim, BSAM would have standing to bring such claim, "*where its trademark rights had been the subject of legal proceedings in Panama, and where it had been denied justice because of the way* […] *BSJ* […] *and BSLS had been treated by Panama*."[100]

2. The U.S. Submission

161. In its Third Written Submission the United States advanced the following proposition:[101]

> "As a threshold matter, Article 10.5.1 requires a Party to accord 'treatment' to a covered investment. Article 10.5.1 differs from other substantive obligations (*e.g.*, 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a 'covered investment.' The minimum standard of treatment under Article 10.5.1 includes the obligation to provide 'fair and equitable treatment,' which, as

[97] Cl. PHB, ¶ 8. *See also*, Tr., Day 1, 37:6-38:3; 39:6-9 (Ms. Hyman).
[98] Cl. PHB, ¶ 9.
[99] Tr., Day 1, 40:18-41:1 (Ms. Hyman).
[100] Cl. PHB, ¶ 10.
[101] U.S. Third Sub., ¶ 3 (references omitted).

> explained in 10.5.2(a), includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Therefore, to establish a breach of Article 10.5.1 on the basis of denial of justice, a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law."

162. In her oral submission on behalf of the United States, Ms. Thornton emphasized that Article 10.5.1 of the TPA requires a TPA Party to accord treatment only to a "*covered investment*," rather than to investors.[102] Thus, the obligations in Article 10.5 of the TPA, including the obligation not to deny justice only apply to treatment accorded to covered investments;[103] and a denial of justice claim cannot be arbitrated under Chapter 10 of the TPA if the claim is for treatment accorded to an investor rather than a covered investment.[104]

3. The Tribunal's Analysis

163. It is Panama's case that BSAM cannot assert a claim that Panama has not accorded BSAM's investments fair and equitable treatment by reason of a denial of justice unless BSAM was itself party to the proceedings in which the denial of justice occurred. In support of this case Panama relies upon the Expert Report of Professor Jan Paulsson to this effect.[105]

164. Professor Paulsson states:

> "Because it is intrinsically tied to the treatment afforded to aliens under municipal law, a claim for denial of justice is limited to the treatment that a party experiences over the course of a local (often judicial) proceeding. If a party does not participate in the process, I fail to see how it could assert a denial of justice claim. This is a corollary to at least two well-accepted rules. The first is that the exhaustion of local remedies is a prerequisite to a denial of justice claim; to exhaust a particular remedy, one necessarily must first pursue it. The second is the concept of waiver: If a party declines *suo moto* to pursue a remedy or argument, it could not properly

[102] U.S. Third Sub., ¶ 3; Tr., Day 1, 21:12-14 (Ms. Thornton).

[103] Tr., Day 1, 22:10-12 (Ms. Thornton).

[104] Tr., Day 1, 22:16-21 (Ms. Thornton). The United States argue that this follows from Article 10.16 of the TPA regarding submission of a claim to arbitration. Tr., Day 1, 23:2-4 (Mr. Thornton).

[105] Resp. Rej., ¶¶ 139-141; RER-Paulsson, ¶¶ 52-54.

> claim to have been *denied* access to the courts or an opportunity to be heard. There is also a logical fallacy in the notion that a party could claim that a court violated its right to be heard when that party did not attempt to participate in the judicial proceedings at issue."[106]

165. This passage accurately states the position under international law in respect of a party who asserts that it has suffered a denial of justice. The Tribunal does not, however, consider that it can automatically be applied to a complaint under the present Treaty that a "*covered investment*" has not been accorded fair and equitable treatment by reason of a denial of justice. As the United States have pointed out, Article 10.5.1 of the TPA is dealing with the treatment that must be accorded to *the covered investment* not to *the investor*.[107] Where a covered investment is unfairly treated by reason of a denial of justice, it is likely that the investor will be party to the proceedings in which the denial of justice occurs, but this is not necessarily the case.

166. For instance, it will not be the case where the investor owns the shares of the company that owns the investment. Where that company suffers a denial of justice to the detriment of the investment, the investor can invoke Article 10.5.1. of the TPA even though he was not party to the proceedings in which the denial of justice occurred. That was the position in *Arif*.

167. In the present case, the relevant issue is not whether BSAM has suffered a denial of justice but whether the trademark licenses that constitute its investments in Panama have been denied fair and equitable treatment by reason of a denial of justice.

168. That is precisely the same question that arises in the case of BSLS in relation to the FIRESTONE trademark that it owns and has licensed to BSAM. It seems plain to the Tribunal that the answer to each question must be the same.

169. On the facts of this case it makes no sense to suggest that BSAM has failed to pursue, or has waived, an available remedy. The unfair treatment that it alleges has been accorded to its investment results from an alleged denial of justice in proceedings brought *against* the

[106] RER-Paulsson, ¶ 52.

[107] U.S. Third Sub., ¶ 3 (references omitted).

owners of the trademarks which are the source of BSAM's investment. BSAM had nothing to contribute to these proceedings nor any reason to seek to intervene in them.

170. In *Arif*, Mr. Arif claimed as sole shareholder in a Moldovan company that had invested in Moldova. He claimed for various breaches of the obligations owed to that company under the relevant BIT. As the tribunal in *Arif* found,[108] he alleged denial of justice as both a breach of the fair and equitable treatment owed in respect of his investment and as a separate breach of customary international law, and both bases were treated separately by the parties in that case.

171. The *Arif* tribunal held:[109]

> "Conversely to a free-standing claim for denial of justice which can only be brought by a person that has participated in the national court proceedings, the standard of fair and equitable treatment also protects the foreign shareholder in a local company. If the standard is breached by a denial of justice, the State will be held responsible towards the indirect investor for a breach of fair and equitable treatment."

172. This Tribunal concurs in that conclusion. In an investment treaty arbitration where a chain of companies is involved, indirect interests in an investment are recognized, notwithstanding that this may involve lifting the veil of incorporation. If a direct investor is involved in litigation for the benefit of an investment in which an indirect investor has an interest, and a denial of justice results in damage to that investment, there seems to be no reason in principle why it should not be open to the indirect investor to invoke the denial of justice as a breach of the obligation to accord fair and equitable treatment to the covered investment.

173. In his Expert Report of 17 June 2019,[110] Professor Paulsson accepts that a parent company that was not a party to local proceedings may have *locus standi* to bring a claim for denial

[108] **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 ("***Arif***"), ¶ 423.
[109] **RLA-0063**, *Arif*, ¶ 438.
[110] RER-Paulsson, ¶ 54.

of justice, but opines that this consideration is inapposite because BSAM did not own or control either of the Bridgestone entities that participated in the local proceedings.

174. In the Tribunal's view, the solution is found in the TPA's provisions governing the standing to bring a claim under the Treaty, not in the rules of customary international law. Whatever the customary international law rules on espousal might be, in the present case, the TPA prescribes the rules governing the bringing of claims and thus varies the otherwise applicable rules of customary international law. Under this Treaty, just as a parent company holding the requisite nationality can bring a claim for an alleged denial of justice experienced by its subsidiary (the covered "*investment*" as defined by Article 10.29 (Definitions)), so too can a licensee holding the requisite nationality bring a claim in respect of an alleged denial of justice experienced by *its* covered investment (in this case the trademark in respect of which the licensee holds rights – again as defined by the TPA). In both cases an investor/claimant seeks to rely upon duties owed to, and rights held by, its covered investment.

175. Moreover, neither Party was able to point to any jurisprudence applicable in the present context that addressed the relationship of the owner and the licensee of a trademark. In the Decision on Expedited Objections, this Tribunal said this of the respective positions of BSAM and BSLS:[111]

> "It seems to the Tribunal that the two claims must stand or fall together. Each claims in respect of its interest in the FIRESTONE trademark, BSLS as the owner and BSAM as the licensee. Each was benefitting from the exploitation of the trademark. BSLS' interest in the trademark was restricted to the royalties that it was to receive from BSAM for the use of the trademark. BSAM's interest was in the fruits of the exploitation of the trademark. BSAM had relied upon BSLS to protect the trademark and thus to protect BSAM's interest in the trademark. As Ms. Williams explained, BSAM as licensee could have joined with BSLS in opposing the registration of the RIVERSTONE trademark. Had it done so, it would no doubt also have been joined as a defendant in the proceedings that resulted in the Supreme Court's judgment."

[111] Decision on Expedited Objections, ¶ 242, cited by the Claimants at Cl. Reply, ¶ 13.

176. In these circumstances, given the way in which the TPA has prescribed the rules of standing and defined "*investment*," the answer is clear; there are no cogent reasons of principle to interpret the TPA as precluding BSAM from alleging a denial of justice on the part of the Supreme Court as constituting a failure to accord to its covered investment fair and equitable treatment, in the same way that it is open to BSLS to advance this case. The merits of so doing are at least as strong as exist in the case of a parent company and its subsidiary. The objection that BSAM was not a party to the relevant litigation is a technicality that has no bearing on the substance of the treaty complaint advanced by BSAM.

177. In its Rejoinder,[112] Panama sought to distinguish *Arif*. It argued that in that case the Tribunal had applied an "*autonomous*" fair and equitable treatment treaty provision that entitled it to disregard the customary international law standard when considering whether a denial of justice had infringed that provision. Panama argued that such an approach was not open to the Claimants in the present case because Article 10.5.1 of the TPA expressly emphasized that the treatment to be applied to covered investments should be "*in accordance with customary international law.*" Furthermore Article 10.5.2 of the TPA provides that:

> "For greater certainty, ***paragraph 1 prescribes the customary international law minimum standard of treatment*** of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard*****,** and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice […] in accordance with the principle of due process embodied in the principal legal systems of the world […]."[113]

178. The Tribunal does not believe that this passage is in point. The issue is one of *locus standi,* not of the standard of treatment to be applied. There is no doubt that, when considering whether there has been a denial of justice under the TPA, the *standard* of customary

[112] Resp. Rej., ¶¶ 144-148.

[113] **R-0001**, TPA, Art. 10.5.2 (emphasis added).

international law has to be applied. The issue is whether, having regard to the relationship between BSAM and BSLS, it is open to BSAM to invoke the delict of denial of justice in relation to litigation in which BSLS but not BSAM was a party. The TPA answers this question in the affirmative and the Tribunal must give effect to it: BSAM, an "*investor*," has standing to claim in respect of an alleged breach of the TPA that has caused loss or damage to its "*covered investment*."

179. For the reasons given, Panama's contention that BSAM has no standing to contend that the alleged denial of justice constituted a failure to accord to its investment fair and equitable treatment is dismissed.

B. BSAM's Claims for Loss

1. The Parties' Positions

a. The Respondent's Position

180. Panama submits that BSAM has failed "*to identify or quantify any loss associated with its flawed and haphazard claims.*"[114] Therefore, Panama says, BSAM has "*failed to satisfy the **jurisdictional requirement** of establishing loss*."[115]

181. The Respondent explains that BSAM's alleged loss is premised on the supposed diminution of value of the BRIDGESTONE and FIRESTONE trademarks both in Panama and in the BSCR Region, and it argues that such contention is problematic for various reasons discussed in the sections that follow.[116]

[114] Resp. C-Mem., ¶ 24.

[115] Resp. C-Mem., ¶ 44 (emphasis added). *See also*, Tr., Day 1, 214:1-15 (Ms. Gehring Flores).

[116] Resp. C-Mem., ¶ 24.

(i) BSAM's Claim for Loss Outside of Panama Exceeds the Scope of this Proceeding

182. Panama submits that BSAM's request for compensation for alleged loss outside of Panama "*plainly exceeds the scope of this proceeding*."[117] That is, the Respondent argues, because (i) under Article 10.16.1(a) of the TPA, the only type of claim that can be submitted to arbitration is a claim that "***the claimant** has incurred loss or damage by reason of, or arising out of*" a breach of an obligation under Section A of Chapter 10;[118] and (ii) under Article 10.29 of the TPA, an entity is a "*claimant*" if and to the extent that it "*attempts to make, is making, or has made an **investment in the territory of*** [Panama]."[119]

183. More particularly, the Respondent argues that BSAM's claim for alleged loss for diminished value of the BRIDGESTONE and FIRESTONE trademarks both in Panama and the BSCR Region (Panama, Costa Rica, Puerto Rico, Guatemala and the Dominican Republic) ignores that trademarks are territorial, and so the Costa Rican, Puerto Rican, Guatemalan and Dominican Republic trademarks are not part of BSAM's investment in Panama.[120] Similar conclusion applies, the Respondent says, to BSAM's licenses to use trademarks registered outside of Panama.[121]

184. The Respondent also submits that this claim was captured by the Tribunal's Decision on Expedited Objections; and that the Claimants are transparently attempting to circumvent the clear instructions in that decision.[122] Panama observes that the Tribunal already determined that "*there is no 'immediate cause-and-effect relationship' between the Supreme Court judgment and the alleged effects outside Panama*" as "*the relationship is speculative and remote*;" and that "*a dispute as to whether States other than Panama are likely to copy Panama's alleged abuse of the Claimants' intellectual property rights to the*

[117] Resp. C-Mem., ¶ 25. *See also*, Resp. C-Mem., ¶ 175 (asserting that the request for damages for the alleged diminution of value of the investments outside of Panama "*falls outside of this Tribunal's jurisdiction.*"); Resp. Rej., ¶ 269; Tr., Day 1, 243:5-244:6 (Ms. Gehring Flores).

[118] Resp. C-Mem., ¶ 25 (citing **R-0001**, TPA, Art. 10.16.1(a)(ii)) (emphasis added by the Respondent)).

[119] Resp. C-Mem., ¶ 25 (citing **R-0001**, TPA, Art. 10.29 (emphasis added by the Respondent)).

[120] Resp. C-Mem., ¶ 26.

[121] Resp. C-Mem., ¶ 26.

[122] Resp. C-Mem., ¶ 177.

detriment of the Claimants is both speculative and remote from each of the Claimants' investments."[123]

185. Panama goes on to submit, however, that even if this were a new damages claim not captured by the Decision on Expedited Objections, this extra-territorial claim is still premised on the hypothetical actions of courts in other States, and thus the same reasoning of the Decision on Expedited Objections would apply to dismiss the "*revamped*" extra-territorial damages claim.[124]

(ii) BSAM Has Not Identified Its Loss

186. Panama also submits that the claim for alleged diminution of value of the BRIDGESTONE and FIRESTONE trademarks refers to the decrease in royalties that a trademark owner receives from licensees, and argues that such decrease could never be a loss to BSAM who is the trademark licensee that pays (not receives) those royalties.[125] Furthermore, for Panama, BSAM is also unable to establish loss because "*the value of the license to the licensee will reflect the fruits of the exploitation of the trademark*," that is, the tire sales revenues, and the Claimants have admitted that the Supreme Court Judgment has not had an impact on revenues from sales.[126] Moreover, the Respondent argues, BSAM's financial records confirm the absence of any injury, as they show that between 2014 and 2017 BSAM has consistently stated that there have been no impairments for any of its intangible assets.[127]

187. The Respondent also submits that, contrary to the Claimants' assertion, the licensor and the licensee of a trademark do not have an undivided interest in the mark's goodwill. Rather, the licensor owns the goodwill and the licensee only has a contractual right to use

[123] Resp. C-Mem., ¶ 176 (citing Decision on Expedited Objections, ¶¶ 247, 354).
[124] Resp. C-Mem., ¶ 178 (citing Decision on Expedited Objection, ¶¶ 353-354).
[125] Resp. C-Mem., ¶ 27.
[126] Resp. C-Mem., ¶ 28. *See also*, Resp. Rej., ¶ 268; Tr., Day 1, 250:18-251:14 (Ms. Gehring Flores).
[127] Tr., Day 1, 251:15-252:4 (Ms. Gehring Flores).

the trademark;[128] and the value of that right is assessed based on the income generated by it.[129]

188. The Respondent goes on to explain that the Tribunal does not need to determine whether BSAM "*could*" establish a loss, given that the reality is that it "*has not established such loss.*"[130] For Panama, given that in addition to establishing a breach "*the TPA requires such a showing of loss, the claims by* [BSAM] *must be rejected at the outset, without further analysis.*"[131] Put a little differently, the Respondent argues that BSAM has not (and is unable to) show that it has suffered any injury "*in connection with its investment (i.e., the trademark licenses)*" as required by Article 10.16.1(a) of the TPA, and therefore, the Tribunal "*need not evaluate* [BSAM's] *damages claim on its merits*."[132]

b. The Claimants' Position

(i) BSAM's Claim for Loss Outside of Panama

189. The Claimants argue that the Tribunal has already made a final determination that BSAM's dispute arises directly out of its investment insofar as the claim relates to damages suffered in Panama.[133]

190. As to the claim for damages outside of Panama, the Claimants acknowledge that during the Expedited Objections phase the Tribunal concluded that BSAM's dispute did not arise directly out of its investment with respect to loss suffered outside of Panama, but they contend that such finding was made with respect to the claims formulated in the Request for Arbitration on the basis that third States were likely to copy the actions of the Panama Supreme Court.[134] According to the Claimants, BSAM's current claim for damages

[128] Resp. Rej., ¶ 266.
[129] Resp. Rej., ¶ 267.
[130] Resp. C-Mem., ¶ 29.
[131] Resp. C-Mem., ¶ 29.
[132] Resp. C-Mem., ¶ 186.
[133] Cl. Mem., ¶ 147 (citing Decision on Expedited Objections, ¶ 246).
[134] Cl. Mem., ¶ 148 (citing Decision on Expedited Objections, ¶¶ 245, 247-248, 346-355).

suffered outside of Panama is premised on a different basis,[135] namely, "*on the diminution of value to BSAM's trademark rights (wherever that loss occurs) caused directly by the Panamanian Supreme Court Judgment*;" which they submit is a dispute that arises directly out of BSAM's investment.[136]

191. The Claimants argue that "*the impairment to the global marks that resulted in Panama from the Supreme Court Judgment necessarily creates impairment, and the resulting economic consequences, in other relevant jurisdictions*;" and for this reason their damages claim also includes impairment of rights in Panama and also "*impairment of rights in the BSCR Region*" (namely, Panama, Costa Rica, Puerto Rico, Guatemala, and the Dominican Republic), which is a region that BSAM treats as a "*consolidated market*" for advertising, promotion and manufacturing purposes.[137]

(ii) BSAM Has Identified Its Loss

192. The Claimants also oppose the Respondent's allegation that BSAM's claim fails to identify or quantify any loss.

193. According to the Claimants, where the TPA breach affects intellectual property rights, the assessment of loss and damages must be undertaken by reference to the specific features of intellectual property. They explain that BSAM's investment, namely, the trademark licenses, is "*impacted by Panama's breach more in terms of a reduction in the value of the brand than in immediate loss of sales and revenue*."[138] This is, the Claimants argue, because if the trademark is worth less to BSLS as a licensor because the mark's enforceability is legally impaired, it is also worth less to BSAM as licensee, since "*BSAM will not be able to sell tires bearing the brand for as high a price*."[139] According to the

[135] Cl. Mem., ¶ 148.

[136] Cl. Mem., ¶ 151.

[137] Cl. Reply, ¶ 24. *See also*, Cl. Mem., n. 519.

[138] Cl. Reply, ¶ 29. *See also*, Cl. Reply, ¶¶ 21-23. The Claimants do argue, however, that while in the immediate aftermath of the Supreme Court Judgment it is unlikely that BSAM will see a dip in sales, overtime, BSAM may see such a drop in sales because the Supreme Court Judgment has made it easier for competitors with confusingly similar marks to enter the market. Cl. Reply, ¶ 94.

[139] Cl. Reply, ¶ 28.

Claimants, these "*economic impacts cannot be discounted simply because they have not yet been felt*."[140]

194. The Claimants submit that the Parties agree (in part) that BSAM's interest is in the profits from sales of products bearing the FIRESTONE and BRIDGESTONE trademarks.[141] However, they explain that both the trademark owner and the licensee "*share in the intangible benefits*" namely, the goodwill and market exclusivity, such that both the owner and the licensee suffer if those rights are impaired.[142] According to the Claimants, the trademark owner and licensees each have an "*undivided interest in the mark's goodwill*."[143] It does not matter, the Claimants argue, whether the trademark owner or the licensee has the legal title ("owns") to the goodwill, because the key point is that BSAM enjoys the benefits of that goodwill for the FIRESTONE and BRIDGESTONE trademarks, and also bears any negative repercussion of damages to those brands.[144]

195. Lastly, the Claimants deny that their claims have not articulated the loss of BSAM separately from that of BSLS, and they submit that their expert report has done so.[145]

2. The U.S. Submission

196. At the Hearing, the United States argued that under the TPA "*an investor may only recover for loss or damage that the Investor incurred in its capacity as an investor of a party*;" and therefore "*the Investor may only recover for damages it incurred in its capacity as an investor-seeking to make, making or having made an 'investment' in the territory of the other Party*."[146]

[140] Cl. Reply, ¶ 28.
[141] Cl. Reply, ¶ 86.
[142] Cl. Reply, ¶ 86.
[143] Cl. Reply, ¶ 89.
[144] Cl. PHB, ¶ 93.
[145] Cl. Reply, ¶ 88.
[146] Tr., Day 1, 27:6-12 (Ms. Thornton).

3. The Tribunal's Analysis

197. For reasons that will become apparent later in this Award, the Tribunal proposes to deal with the other submissions in relation to jurisdiction relatively briefly. Because the objections relate to jurisdiction, the Tribunal is only concerned with the allegations that the Claimants have made, not with whether they have made good those allegations.

a. BSAM's Claim for Loss Suffered Outside Panama

198. In its Decision on Expedited Objections, the Tribunal ruled that BSAM's claims in relation to loss allegedly suffered outside Panama fell outside the jurisdiction of the Tribunal. This was on the basis that the alleged loss was founded on the allegation that courts or other organs of States outside Panama would follow the example of the Panama Supreme Court, or at least that there would be a perceived risk of their doing so, thereby adversely affecting the value of trademark rights outside Panama. This part of the dispute could not possibly be said to arise "*directly out of*" either Claimants' investments.[147] The Tribunal went on to comment:

> "BSLS will no doubt consider carefully whether to pursue a claim in relation to events outside Panama in circumstances where the Tribunal has ruled that it has no jurisdiction to entertain an identical claim by BSAM."[148]

199. BSAM now purports to pursue a claim for loss suffered outside Panama "*made on a different basis*," as formulated in paragraphs 229 to 237 of their Memorial.[149] The Tribunal has considered those paragraphs. They aver a drop in the value of the trademark rights owned by the Claimants because of uncertainty created by the Supreme Court Judgment.

> "This creates uncertainty for a potential purchaser of BSLS or BSAM's trademark rights: how would future courts deal with trademark registrations by competitors? Would competitors file similar damages claims? Would future courts grant those claims, on the basis of the precedent set in the Supreme Court Judgment?"[150]

[147] Decision on Expedited Objections, ¶ 354.
[148] Decision on Expedited Objections, ¶ 355.
[149] Cl. Mem., ¶ 148.
[150] Cl. Mem., ¶ 233.

200. This is not a claim made "*on a different basis*." It is made on the same basis as the claim that the Tribunal held to be outside its jurisdiction in its Decision on Expedited Objections. Panama is right to submit that this claim was captured by the Decision on Expedited Objections.[151] It is not open to BSAM to pursue a claim for loss experienced outside Panama.

b. BSAM's Claim for Loss Inside Panama

201. The Tribunal emphasizes again that a challenge to jurisdiction looks at the claims that the Claimants have *made*, not the claims that they have *made good*.[152] Their claims are not made for alleged reductions in royalties or in earnings from the use of the trademarks. They are made for reductions in the values of their interests in the trademarks. The Claimants advanced a substantial body of evidence at the Hearing that they alleged made good their respective claims for losses. The losses alleged were not related to royalties. Panama's contention that BSAM's claim should be rejected *in limine* on the ground that its pleadings do not identify or quantify any loss does not succeed.

C. BSLS's Claims for Loss

1. The Parties' Positions

a. The Respondent's Position

202. The Respondent contends that BSLS has failed to demonstrate any loss in connection with its investment, as required by Article 10.16.1(a) of the TPA, and as a result its claims fail.[153] According to Panama, BSLS "*has failed to establish that it has 'incurred' loss*" which is a "*threshold **jurisdictional requirement***" under the TPA.[154]

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[151] Resp. C-Mem., ¶ 177.

[152] In paragraph 44 of the Counter-Memorial Panama appears to contend that establishing a loss is a jurisdictional requirement under the TPA. Resp. C-Mem., ¶ 44. This is fallacious. It is a jurisdictional requirement that the Claimants claim to have suffered a loss. Whether the claim is made good depends upon the Tribunal's evaluation of the merits. *See*, **R-0001**, TPA, Art. 10.16(a) and Art. 10.17.

[153] Resp. C-Mem., ¶¶ 32, 42-43.

[154] Resp. C-Mem., ¶ 44 (emphasis added). *See also*, Tr., Day 1, 214:1-15 (Ms. Gehring Flores); Tr., Day 5, 1317:1-2; 1318:1-6 (Ms. Gehring Flores).

(i) The Claim for the Damages Award Ordered by the Supreme Court

203. With respect to the claim for US$5,431,000 that BSJ and BSLS were ordered to pay by the Supreme Court Judgment, Panama contends that BSLS has not established that this loss has been incurred, as required by Article 10.16.1(a)(ii) of the TPA.[155] The Respondent argues that BSLS has not shown that "*it actually suffered any economic loss associated with the payment of*" the Supreme Court Judgment, and as a result, the "*inquiry can and should stop here*."[156]

204. The Respondent submits that BSLS was merely a "*pass-through*" agent for the payment of the funds to Muresa and TGFL, as demonstrated by (i) their own admission in the Request for Arbitration; (ii) Mr. Kingsbury's admission that the funds used to pay came from a loan from BSAM; and (iii) the fact that BSLS has not demonstrated that this loan was or is being repaid.[157] According to Panama, the fact that BSLS paid using a cash inflow from BSAM is the best illustration that BSLS "*did not incur a financial loss.*"[158] The Respondent further submits that the evidence does not support the assertion that interest is paid on the loan, and submits that the evidence suggests instead that the loan simply rolls over every year, and that the obligation to repay it is contingent on the outcome of this arbitration.[159]

205. Put another way, the Respondent argues that BSLS's claim for the payment of the judgment "*must be dismissed*" because "*the financial loss*" of the Supreme Court Judgment "*was suffered by another Bridgestone entity*;" and the TPA *"does not allow a Claimant to submit a claim for injuries suffered entirely by another entity*," but instead requires that "[e]*ach Claimant must establish injury 'on its own behalf.*'"[160]

[155] Resp. C-Mem., ¶ 39.

[156] Tr., Day 1, 216:3-11 (Ms. Gehring Flores).

[157] Resp. C-Mem., ¶ 39 (citing Request for Arbitration, ¶ 53). *See also*, Tr., Day 1, 222:5-10; 223:7-11 (Ms. Gehring Flores).

[158] Tr., Day 1, 223:7-11 (Ms. Gehring Flores).

[159] Resp. Rej., ¶ 242. *See also*, Tr., Day 1, 223:22-225:14 (Ms. Gehring Flores).

[160] Tr., Day 1, 226:15-22 (Ms. Gehring Flores). *See also*, Tr., Day 1, 228:12-20 (Ms. Gehring Flores); Tr., Day 5, 1318:1-6; 1319:8-11 (Ms. Gehring Flores).

(ii) The Claim for the Alleged Uncertainty Created by the Supreme Court Judgment

206. *First,* Panama submits that BSLS has asserted that it may suffer injury from the "*uncertainty*" that might affect hypothetical buyers seeking to acquire trademark rights for the whole Central American region; and its expert's calculations include the decrease in value of the FIRESTONE trademark in other countries.[161] But, Panama says, BSLS's claim for damages in connection with investments outside Panama "*properly falls outside of the jurisdiction of this Tribunal*."[162] This is because the Tribunal's jurisdiction is limited by the terms of the TPA to claims concerning and loss suffered in connection with the Claimants' investments in Panama.[163]

207. The Respondent appears to submit that this claim is also captured by the Tribunal's Decision on Expedited Objections, and accuses the Claimants of transparently attempting to circumvent the Tribunal's instructions there.[164] Panama observes, among others, that "*the Tribunal cautioned* [BSLS] *to* '*consider carefully whether to pursue a claim in relation to events outside Panama in circumstances where the Tribunal has ruled that it has no jurisdiction to entertain an identical claim by BSAM.*'"[165] As in the case of BSAM, the Respondent also submits with respect to BSLS that, even if this extra-territorial damages claim were a new one (not covered by the Tribunal's prior decision), it should be dismissed as speculative and remote.[166]

208. *Second*, as to the claim for damages inside Panama, Respondent submits that BSLS has not even argued that it has "*incurr**ed** loss or damage*" as required by the TPA, and its alleged injury is entirely hypothetical.[167] For the Respondent, BSLS's claim for "*hypothetical*

[161] Resp. C-Mem., ¶ 34 (citing Cl. Mem., ¶ 151).

[162] Resp. C-Mem., ¶ 34. *See also*, Resp. C-Mem., ¶ 44 (table) (asserting: "*BSLS has requested between $1,003,769 and $1,710,588 for alleged injury to investments outside of Panama, which falls outside of the jurisdiction of* […] *this Tribunal.*"); Resp. C-Mem., ¶ 175; Resp. Rej., ¶ 269.

[163] Resp. C-Mem., ¶ 34. *See also*, Tr., Day 1, 243:5-244:6 (Ms. Gehring Flores).

[164] Resp. C-Mem., ¶ 177.

[165] Resp. C-Mem., ¶ 176 (citing Decision on Expedited Objections, ¶ 355).

[166] Resp. C-Mem., ¶ 178 (citing Decision on Expedited Objection, ¶¶ 353-354).

[167] Resp. C-Mem., ¶ 35 (emphasis by the Respondent).

injury in Panama, […] *falls outside of the jurisdiction of this Tribunal*."[168] According to Panama, the TPA specifically requires that the damage "*has already been incurred*," it requires "*existing, rather than future loss*;" and, therefore, "*speculative injury does not fall within the jurisdictional requirements set forth in the TPA*."[169]

209. According to Panama, BSLS's claim relies on the alleged uncertainty to a "*potential*" purchaser of the FIRESTONE trademark in Panama.[170] But, Panama says, in order to demonstrate that the alleged uncertainty has affected the value of its investments, BSLS would need to demonstrate a decrease in the royalties it receives for the use of the FIRESTONE trademark, yet the royalties have remained the same in the relevant period, and there has been no decrease in sale of FIRESTONE branded-tires either.[171] Moreover, Respondent argues, BSLS's own financial records confirm the absence of any injury, as BSLS Financial Statements show no impairment to the trademarks or the good will.[172]

210. *Third,* that BSLS's claims related both to its investments inside and outside of Panama encompass alleged injury for trademark rights not owned by BSLS (*e.g.* the BRIDGESTONE trademark), which is also impermissible under Article 10.16.1 of the TPA.[173]

b. The Claimants' Position

211. The Claimants also oppose the Respondent's allegation that BSLS has not established that it incurred in the loss it claims.

212. The Claimants explain that BSLS claims for two categories of loss: (i) the amount of damages ordered by the Panama Supreme Court; and (ii) damage to the value of the FIRESTONE trademark.[174]

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[168] Resp. C-Mem., ¶ 44 (table).
[169] Tr., Day 5, 1326:11-20 (Ms. Gehring Flores).
[170] Resp. C-Mem., ¶ 35.
[171] Resp. C-Mem., ¶ 35. *See also*, Resp. Rej., ¶¶ 259, 261, 263; Tr., Day 1, 248:8-250:1 (Ms. Gehring Flores).
[172] Tr., Day 1, 251:15-16, 252:5-8 (Ms. Gehring Flores).
[173] Resp. C-Mem., ¶ 36.
[174] Cl. Reply, ¶ 30.

(i) The Claim for the Damages Award Ordered by the Supreme Court

213. With regard to this first category, the Claimants submit that the payment to Muresa under the Supreme Court Judgment was made by BSLS, and it is openly admitted that BSLS obtained a loan from BSAM for that purpose. That inter-company loan, the Claimants argue, is not suspicious, nor does it detract from the conclusion that BSLS made the payment itself because: intercompany loans are not unusual, BSAM made the loan because it is the entity responsible for the use of the BRIDGESTONE and FIRESTONE trademarks in the Americas, and BSLS pays interest to BSAM on that loan.[175] Further, the Claimants add, the loan will be repayable to BSAM regardless of the result of this arbitration.[176]

(ii) The Claim for the Damage to the Value of the FIRESTONE Trademark

214. The Claimants accept that their damages case includes not only impairment of rights in Panama, but also impairment of rights in the BSCR Region,[177] but they argue that the "*Claimants' damages claim relative to the BSCR Region is appropriate and fair*."[178]

215. The Claimants submit that BRIDGESTONE and FIRESTONE are "*well-known*" global brands entitled to heighted protection under the Paris Convention and special protections in international enforcement proceedings, and "*the acquisition or loss of well-known status in one jurisdiction can be used in actions in other jurisdictions against the trademark owner or its licensee.*"[179] It follows, the Claimants argue that, "*damage to the well-known BRIDGESTONE and FIRESTONE marks in Panama (impairment enforceability and exclusivity) has consequences, realized or as yet unrealized, outside of Panama*."[180] More particularly, the Claimants say that, "*a purchaser or investor in the BRIDGESTONE and FIRESTONE marks in Panama would likely find not only the trademark rights in Panama to be impaired by the Supreme Court Judgment, but also the trademark rights in the*

[175] Cl. Reply, ¶ 31. *See also*, Cl. Reply, ¶¶ 18, 81; Tr., Day 1, 119:21-120:10 (Mr. Williams).
[176] Cl. PHB, ¶ 83. *See also*, Tr., Day 1, 120:11-17 (Mr. Williams).
[177] Cl. Reply, ¶ 113.
[178] Cl. Reply, ¶ 114.
[179] Cl. Reply, ¶ 114.
[180] Cl. Reply, ¶ 114.

operationally-integrated BSCR Region," because that region is treated as a consolidated market for advertising, promotion, accounting and manufacturing.[181]

216. The Claimants also deny that BSLS's claim for loss in excess of US$ 5.4 million is hypothetical. They argue that BSLS's damages case is "*real*" because the Supreme Court Judgment "*has impaired the value of the FIRESTONE and BRIDGESTONE trademarks themselves and the licenses to use the trademarks, because of the cloud of uncertainty now cast over them by this judgment*," even though its immediate impact is not necessarily seen on sales.[182] They say that because the right of a trademark is a negative right, if the ability to exclude others is diminished, the value of the trademark is diminished.[183] In the end, the Claimants say, the effect of the Supreme Court Judgment 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*" and "[a] *non-exclusive trademark right is obviously worth less than an exclusive right* […]."[184]

2. The Tribunal's Analysis

a. The Damages Awarded by the Supreme Court

217. BSLS claims the sum of US$ 5,431,000 that it paid to discharge the Supreme Court Judgment holding BSJ and BSLS jointly liable for that sum. This Tribunal clearly has jurisdiction to determine whether this claim is made out. Panama contends that this claim has not been made out because the evidence shows that the payment has been funded by other members of the Bridgestone Group. This is not a submission that BSLS has made a claim that is not within the jurisdiction of the Tribunal. Rather it is a claim that BSLS has

[181] Cl. Reply, ¶ 114.

[182] Cl. Reply, ¶ 33. *See also*, Cl. Reply, ¶¶ 21-23, 98.

[183] Cl. Mem., ¶ 233. *See also*, Cl. Mem., ¶ 234 (arguing that "*the cloud of uncertainty with respect to trademark scope and enforceability created by the Court's decision can be expected to impact the economics of any transactions involving the BRIDGESTONE and FIRESTONE trademarks in Panama*" with respect to "*potential sublicensees, distributors and other business partners and potential acquirers of the trademark rights in Panama*" who "*would likely be aware of the Supreme Court Judgment.*")

[184] Cl. PHB, ¶ 97.

not made out that claim on the evidence. This is not a valid challenge to the jurisdiction of the Tribunal to consider the merits of the claim. It fails for that reason.

b. The Wider Claim for Damage to BSLS's Investment

(i) Claim for Loss Sustained Outside Panama

218. The losses that BSLS seeks to allege that it has sustained outside Panama are the same as those that the Tribunal has ruled to be outside its jurisdiction in the case of BSAM. The Tribunal upholds Panama's jurisdictional challenge to this part of BSLS's claim. It falls outside the jurisdiction of the Tribunal for the same reasons that apply in the case of BSAM.[185]

(ii) Claim for Loss Sustained Within Panama

219. Panama's jurisdictional challenge to this part of BSLS's claim fails for the same reasons that the Tribunal has given in respect of BSAM's parallel claim.[186]

VI. LIABILITY

220. We now reach the heart of the dispute between the Parties. Did BSJ and BSLS suffer a denial of justice at the hands of the Supreme Court of Panama, applying the standard of a denial of justice under customary international law?

A. Applicable Law

221. Whether there has been a denial of justice falls to be determined by applying the principles and standards of customary international law.[187] The Claimants found their allegation of denial of justice on the single decision of the Supreme Court in favour of Muresa and TGFL. Only in rare circumstances will a single judgment satisfy the test of denial of justice

[185] *Supra*, ¶¶ 198-200.
[186] *Supra*, ¶ 201.
[187] **R-0001**, TPA, Art. 10.22 and Art. 10.5; *supra*, ¶¶ 177-178.

under international law. The Parties are agreed as to what those circumstances are, and the United States concur.

222. We turn to the Expert Report of Professor Paulsson, an acknowledged expert in the field who has been cited by the Claimants in their pleadings and whose evidence on the test of denial of justice they have not sought to test by cross-examination nor, indeed, to challenge by way of submission.[188] From this Report the following propositions can be derived:

(i) An erroneous decision by a national court does not constitute a denial of justice under international law. A denial of justice under international law will only occur where there is a systemic failure in the administration of justice by a State.[189]

(ii) International law does not vest international adjudicators with authority to act as courts of appeal from national courts.[190]

(iii) A *bona fide* error by a court, even if it results in serious injustice in the individual case, does not amount to a denial of justice under international law.[191]

(iv) An erroneous decision of a national court can demonstrate that there has been a denial of justice under international law if, but only if, it demonstrates that the court was guilty of bias, fraud, dishonesty, lack of impartiality or gross incompetence.[192]

(v) An exacting standard must be applied to the question of whether a particular judicial decision demonstrates a systemic failure that amounts to a denial of justice under international law. That standard normally requires that the decision demonstrates "*a wilful disregard of due process at law* […] *which shocks, or at least surprises, a sense of judicial propriety*."[193]

223. These propositions are well supported by authority cited by Professor Paulsson, and we endorse them. Indeed, they have not been challenged by the Claimants. They also accord with the submissions of the United States.[194] Both the Claimants[195] and the Respondent[196]

[188] Professor Paulsson is the author of "*Denial of Justice in International Law*," Cambridge University Press (2005).
[189] RER-Paulsson, ¶ 15.
[190] RER-Paulsson, ¶ 20.
[191] RER-Paulsson, ¶ 22.
[192] RER-Paulsson, ¶ 22.
[193] RER-Paulsson, ¶ 25.
[194] U.S. Third Sub., ¶ 4.
[195] Cl. Reply, ¶ 4.
[196] Resp. C-Mem., ¶ 51.

cite the following proposition set out by Professor Paulsson in his work on Denial of Justice:[197]

> "[T]he proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it."

224. The Claimants submit that this properly describes the decision of the Panama Supreme Court. They submit that the result achieved by the Supreme Court was simply incomprehensible. But, at the same time, the Claimants rely on a number of what are alleged to be departures from due process which, if not individually, together are alleged to add up to a denial of justice under principles of international law.

225. To address this case the Tribunal proposes first to set out the relevant events, which consist largely of legal proceedings, with special concentration on those aspects of the proceedings that the Claimants rely upon as constituting, or adding up to, a denial of justice.

B. The Facts

1. The U.S. Trademark Proceedings

226. The Luque Group began marketing tyres bearing the RIVERSTONE mark in 1999.[198] Muresa was the exclusive owner of that trademark.[199]

227. On 27 December 2001, Muresa entered into a representation and distribution agreement with L.V. International, Inc. ("**L.V. International**") "*for the registry and commercialization*" of products bearing the RIVERSTONE mark in countries that included the United States.[200]

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[197] **RLA-0113**, Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005), p. 98.

[198] **C-0176**, Reply to Complaint (20 June 2005), p. 9.

[199] **C-0016**, Civil Complaint by Muresa Intertrade S.A. and Tire Group of Factories Ltd. Inc. v. Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 September 2007), p. 7.

[200] **C-0016**, Civil Complaint by Muresa Intertrade S.A. and Tire Group of Factories Ltd. Inc. v. Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 September 2007), p. 7.

228. On 13 August 2002, L.V. International filed an application with the U.S. Patent and Trademark Office to register the RIVERSTONE trademark in the United States.[201]

229. On 3 December 2003, BFS Brands, LLC and Bridgestone/Firestone North American Tire, LLC, being members of the Bridgestone Group, filed a Notice of Opposition to this application on the ground that the RIVERSTONE mark was confusingly similar to the FIRESTONE mark.[202] L.V. International originally filed pleadings challenging the Notice of Opposition,[203] but on 13 August 2004, L.V. International gave notice of withdrawal of its application to register the RIVERSTONE trademark,[204] which was filed on 20 August 2004.[205]

230. Because the withdrawal was filed unilaterally, rather than by consent, judgment was entered against L.V. International on 13 October 2004.[206]

231. No reason was given for the withdrawal and none has been put in evidence in this arbitration.

232. On 3 November 2004, Mr. Mack of the Washington office of Foley & Lardner LLP, an international law firm, wrote to Mr. Sanchelima of Sanchelima & Associates, P.A., who had acted for L.V. International in the U.S. proceedings, a letter ("the **Foley Letter**") in the following terms:

> "As you are well aware, the Trademark Trial and Appeal Board has rendered judgment against your client, sustained our opposition and refused registration in connection with your client's application to register RIVERSTONE as a trademark for tires.
>
> Please take notice that Bridgestone/Firestone objects not only to any *registration* of the RIVERSTONE mark for tires by your client, but also to any *use* of the mark. Although it is not aware of any current

[201] **C-0009**, Riverstone U.S. Trademark Application, U.S. Patent and Trademark Office (13 August 2002).

[202] **C-0010**, Notice of Riverstone Trademark Opposition, U.S. Patent and Trademark Office (3 December 2003).

[203] **C-0170**, Answer to Notice of Opposition (26 January 2004); **C-0171**, Motion to Dismiss for Lack of Standing (26 January 2004).

[204] **C-0011**, Notice of Voluntary Withdrawal of Application with Prejudice of RIVERSTONE and Design, U.S. Patent and Trademark Office (20 August 2004).

[205] **C-0012**, Order re Riverstone Abandonment Application, U.S. Patent and Trademark Office (13 October 2004).

[206] **C-0012**, Order re Riverstone Abandonment Application, U.S. Patent and Trademark Office (13 October 2004).

> use of the RIVERSTONE mark in the United States, Bridgestone/Firestone hereby makes formal demand upon your client to refrain from any use of the RIVERSTONE trademark in the United States now or at any time in the future.
>
> As for use of the RIVERSTONE mark in other countries, please also take notice that Bridgestone/Firestone's position – that L.V. International, Inc. should refrain from use of the RIVERSTONE mark for tires – is not limited to the United States. Without undertaking a country-by-country analysis at this time and without making any specific demand at this time directed to use of the RIVERSTONE mark in any particular foreign country, you and your client should know that Bridgestone/Firestone objects to and does not condone the use or registration anywhere in the world of the mark RIVERSTONE for tires. Hence, L.V. International, Inc. is acting at its own peril if it chooses to use the mark RIVERSTONE in other countries."[207]

2. The Panamanian Trademark Opposition Proceeding

233. On 6 May 2002, Muresa filed an application to the Panamanian intellectual property office for registration of the RIVERSTONE trademark for tires.[208] This was then reviewed and it was not until 4 February 2005 that the application, together with a number of others of similar vintage, was published in the Official Gazette.[209] Meanwhile, L.V. International had applied for registration of the RIVERSTONE trademark in Bolivia, Costa Rica, the Dominican Republic, Nicaragua and Peru.[210]

234. On 5 April 2005, BSJ and BSLS took the appropriate steps to oppose the Panamanian application. These consisted of bringing suit against Muresa in the Eighth Circuit of the First Judicial District of Panama, which has jurisdiction in trademark disputes.[211] This opposition petition requested the denial of the application for registration of the RIVERSTONE trademark. BSJ and BSLS claimed as owners, respectively, of the

[207] **C-0013**, Letter from Foley & Lardner LLP (3 November 2004) ("the **Foley Letter**") (emphasis in original).

[208] **C-0146**, Application for Registration and Affidavit for Muresa Intertrade S.A (6 May 2002).

[209] **C-0256**, Official Panamanian Gazette No. 162, MICI (4 February 2005).

[210] Resp. Rej., Annex A, pp. 2700-1, 5421-28.

[211] **C-0150**, Complaint in Opposition to the Registration of the Trademark RIVERSTONE and Design (5 April 2005).

BRIDGESTONE and FIRESTONE trademarks registered in Panama. The pleading recited that:

> "The plaintiff companies are members of a single corporate group and represent a single group of economic interests, which group has made itself known for a great many years through the use of the identifiers BRIDGESTONE and FIRESTONE to identify a broad range of products in their countries of origin, in Panama, and in international trade."[212]

235. The ground of the application was that the similarity of the trademark RIVERSTONE to those of BRIDGESTONE and FIRESTONE was so close as to give rise to a grave risk of confusion between them.

236. On 20 June 2005, Muresa filed an Answer to BSJ's and BSLS's opposition petition, describing this as "*the reckless lawsuit.*"[213] This challenged, at some length, the allegation that the RIVERSTONE trademark could be confused with the BRIDGESTONE or FIRESTONE trademarks. It alleged that the RIVERSTONE products were broadly accepted in the local market whereas this was not true of the BRIDGESTONE and FIRESTONE products.[214]

237. On 25 August 2005, L.V. International applied for leave to intervene as a "*coadyuvante*" to support Muresa,[215] on the ground, *inter alia*, that it had a substantial relationship with Muresa,[216] particulars of which were then provided.

238. On 26 August 2005, TGFL made a similar application.[217] These applications were successful, despite an appeal by the Bridgestone parties. At the evidentiary phase of the

[212] **C-0150**, Complaint in Opposition to the Registration of the Trademark RIVERSTONE and Design (5 April 2005), p. 3.
[213] **C-0176**, Reply to Complaint (20 June 2005).
[214] **C-0176**, Reply to Complaint (20 June 2005), p. 11.
[215] **C-0015 / C-0177**, L.V. International Application for Supportive Joint or Third-Party Intervention (25 August 2005).
[216] **C-0015 / C-0177**, L.V. International Application for Supportive Joint or Third-Party Intervention (25 August 2005), p. 2.
[217] **C-0015 / C-0178**, TGFL Application for Supportive Joint or Third-Party Intervention (26 August 2005).

subsequent hearing the Bridgestone parties put in evidence particulars of the U.S. proceedings,[218] submitting that these showed:

> "[T]hat the prior-use rights held by Plaintiffs are not unknown to L.V. INTERNATIONAL, INC. and, based on what L.V. INTERNATIONAL, INC. alleged, they should also be known by Defendant MURESA INTERTRADE, S.A. by virtue of their presumed relationship. This leads to the conclusion that the companies in question are fully aware of Plaintiffs' superior rights over the BRIDGESTONE and FIRESTONE brands, and of the harm caused to Plaintiffs by using and registering a brand similar to theirs."[219]

239. On 21 July 2006, the Eighth Circuit Court gave judgment rejecting BSJ's and BSLS's opposition to the registration of the RIVERSTONE trademark.[220] The Court accepted that there were similarities between the respective trademarks, but concluded that these did not give rise to the risk of confusion. This conclusion was supported by the fact that the respective brands had co-existed in Panama for some while with no evidence that their co-existence had caused error, confusion, mistake, misleading or deception in the public or any detriment to the Bridgestone companies:

> "The manner in which opposing trademarks' presence in the market has materialized (both the opposing and the disputed trademarks, all company trademarks) is one of the determinant factors to eliminate any likelihood of confusion between signs."[221]

240. Accordingly, the Court acceded to Muresa's application to register the RIVERSTONE trademark. The Court released BSJ and BSLS from the obligation to pay attorney's fees:

> "[G]iven that this administration of justice offices deems that it has acted with evident good faith, maintained and held its position in the process, submitted suitable evidence material to prove its standing in cause, all without abusing the right to litigate."[222]

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[218] **R-0123**, Panamanian Opposition Proceeding Evidentiary Hearing (21 February 2006).

[219] **R-0124**, Panamanian Opposition Proceeding Evidentiary Hearing (11 May 2006).

[220] **C-0014 / R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006).

[221] **C-0014 / R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 23 (as translated in R-0040).

[222] **C-0014 / R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 23 (as translated in C-0014).

241. On 3 August 2006, BSJ and BSLS filed a formal notice of appeal against the judgment of the Eighth Circuit Court.[223] On 5 September 2006, they formally withdrew their appeal,[224] thereby incurring a modest liability in costs.

3. The Civil Proceedings

a. The Proceedings at First Instance Before the Eleventh Civil Circuit Court of the First Judicial Circuit of Panama ("the First Instance Court")

(i) The Pleadings

242. On 12 September 2007, Muresa and TGFL[225] filed in the Eleventh Circuit a civil torts claim under, *inter alia*, Article 1644 of the Civil Code,[226] for US$ 5 million and costs against BSJ and BSLS, due to their opposition to the registration of the RIVERSTONE trademark.[227] It was alleged that as a result of this damages and losses were caused to Muresa and TGFL:

> "[G]iven that the product of the brand RIVERSTONE […] stopped being commercialized (sold) as a consequence of the suit filed."[228]

243. On 13 October 2008, BSLS filed its Answer to the claim.[229] This denied any wrongdoing and challenged the damages sought. It contended that if BSLS was to be liable for damages in consequence of a legal proceeding it was, by virtue of Article 217 of the Judicial Code,[230]

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[223] **C-0151**, Notice of Appeal in Opposition to the Registration of the Trademark RIVERSTONE and Design (3 August 2006).

[224] **C-0152**, Withdrawal of Appeal in Opposition to the Registration of the Trademark RIVERSTONE and Design (5 September 2006).

[225] When discussing these proceedings, the Tribunal will, at times, refer to "Muresa" as collectively describing the two claimants in the Civil Proceeding.

[226] **C-0205**, Civil Code of the Republic of Panama (9 May 1904), Art. 1644 ("*Any who causes damage to another by action or omission through fault or negligence is obliged to compensate the damage caused* […].")

[227] **C-0016**, Civil Complaint by Muresa Intertrade S.A. and Tire Group of Factories Ltd. Inc. v. Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 September 2007).

[228] **C-0016**, Civil Complaint by Muresa Intertrade S.A. and Tire Group of Factories Ltd. Inc. v. Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 September 2007), p. 7.

[229] **R-0045**, Answer of BSLS to the Civil Torts Claim (13 October 2008).

[230] **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 217 ("*The parties shall be liable for damages caused to another party or to a third party by their reckless or bad faith procedural conduct*.")

necessary to demonstrate that BSLS had acted recklessly or in bad faith. It had done neither, nor had it acted negligently. The Answer commented:

> "It is worth noting that in a process opposing the registration of the RIVERSTONE Y DISENO brand filed by BFS BRANDS LLC and BRIDGESTONE/FIRESTONE NORTH AMERICA TIRE LLC against L.V. INTERNACIONAL, INC., in the United States of America, the latter accepted the former's claims." [231]

244. On 19 August 2009, BSJ filed its Answer to the claim.[232] This took the same points that had been pleaded by BSLS. It denied wrongdoing or causing damage. It alleged that, by virtue of Article 217 of the Judicial Code, liability could only be established if there had been "*reckless or frivolous procedural conduct and the existence of damage derived from the said conduct*," and BSJ had been guilty of neither. Indeed, BSJ and BSLS had acted "*in clear good faith*," as the Eighth Circuit Court had expressly found in absolving the companies from liability in costs.[233]

245. On the same day, BSJ and BSLS brought before the Eleventh Circuit Court a Petition for Nullification on the ground of want of competence.[234] This argued that the facts alleged gave rise to a claim under Article 217 of the Judicial Code and not to a tort claim under Article 1644 of the Civil Code. It further alleged that the proceedings concerned a trademark and therefore fell within the exclusive competence of the Eighth Circuit Court and should have been brought in the course of the Trademark Opposition Proceeding.

246. On 14 September 2009, Muresa and TGFL replied, arguing that no issues of intellectual property were involved and the claim was properly brought as a civil claim for non-contractual damages pursuant to Article 1228 of the Civil Code.[235] They alleged that the

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[231] **R-0045**, Answer of BSLS to the Civil Torts Claim (13 October 2008), p. 2.

[232] **C-0019**, BSJ Reply to the Complaint, Eleventh Circuit Civil Court (19 August 2009).

[233] **C-0019**, BSJ Reply to the Complaint, Eleventh Circuit Civil Court (19 August 2009), pp. 4, 6.

[234] **C-0186 / R-0062**, Motion for Dismissal for Lack of Jurisdiction and Violation of Due Process, Eleventh Circuit Civil Court (18 August 2009).

[235] **C-0187**, Response to Motion to Dismiss (14 September 2009), p. 4 (referring to Civil Code of the Republic of Panama (9 May 1904), Art. 1228: "*All adversarial issues which are not subject to special procedures in this code shall be tried and decided in an ordinary proceeding. Notwithstanding the fact that the Code permits special procedures, the plaintiff may choose the ordinary route*.")

Trademark Opposition Proceeding had caused them damage because companies with which they had marketing and distribution contracts refused to market tires bearing the RIVERSTONE mark through fear of legal action.

247. The Eleventh Circuit Court did not rule on this issue until the 25 November 2010, and its ruling was notified on 6 December 2010.[236] It then held that the claim was properly brought in the Eleventh Circuit.

248. Meanwhile the substantive action was proceeding. There were procedural steps prior to the taking of evidence ("the Notice of Evidence Phase"), described in paragraphs 88 to 93 of Panama's Counter-Memorial. These involved giving notice of the evidence that each party intended to adduce, and objections to the admissibility of some of this. The Foley Letter was not included by Muresa and TGFL in their notices of evidence.

(ii) The Evidence of Fact

249. Evidence was taken over a period of weeks, starting on 21 April 2010. Witnesses of fact were heard between 21 April and 14 May 2010. The transcripts of the evidence given on behalf of Muresa and TGFL is summarised at some length in the Claimants' Memorial,[237] and this summary has not been challenged by Panama. Panama produced its own short summary of some of this evidence in its Rejoinder,[238] which equally has not been challenged by the Claimants:

> "[…] [C]ommercial customers who previously had purchased RIVERSTONE tires refused to place new orders, concerned that they might get caught in the crossfire. To mitigate, Muresa, Tire Group, and L.V. International sold lower-quality replacement tires, which (1) 'were not well received, because [their] customers were already familiar with the quality of RIVERSTONE,' and (2) could only be sold 'at cost or at 50% of cost.'"

[236] **C-0201 / R-0065**, Decision No. 1859, Denial of the Motion to Dismiss for Lack of Jurisdiction (25 November 2010).

[237] Cl. Mem., ¶ 58.

[238] Resp. Rej., ¶ 48.

250. The major source of this evidence was Mr. Fernan Jesus Luque Gonzalez and, on analysis, the most significant part of the evidence given by Muresa's witnesses consisted of hearsay evidence emanating from this witness. Accordingly, the Tribunal proposes to set out a short summary of the evidence that he gave.[239]

251. Mr. Luque Gonzalez was Manager of Muresa and President of TGFL. The latter is dedicated exclusively to the promotion, exhibition, distribution, production and exportation of RIVERSTONE tires. These tires are all produced at factories in China. BRIDGESTONE and FIRESTONE had challenged RIVERSTONE in the United States, Argentina, Chile, the Dominican Republic, Colombia, Venezuela, South Africa, South Korea and China.

252. Muresa and TGFL's clients did not want RIVERSTONE products to be shipped because they feared a seizure or reprisals against them, because they were aware that RIVERSTONE was being challenged in Panama by BRIDGESTONE.

> "Fears of a seizure were based on the information we were given by customs agents and by some related persons that in the case of a brand registration challenge we could face seizures, and consequently, we decided to halt production, we sent a letter to our agent in China instructing him to communicate this to the factory and that we had also been notified in the Dominican Republic of the seizure of the inventory that our distributors had in that country."[240]

253. Mr. Luque Gonzalez said that inferior alternatives were sold in place of RIVERSTONE products at 50% of cost, but these were not well received. From 2001, when RIVERSTONE was launched, sales were projected to grow at an annual rate of 30%. After the dispute in 2007 RIVERSTONE was re-activated but without the expected success because of the long interruption in supplying the brand. Furthermore, the factories in China initially refused to deal with them.

> "Once [*sic*] of the main reasons for which we stopped selling the brand is that all of the factories in China and all of our customers

[239] **C-0160**, Testimony of Fernan Jesus Luque Gonzalez (27 April 2010); and **C-0161**, Continuation of the Testimony of Fernan Jesus Luque Gonzalez (27 April 2010).

[240] **C-0161**, Continuation of the Testimony of Fernan Jesus Luque Gonzalez (27 April 2010), p. 3.

> were aware of the dispute and therefore the latter refused to buy and the former to produce."[241]

254. Mr. Luque Gonzalez was asked by counsel for the defendants a question put to most of Muresa's witnesses of fact.[242] Did Muresa at any time receive from BJS or BSLS any letter or communication requesting Muresa or TGFL to suspend or cease selling products carrying the RIVERSTONE brand and design in Panama? His answer was that they had received information from some customs agents and other connected businessmen that products bearing the RIVERSTONE brand were going to be seized.

255. Faced with a leading question by the plaintiffs' representative, Mr. Jorge Albert Luque Gonzalez, the Manager of L.V. International, was more forthcoming:[243]

> "[…] I informed Ms. LUCINDA DE LUQUE in addition to MR. EGGIS LUQUE and MR. FERNAN LUQUE of the objection that existed to the brand in the United States and of the danger that if they continued to import the tire [*sic*] they could be seized, this according to the letter that was sent to us by our attorney JESUS SANCHEZLIMA. In relation to the letter that he received from the attorneys for BRIDGESTONE Mr. PETER MACK of the FOLEY legal firm, where he stated that we could not register and sell the RIVERSTONE brand in any part of the world and that they could seize any tire not only in the United States but in any part of the world where the RIVERSTONE brand was sold or marketed."

(iii) The Expert Witnesses

256. The parties had retained accounting experts – Mr. Aguilar and Ms. de Leon for Muresa and TGFL and Mr. Ochoa for the Bridgestone companies. Ms. de Gutierrez had been appointed as accounting expert to the court. They filed their Reports on 24 May 2010.

257. Affidavits were put in evidence from Muresa's accountant, Ms. Moreira.[244] In these she stated that sales had fallen by more than 5 million balboas[245] in the period 2005 to 2008

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[241] **C-0161**, Continuation of the Testimony of Fernan Jesus Luque Gonzalez (27 April 2010), p. 8.

[242] **C-0161**, Continuation of the Testimony of Fernan Jesus Luque Gonzalez (27 April 2010), p. 7.

[243] **C-0147**, Continuation of the Testimonial Hearing of Jorge Alberto Luque Gonzalez (14 May 2010), p. 2.

[244] **C-0189**, Submission of List of Evidence by Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc. (28 September 2009).

[245] 1 balboa = 1 US$.

"*as a result of the presentation of the demand of registry opposition of the brand RIVERSTONE and design, by societies BRIGSTONE* [sic] *CORPORATION AND BRIGSTONE* [sic] *LICENSING Services Inc.*"[246]

258. This evidence was supported by the plaintiffs' expert witnesses when they came to give oral evidence.[247] They stated that for the years 2006-2008 there had been a reduction in Muresa's sales of RIVERSTONE tires of B/. 3,351,731.15. In the case of TGFL the reduction was B/. 2,424,062.69. The former figure had regard to the failure to achieve a projected increase of sales; the latter was simply based on prior sales.

259. The experts stated that they had asked Muresa why these reductions had occurred. The company referred to the Foley Letter as an explanation for this. The experts expressed the view that this, coupled with the Trademark Opposition Proceeding, was responsible for the shortfall in RIVERSTONE sales, albeit that Muresa continued to sell RIVERSTONE tires that it had in its warehouses. The experts had annexed the Foley Letter to their Report, with the following explanation:

> "Also, prior to the complaint, on November 3, 2004, Foley & Lardner LLP Attorneys sent a letter that is attached with the documents submitted with the expert's report, which specifies that the position of Bridgestone/Firestone was to formally request that L.V. International Inc. abstain from using the brand RIVERSTONE, not just in the United States but also in all parts of the world."[248]

260. The Court expert also annexed the Foley Letter to her Report, remarking that it was the only thing that Ms. Moreira and Mr. Medina had been able to produce when asked to produce documentation supporting their evidence that Muresa had been afraid of having problems if they continued to market tires bearing the RIVERSTONE mark. The judge subsequently upheld an objection to a question on the ground that this letter had not been admitted in evidence.[249]

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[246] **C-0189**, Submission of List of Evidence by Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc. (28 September 2009), p. 2.

[247] **C-0198**, Interrogatory of Experts Jose Antonio Aguilar and Psiquies de Leon (26 May 2010).

[248] **C-0162**, Accounting Expert Report of José Antonio Aguilar de Sedas and Psiquies De León (24 May 2010), p. 2.

[249] **C-0196**, Interrogatory of Expert Vera Lindo de Gutierrez (25 May 2010), pp. 22-23.

261. While Muresa's experts supported Muresa's case on the reduction to sales of RIVERSTONE tires caused by the opposition to the registration of the RIVERSTONE mark in Panama, invoking the Foley Letter in support, the Bridgestone companies' expert and the Court expert did not do so.

262. Mr. Ochoa's Report[250] stated, *inter alia*:

(i) It was not possible to obtain information supporting the veracity of Muresa's sales projections.

(ii) It was not possible to submit a professional opinion as to why the sales projections were not met, because it was not possible to obtain supporting documentation.

(iii) No documents were seen evidencing concern on the part of customers about purchasing RIVERSTONE tires.

263. Ms. de Gutierrez's Report[251] stated, *inter alia*:

(i) She did not see documents supporting Muresa's sales projections.

(ii) She did not see any documents that explained any limitation on achieving Muresa's sales objectives.

(iii) She saw no documentation evidencing concern on behalf of buyers in respect of the purchase of RIVERSTONE tires.

(iv) In relation to the allegation that damages were caused to Muresa because of an inability to sell RIVERSTONE tires:

> "We do not have documents that indicate that they have had to suspend sales and the projections were not based on any study, also the question asks what were the damages, by not being able to sell their products, and the company did not stop selling the RIVERSTONE tires, therefore we cannot say if there were damages caused to […] Muresa […] if they existed and neither can we say what the possible causes were of those damages given that there is no information in the file that would allow us to attribute the existence of such damages."[252]

[250] **C-0020**, Accounting Expert Report of Manuel Ochoa (24 May 2010).

[251] **C-0163**, Accounting Expert Report of Vera Luisa Lindo de Gutiérrez (Court Expert) (24 May 2010).

[252] **C-0163**, Accounting Expert Report of Vera Luisa Lindo de Gutiérrez (Court Expert) (24 May 2010), p. 5.

(iv) L.V. International's Intervention

264. Meanwhile, on 11 May 2010, L.V. International submitted a Petition to intervene[253] as a third party *coadyuvante*. This placed before the court the Foley Letter, and alleged that this was obviously a threat against the whole group of related companies, including Muresa and TGFL.

265. Mr. Jorge Alberto Luque Gonzalez, the President of L.V. International, gave evidence on 14 May 2010.[254] He was asked by counsel for the plaintiffs whether he informed Ms. Lucinda de Luque, legal representative of Muresa, of the objection that had been made to the RIVERSTONE brand in the United States. Counsel for the defendants unsuccessfully objected to this question. In reply Mr. Luque Gonzalez stated that he had shown the Foley Letter not only to Mr. Lucinda de Luque, but to Mr. Eggis Luque and Mr. Fernan Luque.

266. L.V. International's Petition was defective, and a corrected version was submitted on 3 June 2010.[255] This appears to have been overlooked so that the Court did not rule on this until 5 May 2011, when the Court's substantive decision was under appeal. The Court rejected the Petition on the ground that it had been filed too late in the proceedings, but this decision was reversed by the Appeal Court.[256]

(v) The Closing Submissions

267. The Foley Letter featured in the parties' written closing submissions to the First Instance Court. Muresa alleged that this was the culmination of a series of threats expressing opposition to the registration, use and sale of RIVERSTONE tires anywhere in the

[253] **R-0126**, Corrected L.V. International Inc. Third-Party *Coadyuvant*e Petition (3 June 2010). The original petition had been filed on 11 May 2010. *See*, **C-0018**, L.V. International Inc. Power of Attorney, Eleventh Circuit Civil Court (11 May 2010).

[254] **C-0148**, Testimonial Hearing of Jorge Alberto Luque Gonzalez (14 May 2010); **C-0147**, Continuation of the Testimonial Hearing of Jorge Alberto Luque Gonzalez (14 May 2010).

[255] **R-0126**, Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010).

[256] **R-0101**, Decision on L.V. International Inc.'s Third-Party Coadyuvante Petition, First Superior Court (19 June 2012).

world,[257] which confirmed the "*malicious acts of intimidation and threats*" against the Muresa Group.

268. Some six pages of the submissions of BSJ and BSLS were devoted to the Foley Letter.[258] Most of these were directed to attacking the admissibility of the letter. It was conceded that Article 973 of the Judicial Code permitted experts to receive documents and information that were relevant to their duties, but it was alleged that the Foley Letter did not fall into that category. The experts' duties were to quantify the damage suffered by Muresa and TGFL as a matter of accountancy. The Foley Letter had no bearing on those duties. Its introduction violated Articles 871, 877 and 878 of the Judicial Code. The letter had not been filed at the proper stage of the evidentiary process. It was irrelevant.

269. The last point raised a question of substance as well as form. It was submitted that the letter was not capable of constituting intimidation and furthermore that it was never even seen by Muresa's personnel. It had been no part of the case advanced by Muresa's witnesses that they had been influenced by the letter. It was their evidence that they had been influenced by the fear of seizure of RIVERSTONE tires as a result of the BSJ's and BSLS's opposition to the registration of the mark.

270. More broadly, BSJ and BSLS invoked Article 217 of the Judicial Code, contending that this and not Article 1644 of the Civil Code was the basis of the plaintiffs' claim to damages. BSJ and BSLS had not been reckless. The Eighth Court had held that they had "*acted with clear good faith*" and this constituted *res judicata*. Nor had the plaintiffs established their claim to damages. It had been their case that, as a consequence of BSJ's and BSLS's Trademark Opposition Proceeding, they had ceased selling RIVERSTONE tires, but the evidence had not supported this case. Insofar as they had stopped selling RIVERSTONE tires this was in no way attributable to the Trademark Opposition Proceeding.

[257] **C-0164**, Concluding Arguments Filed by Muresa Intertrade S.A in Civil Action (4 June 2010), pp. 3-4.
[258] **C-200**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Closing Arguments Before the Eleventh Civil Circuit Court (11 June 2010), pp. 12-15, 19-21.

(vi) The Judgment

271. On 25 November 2010, the First Instance Court rejected BSJ's and BSLS's Petition for Nullification.[259] It held that the plaintiffs' claim was for extra-contractual liability pursuant to Article 1644 of the Civil Code and did not fall within the exclusive competence of the Eighth Circuit Court.[260]

272. On 17 December 2010, the First Instance Court delivered judgment.[261] The Court rejected the defendants' plea of *res judicata* on the ground that the necessary identity of parties, property and claim had not been made out. The Court then accepted a submission made by the defendants that TGFL, which had merely appeared as intervener in the Trademark Opposition Proceeding, had no legal standing in the instant suit.

273. The First Instance Court then turned to the merits of Muresa's claim in a passage that occupied approximately four pages of the judgment. The Court observed that the US$ 5 million in damages alleged resulted from the plaintiffs having to stop selling the RIVERSTONE brand and to sell instead inferior tires, which caused customer complaints and liability under products warranties. Turning to the evidence the Court found, *inter alia*:

(i) The inferior tires had been sold by the plaintiffs before the Trademark Opposition Proceeding, and continued to be sold thereafter.

(ii) RIVERSTONE tires continued to be sold by Muresa after the commencement of the Trademark Opposition Proceeding.

(iii) The plaintiff's evidence was that it was fear of seizure that caused the cease of production and sales of RIVERSTONE tires, not any judicial order in the Trademark Opposition Proceeding; nor could such an order have been made in those proceedings.

(iv) The accountancy evidence, as analysed by the experts, did not reflect the losses alleged by the plaintiff. Insofar as the claim was based on projected sales for 2005

[259] *See supra*, ¶ 247.

[260] **C-0201 / R-0065**, Decision No. 1859, Denial of the Motion to Dismiss for Lack of Jurisdiction (25 November 2010).

[261] **C-0021 / R-0036**, Judgment No. 70, Eleventh Civil Circuit Court, First Judicial Circuit (17 December 2010) ("the **Eleventh Civil Circuit Court Judgment**").

and 2006 there was no accounting basis for these projections, which were in conflict with historic sales accounts.

274. Thus, the emphasis of the judgment was on Muresa's failure to prove loss. No mention was made of the Foley Letter, and no ruling on the objection to its admissibility. The judgment ended with a citation of "*Legal Grounds*." These included Article 1644 of the Civil Code but not Article 217 of the Judicial Code.

275. Muresa's claim was accordingly dismissed with costs.

b. The Appeal to the First Superior Court of the First Judicial District of Panama ("the Appeal Court") and the *Coadyuvante* Petition

(i) The Pleadings

276. On 5 January 2011, Muresa and TGFL filed an Appeal against the decision of the First Instance Court.[262] They contended that the First Instance Court had been wrong to rule that TGFL lacked legal standing.

277. The Appellants advanced a claim for US$ 5,775,793.84,[263] founded on Article 1644 of the Civil Code. This dealt at some length with both liability and damages. So far as liability was concerned, the Foley Letter now featured prominently. The Appellants contended that the First Instance Court failed to have regard to the fact that BSJ and BSLS "*triggered a campaign of prosecution across all countries where it was attempted to register the* [RIVERSTONE] *brand*" and made veiled threats in the Foley Letter,[264] which was referred to repeatedly.

278. In support of the damages claimed, the Appellants quoted over twenty pages from the evidence given by their witnesses of fact and their expert witnesses in the First Instance trial.

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[262] **C-0022**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc. Appeal to Judgment No. 70 (5 January 2011).
[263] *See supra,* ¶ 258 for the basis of this.
[264] **C-0022**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc. Appeal to Judgment No. 70 (5 January 2011), p. 20.

279. On 14 January 2011, BSJ and BSLS filed a lengthy Opposition to the Appeal.[265] This took the point that the claim should properly be based on Article 217 of the Judicial Code, not Article 1644 of the Civil Code, so that Muresa had to establish recklessness or bad faith.[266] Far from being able to do so, it was Muresa that had been guilty of recklessness and bad faith in adducing evidence that falsely contended that the Trademark Opposition Proceeding had prevented Muresa from selling RIVERSTONE tires, when the sale of RIVERSTONE tires had never ceased. The plaintiffs' accountancy experts had not spoken of suspension of sales, but given evidence of an alleged reduction in sales.

280. The Opposition to the Appeal then attacked the integrity of the plaintiffs' experts, alleging that they had improperly introduced into their evidence the Foley Letter, which was extemporaneous and not an accounting document, thereby depriving the defendants of the opportunity to deal with it. The Opposition to the Appeal then alleged that the introduction of the Foley Letter offended against a number of procedural rules, namely Articles 856, 857, 871, 877 and 878 of the Civil Code.[267] For all these reasons the letter should be rejected.

281. The Opposition to the Appeal then proceeded to deal at some length with the plaintiffs' case on both causation and damages, setting out once more the respects in which introduction of the Foley Letter would violate rules of procedure.

(ii) The *Coadyuvante* Petition

282. By way of *entr'acte*, the Appeal Court directed that the First Instance Court should rule on L.V. International's application to intervene as a third-party *Coadyuvante*. On 5 May 2011, the First Instance Court made an Order rejecting that application, on the ground that it had been made too late.[268] On 26 May 2011, L.V. International applied to the Appeal Court

[265] **C-0023**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Opposition to Appeal (14 January 2011).
[266] **C-0023**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Opposition to Appeal (14 January 2011), p. 4.
[267] **C-0023**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Opposition to Appeal (14 January 2011), p. 17.
[268] **R-0104**, Judgment No. 629, Eleventh Civil Circuit Court (5 May 2011).

to revoke that Order,[269] and declare it a *Coadyuvante*. The defendants opposed this application, objecting to:

> "[T]he form and substance of each piece of evidence submitted with the third-party coadyuvante application because they are irrelevant to the proceeding and because they are foreign documents that were not properly authenticated […]."[270]

283. The Appeal Court nonetheless allowed the Appeal,[271] so L.V. International was re-inserted into the proceedings.

(iii) The Decision[272]

284. In the first 13 pages of its judgment, the Appeal Court sets out an accurate summary of the contentions of the respective parties, including (i) the Appellants' reliance on the Foley Letter and the defendants' challenge to its admissibility; and (ii) the defendants' contention that Article 217 of the Judicial Code, not Article 1644 of the Civil Code, governed liability.

285. The Appeal Court then emphasises the need for a plaintiff to establish damage in order to make good a claim under Article 1644 of the Civil Code, citing jurisprudence in support of this seminal requirement. It draws the following conclusion:[273]

> "The Appellant's disagreement inevitably leads us to exhaustively examine the body of evidence that is the basis of the claim, in accordance, of course, with the requirements to establish non-contractual liability.
>
> In that sense one must seek to DETERMINE THE DAMAGES. As a first precondition of civil liability, we must examine the body of evidence in the file, and the Plaintiff's legal standing to claim the aforementioned damages."

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[269] **R-0105**, L.V. International Inc. Appeal of Judgment No. 629 (26 May 2011).

[270] **R-0103**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to L.V. International Inc.'s Appeal of Judgment No. 629 (2 June 2011), p. 1.

[271] **R-0101**, Decision on L.V. International Inc.'s Third-Party Coadyuvante Petition, First Superior Court (19 June 2012).

[272] **C-0024 / R-0037**, Decision, First Superior Court (23 May 2013) ("the **First Superior Court Decision**").

[273] **C-0024 / R-0037**, First Superior Court Decision, p. 17 (as translated in R-0037).

286. There follows a passage in which the Appeal Court reverses the decision of the First Instance Court by holding that TGFL has legal standing to be party to the claim.

287. The Appeal Court then refers to the defendants' contention that recklessness or bad faith was the touchstone of liability, and concludes:[274]

> "Consequently, one needs to verify whether the Respondents acted recklessly and [in] bad faith when they opposed the trademark registration requested by the Plaintiffs."

288. The Appeal Court then recites that, from an examination of the record, the plaintiffs have failed to prove that the defendants were guilty of recklessness, wilful misconduct or gross negligence in opposing the plaintiffs' registration of the RIVERSTONE mark. It comments:[275]

> "Thus, it has been understood that 'to become a source of liability, recklessness – represented by an abuse of the litigation right – should be characterized by excessive conduct, where recklessness goes beyond a mere exercise of procedural rights authorized by the law in defense of an interest.' In other words, one infers that recklessness that gives rise to compensation, as stated in Article 217 of the Judicial Code, is comparable to 'gross negligence or willful conduct' […].
>
> […]
>
> Thus, if the aforementioned recklessness or willful conduct by the Respondents has not been proven, we can hardly examine whether the alleged damages – allegedly caused by a conduct consisting in exercising a right – have been proven, let alone determine their quantum."

289. The Appeal Court accordingly confirmed the substantive decision of the First Instance Court.

[274] **C-0024 / R-0037,** First Superior Court Decision, p. 19 (as translated in R-0037).

[275] **C-0024 / R-0037**, First Superior Court Decision, pp. 20-21 (as translated in R-0037).

c. The Cassation Proceedings

290. Cassation is a procedure for reviewing and vacating second-instance decisions. If the Supreme Court vacates a decision on substantive grounds, it proceeds to decide the case itself.[276] Article 1169 of the Judicial Code provides:

> "The Cassation Recourse on the merits takes place with regards to the resolutions referred to in [A]rticle 1164, when there are grounds to determine the infringement of substantive rules of law, by any of the following concepts: direct violation, misapplication or misinterpretation of the rule of law, error of fact about the existence of the evidence and the rule of law in terms of the appreciation of the said evidence."[277]

The error must substantially have affected the result.

(i) The Application

291. On 1 July 2013, Muresa and TGLF applied for Cassation of the Appeal Court's decision.[278] The First Cause was stated to be:

> "Breach of substantive rules of law, by error of fact as to the existence of the evidence, which has substantially influenced the operative provisions of the appealed resolution (Cause contained in Article 1169 of the Judicial Code)."[279]

292. The six reasons advanced in support of this cause,[280] alleged that the Appeal Court "*completely ignored*," "*ignored by not taking into consideration*," "*did not value, but rather completely ignored*," "*ignored*," "*did not take into account*" the following:[281]

(i) The Foley Letter.

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[276] **R-0138**, Judicial Code of the Republic of Panama (10 September 2001), Arts. 1162-1164, 1195.

[277] **R-0138**, Judicial Code of the Republic of Panama (10 September 2001), Arts. 1169.

[278] **R-0046**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc.'s Appeal in Cassation [Recourse] on Merits to Supreme Court (1 July 2013).

[279] **R-0046**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc.'s Appeal in Cassation [Recourse] on Merits to Supreme Court (1 July 2013), pp. 1-2.

[280] See *infra*, ¶ 300.

[281] **R-0046**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc.'s Appeal in Cassation [Recourse] on Merits to Supreme Court (1 July 2013), pp. 2-4.

(ii) The evidence of Ms. Moreira, Muresa's accountant, that Muresa and TGFL had ceased to sell RIVERSTONE tires due to the Trademark Opposition Proceeding.

(iii) The record showing that BSJ and BSLS withdrew their appeal in the Trademark Opposition Proceeding.

(iv) The evidence given to the First Instance Court by Muresa's witnesses that Muresa and TGFL could not sell RIVERSTONE tires due to the Trademark Opposition Proceeding.

(v) The evidence given to the First Instance Court by Muresa's witnesses that they were aware of the Foley Letter.

(vi) The evidence of the Muresa accountancy experts that there was a decrease in sales in the sum of US$ 5,168,270.56 due to the Trademark Opposition Proceeding.

293. The Second Cause advanced for cassation was violation of rules of law. The particulars pleaded in support of this cause essentially duplicated those relied upon in support of the First Cause. It should be noted, however, that the plaintiffs alleged that BSJ and BSLS had directly violated Article 217 of the Judicial Code and that, as a consequence of this, Article 1644 of the Civil Code was "*also directly infringed.*"[282]

294. On 16 September 2013, BSJ and BSLS filed an Opposition to the Admission of the Cassation Appeal.[283] This joined issue with the contention that the Appeal Court had ignored the various items of evidence, arguing that a mere omission to mention evidence did not prove that it had been ignored. The pleading went on to submit that none of the items allegedly ignored could have affected the result of the case, as there was no evidence as to how Bridgestone was alleged to have caused the losses. As to the Second Cause, the matters relied upon simply duplicated the First Cause. The pleading observed, without demur, that Muresa relied on Article 217 of the Judicial Code and Article 1644 of the Civil Code.

[282] **R-0046**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc.'s Appeal in Cassation [Recourse] on Merits to Supreme Court (1 July 2013), p. 8.
[283] **R-0047**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.' Objection to the Admission of the Cassation Recourse (16 September 2013).

(ii) The Decision on Admissibility

295. On 4 December 2013, the Civil Division of the Supreme Court, consisting of Judge Oydén Ortega Durán, Judge Hernán A. de León Batista and Judge Harley J. Mitchell, ruled that the First Cause was admissible but that the Second Cause was not.[284]

(iii) The Pleadings

296. On 3 January 2014, Muresa and TGFL submitted their written submissions in support of Cassation to the Supreme Court.[285] These repeated allegations that the Appeal Court ignored relevant evidence, including the Foley Letter. They alleged that the threats issued by the defendants' lawyers constituted reckless behaviour that caused the plaintiffs to take precautionary measures. They further alleged that there had been "*seizure and challenges*" against the RIVERSTONE brand in the Dominican Republic, China and other countries. Allegations of recklessness and bad faith were made repeatedly.

297. BSJ and BSLS replied on 14 January 2014.[286] They expressly relied upon the passage in which the Appeal Court had defined the "*recklessness that gives rise to the compensation referred to in* [A]*rticle 217*."[287] Three pages of the pleading are then devoted to an attack on the admissibility of the Foley Letter. The pleading goes on to draw attention to the conflict between Muresa's case that it was forced to stop selling the RIVERSTONE brand with the evidence that showed that they continued to sell RIVERSTONE tires. The pleading then challenges the relevance of BSJ's and BSLS's withdrawal of their appeal in the Trademark Opposition Proceeding, arguing that this could not possibly constitute recklessness or bad faith. Finally, the pleading deals with the evidence, asserting that it establishes neither damage nor reckless behaviour on the part of BSJ and BSLS. Thus, that

[284] **R-0050**, Decision by the Supreme Court on the Admission of the Cassation Recourse (4 December 2013).
[285] **R-0051**, Muresa Intertrade S.A and Tire Group of Factories Ltd., Inc.'s Statement in Support of the Cassation Recourse (3 January 2014).
[286] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.' Response to the Cassation Recourse (14 January 2014).
[287] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.' Response to the Cassation Recourse (14 January 2014), p. 4.

part of the pleading that addresses liability does so on the premise that the test of liability is recklessness or bad faith.

d. The Supreme Court Judgment

298. The Supreme Court delivered its judgment on 28 May 2014.[288] The Reporting Judge was Judge Oydén Ortega Durán, and he delivered a Majority Judgment on behalf of himself and Judge Hernán A. de León Batista. Judge Harley J. Mitchell D. delivered a Dissenting Opinion. As the Supreme Court Judgment is central to these proceedings, we annex it to this Award in its entirety.[289] In order to facilitate the analysis that is to follow we propose to break down the Majority Judgment into its various elements.

(i) The Majority Judgment

(a) The Ground for Cassation

299. At the beginning of their opinion, the Majority stated the ground upon which cassation was sought: "*infringement of substantive rules of law due to factual error regarding the existence of evidence*."[290] They went on to explain what this ground of cassation involves:

> "[…] [W]hen evidence in the proceeding was ignored by the Upper Court when issuing a decision; and when such evidence would have had an influence on the dispositive part of the decision."[291]

(b) The Finding that the Ground for Cassation was Made Out

300. Before setting out their opinion, the Majority had set out the six different respects in which the plaintiffs asserted that there had been "*error regarding the existence of evidence which substantially influenced the dispositive part of the Decision*." Each one of these expressly alleged that the Appeal Court had "*ignored*" evidence. The six items of evidence alleged to have been ignored are set out at paragraph 292 *supra*.

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[288] **C-0027 / R-0034**, Judgment, Supreme Court, Civil Chamber (28 May 2014) ("the **Supreme Court Judgment**").
[289] **Annex A**.
[290] **C-0027 / R-0034**, Supreme Court Judgment, p. 7 (as translated in R-0034).
[291] **C-0027 / R-0034**, Supreme Court Judgment, p. 7 (as translated in R-0034).

301. In a short paragraph the Majority held that, subject to the question of their impact on the dispositive decision, these grounds for cassation were made out:[292]

> "[…] [A] thorough review of the challenged Decision shows that the evidence referred to in the Six Reasons was ignored. The Upper Court only pointed out that a review of the body of evidence did not support the Plaintiffs' claim. The Upper Court did not conduct a thorough analysis of the evidence, and did not identify any evidentiary elements referring to it in a general and global way.
>
> […] It has been shown that the aforementioned evidence was not assessed by the Upper Court in the challenged decision. […]."

302. The Majority then remarked that it remained for the Chamber to determine whether the evidence in question supported the plaintiffs' claims.[293]

(c) The Legal Test of Liability Applied by the Supreme Court

303. The Majority recited that the plaintiffs claimed that there had been "*a violation of the provisions of Article 1644, Civil Code, in accordance with Article 217, Judicial Code*" and set out the provisions of each.[294] The Majority accordingly applied the test of recklessness and bad faith as being determinative of liability.

(d) The Admission of the Foley Letter and Assessment of the Evidence Alleged to Have Been Ignored

304. The Majority referred to the fact that a Spanish translation of the Foley Letter had been introduced into the documentary evidence on two occasions,[295] these being their incorporation in expert reports. After referring to other evidence in the list of six items relied upon by the plaintiff as having been ignored by the Appeal Court, the Majority commented:[296]

> "The Chamber notes that the aforementioned evidence, on whose grounds the merits are based, was duly and timely submitted to the Court, and does not appear to have been challenged as to its

[292] **C-0027 / R-0034**, Supreme Court Judgment, p. 7 (as translated in R-0034).

[293] **C-0027 / R-0034**, Supreme Court Judgment, p. 7.

[294] **C-0027 / R-0034**, Supreme Court Judgment, pp. 13-14 (as translated in R-0034).

[295] **C-0027 / R-0034**, Supreme Court Judgment, p. 8 (referring to case file pp. 2622-2628 and 2955-2958).

[296] **C-0027 / R-0034**, Supreme Court Judgment, pp. 12-13 (as translated in R-0034).

> authenticity and truthfulness. Thus, such evidence may be assessed jointly."

(e) The Majority Findings on Damages

305. Before considering the allegations of negligent and reckless action taken by the Bridgestone defendants in bad faith, the Majority considered the evidence of damage allegedly sustained by the plaintiffs. In doing so, they had regard to the evidence that the plaintiffs had alleged had been ignored by the Appeal Court. They stated:[297]

> "This Chamber fully verified the body of evidence, on which the notion of factual error is based about the existence of the evidence."

306. The Majority accepted this evidence, the truthfulness of which they had described as unchallenged, as establishing that the Muresa plaintiffs had sustained the losses that they alleged:

> "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."[298]

307. There is no indication that the Majority gave any consideration to the other evidence adduced before the First Instance Court, or even to the judgment of that Court.

(f) The Majority's Finding on Liability

308. The Majority endorsed the finding of the Appeal Court that a finding of negligence was necessary if liability was to be established pursuant to Article 1644 of the Civil Code, but stated that they did not agree that negligence was not established.[299] They went on to make findings of negligence and bad faith against BSJ and BSLS on the following basis:

(i) The Foley Letter was "*obviously intimidating and reckless conduct*."[300]

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[297] **C-0027 / R-0034**, Supreme Court Judgment, p. 14 (as translated in R-0034).

[298] **C-0027 / R-0034**, Supreme Court Judgment, p. 15 (as translated in R-0034).

[299] **C-0027 / R-0034**, Supreme Court Judgment, p. 15.

[300] **C-0027 / R-0034**, Supreme Court Judgment, p. 15 (as translated in R-0034).

(ii) BSJ and BSLS "*went to extremes to oppose the registration of a product brand that was conveniently commercially competitive. Then, after spending a significant amount of time in litigation, they withdrew the appeal* [that] *they had filed against an adverse Decision*."[301]

(iii) There was strong evidence that Muresa had a legal right to market their product and BSJ and BSLS, without strong legal grounds, set out to cause damage to their commercial rivals, wishing to jeopardize Muresa's dominant market presence. This was not behaviour taken in good faith. It was negligent and caused irreversible damage to the plaintiffs' business activities.[302]

(ii) The Dissent of Judge Harley J. Mitchell, D.

309. Judge Mitchell recorded that he had submitted remarks to his colleagues which were partially accepted, but that he did not agree with their decision.[303] The reasons that he gave for his dissent included the following:

(i) Submitting the Foley Letter and filing the Trademark Opposition Petition were not "*reckless*" per se.[304]

(ii) The Majority Judgment did not verify the Foley Letter's origin, how it reached the proceedings, or when it was drafted or sent.[305]

(iii) The copies of the Foley Letter did not meet the necessary procedural requirements to be admitted as evidence.[306]

(iv) The plaintiffs advanced their claim on the basis that owing to the Trademark Opposition Proceeding they *stopped selling* RIVERSTONE products, but the Majority Judgment states that the damages were caused by a *decrease in sales.*[307] In fact, RIVERSTONE tires were never withdrawn from the market.[308]

(v) The Majority did not have regard to the plaintiffs' own evidence, which showed that lower quality tires were already being marketed by Muresa before the Trademark Opposition Proceeding.[309]

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[301] **C-0027 / R-0034**, Supreme Court Judgment, p. 16 (as translated in R-0034).
[302] **C-0027 / R-0034**, Supreme Court Judgment, p. 17.
[303] **C-0027 / R-0034**, Supreme Court Judgment, p. 19.
[304] **C-0027 / R-0034**, Supreme Court Judgment, p. 19.
[305] **C-0027 / R-0034**, Supreme Court Judgment, p. 19.
[306] **C-0027 / R-0034**, Supreme Court Judgment, pp. 20, 24.
[307] **C-0027 / R-0034**, Supreme Court Judgment, p. 22.
[308] **C-0027 / R-0034**, Supreme Court Judgment, p. 24.
[309] **C-0027 / R-0034**, Supreme Court Judgment, p. 22.

(vi) The decrease in sales of RIVERSTONE products was attributable to a fear of seizure and not to the Trademark Opposition Proceeding.[310]

(vii) The Majority disregarded the finding of the Eighth Circuit Court that BSJ and BSLS had acted in evident good faith and without abuse of litigation.[311]

(viii) The Majority carried out no analysis to support their conclusion that a US$ 5 million loss was suffered, and ignored the evidence of the Court's expert that there was no evidence to support the damages claimed.[312]

310. Judge Mitchell made it clear that what he considered to be in issue was "*abuse of right, recklessness, and application of Article 217 of the Judicial Code.*"[313]

e. The Post-Cassation Proceedings

311. BSJ and BSLS took various procedural steps, beginning on 16 June 2014 and ending on 9 May 2016, in vain attempts to reverse the Supreme Court Judgment:

(i) A Motion for Clarification and Modification.[314] This was rejected.[315]

(ii) A Request for Judicial Review.[316] This was rejected.[317]

(iii) An Appeal against the rejection of the Request for Judicial Review.[318] This was rejected.[319]

(iv) A further Motion for Clarification.[320] This was rejected.[321]

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[310] **C-0027 / R-0034**, Supreme Court Judgment, p. 23.

[311] **C-0027 / R-0034**, Supreme Court Judgment, p. 25.

[312] **C-0027 / R-0034**, Supreme Court Judgment, p. 26.

[313] **C-0027 / R-0034**, Supreme Court Judgment, p. 21 (as translated in R-0034).

[314] **R-0053**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Motion for Clarification and Modification of the Decision of the Supreme Court of Panama (16 June 2014).

[315] **R-0055**, Decision by the Supreme Court of Panama on the Motion for Clarification and Modification (28 November 2014).

[316] **R-0056**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Recourse for Review of the Supreme Court Decision (30 September 2014).

[317] **R-0073**, Decision of the Supreme Court on the Recourse for Review (7 November 2014).

[318] **R-0057**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Appeal of the Supreme Court's Denial of the Recourse for Review (16 December 2014).

[319] **R-0058**, Decision of the Supreme Court of Panama on the Appeal of its Prior Denial of the Recourse for Review (16 March 2016).

[320] **C-0210**, Motion for Clarification (29 March 2016).

[321] **R-0059**, Decision by the Supreme Court of Panama Denying the Motion for Clarification (9 May 2016).

C. The Claim for Denial of Justice under Article 10.5 of the TPA

1. The Parties' Positions

a. The Claimants' Position

312. The Claimants contend that Article 10.5 of the TPA requires Panama to provide to covered investments (including investments in intellectual property rights) fair and equitable treatment in accordance with customary international law, and it explicitly requires the Respondent not to deny justice to investors.[322] The Claimants note that the TPA "*specifically refers to the customary international law standard for denial of justice*," but remark that the TPA also adds that 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*."[323] In consequence, the Claimants argue, Panama's promise to an American investor is that its system of justice would not fail to meet the standards of due process well-established in the United States, one of the principal systems of the world.[324]

313. The Claimants submitted in their Memorial that the Respondent's duty not to deny justice also arises from customary international law,[325] but they have since emphasized that BSLS's and BSAM's claim in this case is "*explicitly brought under the fair and equitable treatment standard at Article 10.5 of the TPA*."[326]

314. According to the Claimants, the Respondent has breached Article 10.5 of the TPA by issuing the Supreme Court Judgment of 28 May 2014, after a "*deeply problematic*" process.[327] For the Claimants, this judgment can only be described as a "*shocking, arbitrary and profoundly unjust*" ruling that "[n]*o honest or competent court could possibly*

[322] Cl. Mem., ¶ 153; Cl. Mem., ¶ 155 (citing, TPA, Art. 10.29).
[323] Cl. PHB, ¶ 12 (quoting **C-0117**, TPA, Art. 10.5(2)(a).) *See also*, Tr., Day 1, 41:17-22 (Ms. Hyman).
[324] Cl. PHB, ¶ 12.
[325] Cl. Mem., ¶ 158.
[326] Cl. Reply, n. 56. *See also*, Cl. Reply, ¶ 26; Cl. PHB, ¶ 11.
[327] Cl. Mem., ¶ 157. *See also, id*., ¶ 10.

have given […]."[328] The Claimants argue that the Supreme Court Judgment "*is a decision that no court in Panama, no court in the Latin American Region, in fact, no court in any country around the world has ever taken, ever*;" which "*undercuts one of the fundamental rights of trademarks*," namely, "*the right to oppose the registration of potentially confusingly similar marks*."[329]

(i) The Standard for Denial of Justice

315. The Claimants contend that, as established by arbitral decisions, a denial of justice may occur when there is "*clear and malicious misapplication of the law*;" "*lack of due process*" to a point which "*offends a sense of judicial propriety*;" a decision that is "*clearly improper and discreditable*" in light of all the facts; or "*when it is clear that the court has* […] *'administer*[ed] *justice in a seriously inadequate way.'*"[330] This said, the Claimants also submit that there is no definitive test for denial of justice under international law, given the wide range of possibilities and factual circumstances that could amount to denial of justice.[331]

316. For the Claimants, while the duty not to deny justice is procedural, a breach can also occur "*when the decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith*."[332] Sometimes, the Claimants argue, "*the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it*," as is the case here.[333] According to the Claimants, after the Hearing, it is common ground that the applicable standard is that "[i]*f the existence of grave and manifest injustice is established, two possibilities present themselves: either the*

[328] Cl. Reply, ¶ 2.

[329] Tr., Day 1, 31:3-10 (Mr. Kho).

[330] Cl. Mem., ¶¶ 159-162 (citing **CLA-0069**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 ("***Loewen***"); **CLA-0071**, *Robert Azinian et al v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 ("***Azinian***"); **CLA-0072**, *Jan de Nul N.V. v. Egyp*t, ICSID Case No. ARB/04/13, Award, 6 November 2008 ("***Jan de Nul***"); and **CLA-0073,** *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 ("***Mondev***"))

[331] Cl. Reply, ¶ 34.

[332] Cl. Mem., ¶ 198 (citing **CLA-0070***, Rumeli, Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 ("***Rumeli***")).

[333] Cl. Reply, ¶ 4 (citing **CLA-0077**, Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005)). *See also*, Cl. PHB, ¶ 13; Tr., Day 1, 43:19-44:3, 44:19-45:2 (Ms. Hyman).

judicial decision-maker was dishonest […] *or he or she was grossly incompetent*."[334] The Claimants thus argue that "*the best way for the Tribunal to frame the test for denial of justice*" is "*a judgment so egregious that no honest or competent court could have given it*."[335]

317. The Claimants accept that the standard for a finding of denial of justice is high, but they contend that such high standard is met here because the Supreme Court Judgment was "*manifestly 'arbitrary, irrational, and unjust.'*"[336]

318. The Claimants submit that it is also common ground between the Parties that a denial of justice is not merely a mistake by a court, nor is a claim for denial of justice merely another appeal; but they argue that there is no appeal in the present case.[337]

319. The Claimants submit, however, that while their claim does not ask the Tribunal to adjudicate on issues of Panamanian law, it is necessary for them to highlight the ways in which the Supreme Court ignored Panamanian law in order to demonstrate "*the extent to which 'the courts failed to meet international law's requirements for the conduct of a civil proceeding.'*"[338] According to the Claimants, the only way to analyse whether the Supreme Court Judgment was "*egregious*" is to "*consider in detail where the Supreme Court went wrong, and why their decision grossly misapplied Panamanian law and breached Panamanian standards of due process*," and it is then for the Tribunal to determine "*whether these serious errors and breaches*" amount to a decision that was "*egregiously wrong*."[339]

320. Finally, observing that the exhaustion of domestic remedies is a precondition to a denial of justice claim, unless any remaining remedies provide no "*reasonable possibility of effective*

[334] Cl. PHB, ¶ 14 (quoting RER-Paulsson, ¶ 30 and Tr., Day 5, 1279:15-16).
[335] Tr., Day 1, 46:19-22 (Ms. Hyman).
[336] Cl. Reply, ¶ 35.
[337] Cl. PHB, ¶¶ 15, 17.
[338] Cl. Reply, ¶ 35 (quoting **RLA-0011**, *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 ("***Tenaris***")).
[339] Tr., Day 1, 47:20-48:6 (Ms. Hyman).

redress;"[340] the Claimants contend that BSLS and BSJ have met that condition by exhausting all domestic remedies available to them.[341] In response to allegations by the Respondent, the Claimants further submit that the filing of a complaint against the Supreme Court Justices with the National Assembly was not a remedy to be exhausted prior to submission of this claim because (i) the National Assembly track record for investigations of Supreme Court Justices in Panama is very poor; and (ii) even if a complaint had led to an investigation and finding of misconduct, the remedy would have been removing the judges from office (not to quash the Supreme Court Judgment).[342]

(ii) The Respondent's Denial of Justice

321. The Claimants submit that in this case the Respondent has breached its obligation not to deny justice because the Panamanian Supreme Court (i) incurred fundamental breaches of due process; (ii) produced an arbitrary decision; (iii) produced a grossly incompetent decision; and (iv) there was corruption in the process.[343]

322. This said, the Claimants also explain that their "*complaint is not that Panamanian law does not contain adequate procedures to ensure due process*," but rather, that "*Panama's justice system failed the Claimants because Panama's own principles and laws were abandoned by the Supreme Court in this case, and because Panama has failed to end the systemic corruption within the judiciary that it admits exists and which gave rise to the impugned judgment*."[344]

323. The Claimants have also argued, however, that the Tribunal does not need to make a positive finding of corruption to conclude that a denial of justice has occurred here.[345] According to the Claimants, the denial of justice claim can be sustained if the Tribunal finds that "*the Supreme Court's decision was so clearly improper and discreditable, and*

[340] Cl. Mem., ¶ 163.
[341] Cl. Mem., ¶ 164.
[342] Tr., Day 1, 48:19-50:6 (Ms. Hyman).
[343] Cl. Mem., ¶ 165; Cl. Reply, ¶ 53.
[344] Cl. Reply, ¶ 35.
[345] Cl. Mem., ¶ 9; Cl. Reply, ¶ 5.

that its failure to adhere to Panamanian rules of procedure and standards of due process was so flagrant that it lead to an outcome that was manifestly unjust and shocks a sense of judicial propriety."[346] In the Claimants' submission, it is sufficient to find that "*no honest or competent court could possibly have given*" the judgment at issue.[347]

(a) Due Process

324. The Claimants allege that due process is a fundamental guarantee enshrined in the Panama Constitution,[348] and it is also an international standard that the Respondent is bound to protect.[349] According to the Claimants, the international law standard for due process was breached in this case for a number of reasons that are summarized below.[350]

325. *First*, the Claimants submit that the Supreme Court Judgment was based on a provision different from that relied upon in Muresa's claim, in violation of Article 991 of the Panama Judicial Code and the international right to due process.[351] More particularly, the Claimants argue, the Supreme Court based its decision on Articles 217 (concerning loss arising out of procedural actions pursued recklessly and in bad faith) and 780 of the Judicial Code, while Muresa's claim was filed only on the basis of Article 1644 of the Civil Code (the tort provision concerning loss arising out of fault or negligence) and Article 1706.[352] According to the Claimants, the elements of both of these causes of action are different, and one cause of action cannot be considered as "*inherent*" in the other, as the Respondent's expert has argued.[353]

326. For the Claimants, this "*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*

[346] Cl. Mem., ¶ 9.
[347] Cl. Reply, ¶ 5.
[348] Cl. Mem., ¶ 167.
[349] Cl. Reply, ¶ 38.
[350] Cl. Reply, ¶ 39; Cl. Mem., ¶ 169.
[351] Cl. Mem., ¶ 169(a); Cl. Reply, ¶ 39(a).
[352] Cl. Mem., ¶¶ 171-177; Cl. Reply, ¶ 2(a); Cl. PHB, ¶¶ 42-43.
[353] Cl. Reply, ¶ 2(a).

based solely on the legal grounds in a complaint."[354] They further submit that this way of proceeding by the Supreme Court was "*seriously unjust*;" it constituted "*a grave violation of the international law right of due process because the decision was based on a legal point that BSLS and BSJ had no opportunity to address*;"[355] and it was a "*serious violation of the right to a fair hearing*" under international law.[356]

327. The Claimants admit that in the local litigation BSLS and BSJ asked that Muresa's claim be dismissed on the ground that Article 217 of the Judicial Code was the appropriate provision for the claim, instead of Article 1644 of the Civil Code. But they submit that this is not relevant here because that request did not succeed, Muresa maintained the claim only on the basis of Article 1644 of the Civil Code, and therefore it was not necessary or appropriate for BSLS and BSJ to respond to a claim under Article 217 of the Judicial Code which was never brought.[357] Contrary to the Respondent's contentions, the Claimants deny that BSLS and BSJ "*invoke*[d]" Article 217 of the Judicial Code or "*request*[ed]" that it be applied to the dispute, and argue that all they did was attempt to strike out the claim by arguing that it was submitted on the wrong basis.[358]

328. The Claimants emphasize also that the problem here is not only that the Supreme Court relied on a provision not cited by Muresa, but also that the Supreme Court determined that BSLS and BSJ had been reckless and acted in bad faith, when neither of those allegations had been made in Muresa's complaint.[359]

329. All this said, at the Hearing, the Claimants observed that while they still maintained their Article 217 consistency argument and were not abandoning it, it was not their primary case.[360]

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[354] Cl. PHB, ¶¶ 43(a). *See also*, Cl. PHB, ¶ 44.
[355] Cl. Reply, ¶ 2(a). *See also*, Cl. Reply, ¶ 39(a); Cl. PHB, ¶¶ 43(b), 46.
[356] Cl. Reply, ¶ 55.
[357] Cl. Reply, ¶ 2(a). *See also*, Cl. Reply, ¶ 56; Cl. PHB, ¶¶ 46-47.
[358] Cl. Reply, ¶¶ 66-67.
[359] Cl. Reply, ¶¶ 54-55.
[360] Tr., Day 1, 83:1-14 (Mr. Williams). *See also*, Tr., Day 6, 1402:20-1403:4 (Mr. Williams).

330. *Second*, the Claimants argue that the Supreme Court Judgment was based on the letter of 3 November 2004 sent by Foley and Lardner on behalf of BFS Brands, LLC and Bridgestone/Firestone North American Tire, LLC to L.V. International, Inc ("the **Foley Letter**"), in violation of Articles 792, 856, 857, 871, 877 and 878 of the Panama Judicial Code, the principle of listening to the other side, and the international right to due process.[361] More particularly, the Claimants complain that the Supreme Court gave "*decisive weight*" to this letter in finding "*negligence*" on the part of BSLS and BSJ, although the letter was not sent by BSLS or BSJ or on their behalf, was not addressed to Muresa or TGFL, related to separate proceedings in the United States, was not authenticated, was never presented in original, was not verified by its author, was written in a foreign language (English) and not accompanied by a Court-ordered translation, and it was not admitted into evidence.[362]

331. According to the Claimants, these are not mere technicalities, but rather, they constitute a "*shocking defect of mandatory due process*" because under Panamanian law there is no judicial discretion with respect to compliance with evidentiary rules.[363] The Claimants also argue that the Foley Letter was only introduced with Muresa's quantum expert report months after the Eleventh Circuit Court had issued its order admitting evidence, as a result of which BSLS and BSJ did not have an opportunity to deal with it or put it in responsive evidence. For the Claimants, given the reliance placed by the Supreme Court Judgment on this document, "*this was a very serious breach of international law rights of due process*."[364] The Claimants further explain that, while the Foley Letter was appended to L.V. International *coadyuvante* petition, "*it did not become evidence because of that*;" and in any event, the *coadyuvante* petition was long after the evidence-taking stage.[365]

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[361] Cl. Mem., ¶¶ 169(b), 178-191; Cl. Reply, ¶¶ 2(b), 39(b).

[362] Cl. Mem., ¶¶ 184-190; Cl. Reply, ¶ 57. *See also*, Cl. PHB, ¶ 37 (a) (c) (d); Tr., Day 1, 73:17-74:16 (Mr. Williams). The Claimants have also submitted that the Supreme Court findings about the contents of the Foley Letter were impossible to understand, "*wrong and entirely divorced from what the letter actually said*," making the ruling one that no honest or competent court could have made. Cl. PHB, ¶ 37(f)-(g).

[363] Cl. Reply, ¶ 2(b).

[364] Cl. Reply, ¶¶ 2(b), 39(b), 57; Cl. Mem., ¶ 191. *See also*, Cl. PHB, ¶ 37(b).

[365] Cl. PHB, ¶ 37(a). *See also*, Tr., Day 5, 1231:4-15 (Mr. Williams); Tr., Day 1, 78:12-80:15 (Mr. Williams).

332. *Third,* the Claimants contend that the Supreme Court Judgment was based on a document not relevant to the proceeding (the "Foley Letter"), in violation of Article 783 of the Panama Judicial Code and the international right to a non-arbitrary process.[366] The letter should not have received any evidentiary weight, the Claimants argue, as it was sent by and addressed to third parties not involved in the Panama Civil Proceeding, and related to a proceeding in the United States.[367]

333. *Fourth*, the Claimants submit that the Supreme Court Judgment was based on grounds not raised by Muresa in its complaint and to which BSLS and BSJ could not respond, in violation of the principle of consistency and the international right to due process.[368] More particularly, the Claimants complain that the Supreme Court relied on allegations about proceedings brought in other countries to which BSLS and BSJ had no opportunity to respond, and found BSLS and BSJ liable simply for having exercised their rights to trademark protection.[369]

334. Relatedly, the Claimants also complain that the Supreme Court Judgment was based on the factual finding that the Foley Letter constituted intimidating and reckless behaviour by BSLS and BSJ, an allegation that was not made in Muresa's claim, and to which BSLS and BSJ did not have an opportunity to respond.[370] This was, the Claimants argue, a violation of mandatory requirements in Article 991 of the Panama Judicial Code, and a "*shocking*" and "*grave*" violation of their international right to due process.[371]

335. *Fifth*, according to the Claimants, the Supreme Court did not conduct a reasoned examination of the evidence because it ignored BSLS's and BSAM's evidence and the Court's own-expert's evidence, and it relied on unsupported witness evidence contradicted by documents, in violation of Article 781 of the Judicial Code and of the international law

[366] Cl. Mem., ¶ 169(c); Cl. Reply, ¶ 2(d).
[367] Cl. Mem. ¶¶ 192-193.
[368] Cl. Mem., ¶ 169(d); Cl. Reply, ¶ 39(c).
[369] Cl. Mem., ¶¶ 194-197.
[370] Cl. Reply, ¶ 2(c). *See also*, Cl. Mem., ¶ 176; Cl. PHB, ¶ 37(e).
[371] Cl. Reply, ¶ 2(c).

"*right to a court process free from arbitrariness.*"[372] For the Claimants, this amounts to "*an absence of due process*."[373]

336. *Sixth,* the Claimants argue that the Supreme Court Judgment provided no basis for its finding that BSLS's and BSJ's actions caused loss to Muresa of US$ 5,431,000 million, in violation of (i) Articles 990 and 199 of the Judicial Code which require that the reasoning and legal bases for decisions be "*explicit*;" and (ii) also in "*grave violation*[] *of the international law right to due process*" and BSLS's and BSJ's right to a fair hearing.[374] For the Claimants, both the Supreme Court's findings on causation and on loss are unexplained, incoherent and impossible to understand.[375]

337. *Seventh*, the Claimants also point out that while the Eight Circuit Court that heard the Trademark Opposition Proceeding had found that BSLS and BSJ had acted in good faith — a finding that was not appealed, was final and binding and constituted *res judicata* — the Supreme Court Judgment ruled that BSLS and BSJ had not acted in good faith and were reckless.[376] This said, at the Hearing, the Claimants also stated that *res judicata* was not a "*first-level argument before this Tribunal*;"[377] and that the Claimants were not going to press it, and that it was "*no longer pursued*" by them.[378] Instead, in the end, the Claimants argument was that it was "*legally incoherent*" for the Supreme Court to have found liability for procedural recklessness under Article 217 of the Judicial Code, when the court in the underlying litigation had found the BSJ and BSLS had acted with evident good faith.[379]

[372] Cl. Reply, ¶¶ 39(d), 61.
[373] Cl. PHB, ¶¶ 51-54, 57-58.
[374] Cl. Reply, ¶¶ 2(f), 39(e), 60.
[375] *See* Cl. PHB, ¶¶ 59-60.
[376] Cl. Reply, ¶ 59. *See also*, Tr., Day 1, 72:10-18 (Mr. Williams).
[377] Tr., Day 1, 73:9-14 (Mr. Williams).
[378] Tr., Day 5, 1230:6-11 (Mr. Williams); Tr., Day 6, 1402:15-16 (Mr. Williams).
[379] Tr., Day 5, 1228:8-1230:2 (Mr. Williams). *See also*, Cl. PHB, ¶ 36.

(b) Arbitrariness

338. *First*, the Claimants contend that the Supreme Court Judgment was arbitrary because it failed to conduct a reasoned examination of the evidence.[380] In particular, the Claimants complain that the Supreme Court: (i) ignored documentary evidence showing large amounts of sales of RIVERSTONE tires in the relevant period;[381] (ii) ignored the expert reports of the Court-appointed expert and BSLS's and BSJ's expert;[382] (iii) only considered the opinion of Muresa's expert and its witnesses, which were contradicted by the documentary evidence, the Court-appointed expert and BSLS's and BSJ's expert;[383] and (iv) failed to conduct any examination of the evidence or provide any reasoning for the loss of over US$ 5 million it awarded,[384] and made no attempt to apportion the loss suffered by Muresa and the loss suffered by TGFL.[385]

339. *Second*, the Claimants allege that a "*grave violation of the international law right to a non-arbitrary process*" took place when the Supreme Court found that the Foley Letter was a threatening and reckless action by BSLS and BSJ against Muresa. For the Claimants, this is "*wholly illogical and impossible to understand*," as the letter was not sent by BSLS or BSJ, it was not addressed to Muresa or TGFL and it did not refer to intellectual property rights in Panama.[386]

340. *Third,* the Claimants submit that another "*grave violation of the international law right to a non-arbitrary process*" occurred when the Supreme Court found that BSLS's and BSJ's Trademark Opposition Proceeding against Muresa was initiated with the intention to harm. This, the Claimants submit, is "*impossible to understand*" and "*entirely unsupported by any evidence*," given that BSLS and BSJ were simply invoking the mechanism for

[380] Cl. Mem., ¶ 201. *See also*, Cl. PHB, ¶¶ 51-54, 58.
[381] Cl. Mem., ¶¶ 201(a), 202.
[382] Cl. Mem., ¶¶ 201(b), 203.
[383] Cl. Mem., ¶¶ 201(c), 204.
[384] Cl. Mem., ¶¶ 201(d), 205-206. *See also*, Cl. Reply, ¶ 2(f).
[385] Cl. Mem., ¶ 207.
[386] Cl. Reply, ¶ 2(d). *See also*, Cl. Reply, ¶ 58.

trademark opposition mandated under Panamanian law on "*entirely reasonable grounds.*"[387]

(c) Incompetence

341. The Claimants also submit that the Panamanian Supreme Court produced an "*incompetent decision.*"[388] The Claimants further explain that this ground refers to "*judicial bad faith*" as distinguished from "*mere error*."[389]

342. According to the Claimants, the violations of due process and grounds for arbitrariness they have raised also serve to support the conclusion that "*no judge, attempting to apply the law in good faith, could have made the findings in the Supreme Court Judgment.*"[390] That said, the Claimants argue, whether the lack of bad faith was the result of corruption, malice or gross incompetence is not something that the Tribunal needs to decide.[391]

343. The Claimants also submit that the Supreme Court Judgment exhibits "*clear ignorance*" by the Court, as "[t]*he notion that simply bringing a trademark opposition action is itself abusive or reckless, just because that brand is already in the market, entirely undermines the intellectual property rights that BSLS and BSJ have*" and is "*simply wrong in Panamanian law*."[392]

(d) Corruption

344. The Claimants submit that the Supreme Court Judgment is "*so egregiously wrong that no honest or competent court could possibly have given it*;" and therefore the Tribunal does not need to go further to find a denial of justice.[393] This said, the Claimants have made various arguments with regard to corruption in this case.

[387] Cl. Reply, ¶ 2(e).
[388] Cl. Mem., ¶ 165.
[389] Cl. Mem., ¶ 211.
[390] Cl. Mem., ¶ 211.
[391] Cl. Mem., ¶ 211.
[392] Cl. Mem., ¶ 215.
[393] Cl. PHB, ¶ 61.

345. The Claimants contend that (i) "*serious errors in the substance*" of a local court judgment are evidence of "*malice*;"[394] (ii) there is an "*endemic corruption*" in the Panamanian justice system, and there have been numerous allegations of corruption against the Justice that drafted the Supreme Court Judgment at issue and other justices;[395] and (iii) the Panamanian Ambassador to the United States in office in March 2015 admitted on behalf of Panama that the Supreme Court Judgment was the result of corruption.[396]

346. While accepting that "*specific acts of corruption in a case like this would be very hard to prove*;" the Claimants submit that in light of "*Panama's admission of corruption*," the Tribunal should conclude that "*the Supreme Court Judgment is so clearly and manifestly wrong, that it could only have been procured through corruption*."[397]

347. The Claimants further submit that given the obvious difficulty of obtaining direct evidence of corruption, circumstantial evidence can be enough.[398] And even if the circumstantial evidence is insufficient to positively establish corruption, it should be "*taken into account in considering the factual matrix of an impugned judgment*."[399]

348. In this case, the Claimants say, the following circumstantial evidence points to corruption: (i) the admission by the Panama Ambassador to the United States that the Supreme Court Judgment was procured through corruption;[400] (ii) the Respondent's delay in searching documents requested in document production until Justice Ortega (drafter of the Supreme Court Judgment) had left the Court;[401] (iii) the large quantity of circumstantial evidence on corruption relating to Justice Ortega and the judiciary in general;[402] and (iv) the fact that it

[394] Cl. Mem., ¶ 209.
[395] Cl. Mem., ¶¶ 116-130, 210; Cl. Reply, ¶¶ 7, 45-46; Cl. Reply Supp., ¶ 32.
[396] Cl. Mem., ¶¶ 8, 210; Cl. Reply, ¶ 3.
[397] Cl. Mem., ¶ 210.
[398] Cl. Reply, ¶¶ 5, 41. *See also*, Cl. PHB, ¶ 65; Tr., Day 1, 103:18-22, 111:12-20 (Mr. Williams).
[399] Cl. Reply, ¶ 5.
[400] Cl. PHB, ¶¶ 62(a), 67-72. *See also*, Tr., Day 1, 106:3-107:14 (Mr. Williams).
[401] Cl. PHB, ¶¶ 62(b), 73-81. *See also*, Tr., Day 1, 107:21-109:15 (Mr. Williams).
[402] Cl. PHB, ¶¶ 62(c), 66. *See also*, Tr., Day 1, 104:14-106:2 (Mr. Williams).

would be "*surprising*" that two Supreme Court Judges "*could be so incompetent*" as to produce a judgment as bad as the one at issue.[403]

349. The Claimants add that to the extent evidence of corruption exists, it is within the Respondent's possession, custody or control; and it is telling that the Respondent has failed to comply with the Tribunal's orders to produce non-privileged documents responsive to the Claimants' requests on this subject.[404] The Claimants argue that "[t]*he strong inference is that there are documents that the Respondent would prefer not to reveal*."[405] More expressly, the Claimants submit that during the document production phase "*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*" and, in light of that, 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*."[406]

350. Finally, according to the Claimants, the Respondent's Counter-Memorial and responses on document production did not even attempt to deny the existence of corruption generally in the judiciary or specifically in relation to the justices in question, and the Tribunal should also draw adverse inferences from that silence.[407]

(e) No Competent or Honest Court Could Have Given the Supreme Court Judgment

351. Throughout their arguments, the Claimants have also highlighted other alleged defects or flaws of the Supreme Court Judgment.

352. *First*, the Claimants submit that the judgment is "*non-sensical and entirely incoherent*" in that it decided that the First Superior Court had made an "*error of fact about the existence*

[403] Cl. PHB, ¶¶ 62(d).
[404] Cl. Reply, ¶ 40. *See also*, Cl. Reply, ¶¶ 8-9; Cl. Reply Supp., ¶ 32.
[405] Cl. Reply Supp., ¶ 32.
[406] Cl. PHB, ¶ 81.
[407] Cl. Reply, ¶ 42.

of the evidence" (fourth cassation ground under Article 1169 of the Judicial Code) when it was apparent that such error was not made because the First Superior Court Judgment had specifically referred to the evidence at issue, or that evidence had not been submitted or raised with the First Superior Court. For the Claimants, this is a finding that "*no honest or competent court could have made.*"[408] More particularly, the Claimants argue that:

- There was no basis for the Supreme Court to conclude that the First Superior Court had totally ignored the Foley Letter, because the First Superior Court repeatedly mentioned that letter; and therefore, the Supreme Court's conclusion is "*impossible to understand.*"[409]

- It is "*not possible to understand*" the Supreme Court's finding that the First Superior Court made a mistake or ignored certain certificates by Muresa's accountants regarding amounts of sales, because, although the First Superior Court did not mention those certificates, it did refer to Muresa's expert reports on quantum which are expressly based on them.[410]

- It was "*absurd*" for Muresa to complain that the First Superior Court ignored the BSJ and BSLS's withdrawal of the appeal in the Trademark Opposition Proceeding, because that fact was never raised by Muresa with the First Superior Court.[411]

- It is "*not possible to understand*" how the Supreme Court could have made the finding that the First Superior Court ignored or made a mistake about the existence of witness evidence about the volume of tire sales, because that evidence is expressly cited in the First Superior Court Judgment.[412]

- It is "*not possible to understand*" how the Supreme Court believed that the First Superior Court ignored a witness statement about alleged threats concerning seizure and confiscation, when the First Superior Court expressly referred to that.[413]

- It is not possible to understand how the Supreme Court concluded that the First Superior Court thought that certain accounting expert evidence did not exist or was ignored, when the First Superior Court Judgment contains numerous references to that evidence.[414]

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[408] Cl. PHB, ¶ 32.

[409] Tr., Day 1, 56:1-15 (Mr. Williams).

[410] Tr., Day 1, 56:18-57:15 (Mr. Williams).

[411] Tr., Day 1, 57:16-58:12 (Mr. Williams).

[412] Tr., Day 1, 59:9-60:3 (Mr. Williams).

[413] Tr., Day 1, 61:17-62:2 (Mr. Williams).

[414] Tr., Day 1, 62:3-11 (Mr. Williams).

353. The Claimants distinguish between the fourth and fifth ground for cassation under Article 1169 of the Judicial Code, namely, "*error of fact about the existence of the evidence*" (fourth ground) and "*error of the rule of law in terms of the appreciation of the said evidence*" (fifth ground).[415] Relying on Mr. Arjona's opinion, they submit that "*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 evidence exists but makes any mistake of appreciation (ranging from applying no weight to applying too much weight) then that falls within ground five.*"[416] The Claimants observe that the fifth cassation ground was not relied upon in Muresa's cassation recourse, and criticize the Supreme Court Judgment for finding that "*Muresa's argument of a failure of appreciation of evidence fell within ground four.*"[417]

354. *Second,* the Claimants submit that the findings of the Supreme Court Judgment on liability have "*no basis*," and that "*no competent or honest court could have reached*" them.[418]

- The Claimants argue that the first basis for liability was the Supreme Court's finding that the Trademark Opposition Proceeding was reckless because (i) Muresa had a legal right to market the product; (ii) Muresa's product was a competitor; (iii) BSLS had intent to cause damage; and (iv) the opposition had no legal basis.[419] And for the Claimants, finding (i) "*misunderstand*[] *the purpose of intellectual property*," and "*cannot be understood*," because the opposition to the registration did not affect Muresa's ability to continue selling;[420] finding (ii) is "*absurd*" because the purpose of the trademark opposition regime is to protect against similar marks for the same or similar products;[421] finding (iii) is unexplained, and cannot be reconciled with the finding of good faith in the Trademark Opposition Proceeding;[422] and finding (iv) is unsupported and based on the fundamental misunderstanding that is wrong to oppose the registration of a mark for a competing product, and it is "*impossible to understand*" in light of other successful oppositions by the Bridgestone Group of "STONE" suffix trademarks in Panama and the finding of good faith in the

[415] Cl. PHB, ¶¶ 19, 28.
[416] Cl. PHB, ¶ 28.
[417] Cl. PHB, ¶¶ 22, 32. *See also*, Tr., Day 1, 54:19-56:15; 60:19-61:1 (Mr. Williams).
[418] Tr., Day 1, 82:16-22 (Mr. Williams).
[419] Tr., Day 1, 63:14-65:7 (Mr. Williams). *See also*, Cl. PHB, ¶ 33(a)(i).
[420] Tr., Day 1, 65:9-66:11 (Mr. Williams). *See also*, Tr., Day 5, 1225:8-13 (Mr. Williams); Cl. PHB, ¶ 35(a).
[421] Tr., Day 1, 66:12-18 (Mr. Williams). *See also*, Tr., Day 5, 1225:19-1226:2 (Mr. Williams); Cl. PHB, ¶ 35(b).
[422] Tr., Day 1, 67:12-70:4 (Mr. Williams). *See also*, Cl. PHB, ¶ 35(c).

Trademark Opposition Proceeding.[423] Moreover, the Claimants argue, there is a "*fundamental problem*" with the Supreme Court Judgment finding liability under Article 217 of the Judicial Code, which presupposes underlying litigation in which the liable party exhibited bad faith, when the court in the underlying litigation had itself found that the party acted in good faith.[424]

- The Claimants submit that the second basis of liability was the Supreme Court's finding that the Foley Letter was "*obviously intimidating and reckless*," which appeared to be the primary basis for liability.[425] And for the Claimants, this finding entails a denial of justice because (i) it was "*irrational and unreasonable*" in light of the content, the sender and the recipient of the letter; and (ii) it was in violation of due process to rely on a document not properly admitted into evidence, and to which BSJ and BSLS did not have an opportunity to respond.[426] The Claimants also fault the Supreme Court for not explaining how the Panamanian court '*even had jurisdiction*" or why Panamanian law should apply to the sending of this letter sent in the United States between U.S. attorneys.[427] This finding, the Claimants say, was "*so fundamentally flawed*" that "*no competent court could have reached that outcome*."[428]

- The Claimants contend that the third basis for liability was the Supreme Court's finding that the withdrawal of the appeal in the Trademark Opposition Proceeding was reckless.[429] And for the Claimants, this finding is "*incomprehensible*," because the short deadline to file an appeal makes it inevitable for parties to file precautionary appeals, and the appeal was withdrawn in a timely manner and Muresa did not even have to respond to it, nor did it incur in any cost.[430] Moreover, Claimants argue, the finding constitutes a "*serious error*" because the withdrawal of the appeal was not raised in Muresa's complaint.[431] Lastly, the withdrawal of the appeal does not constitute evidence that that the Trademark Opposition Proceeding was without merit.[432]

355. *Third*, according to the Claimants, with regard to causation the Supreme Court found that BSJ and BSLS's legal action had caused damages to Muresa in the form of "*loss of sales*

[423] Tr., Day 1, 70:5-72:9 (Mr. Williams). *See also*, Cl. PHB, ¶ 35(d).
[424] Cl. PHB, ¶ 36.
[425] Tr., Day 1, 73:17-74:2 (Mr. Williams). *See also*, Cl. PHB, ¶ 33(a)(ii).
[426] Tr., Day 1, 74:3-16 (Mr. Williams). *See also*, Cl. PHB, ¶ 37(a)-(d), (g).
[427] Tr., Day 5, 1233:1-11 (Mr. Williams).
[428] Tr., Day 1, 83:8-12 (Mr. Williams).
[429] Tr., Day 1, 85:20-86:4 (Mr. Williams). *See also*, Cl. PHB, ¶ 33(a)(iii).
[430] Tr., Day 1, 86:5-88:22 (Mr. Williams). *See also*, Cl. PHB, ¶¶ 38-40.
[431] Tr., Day 1, 89:4-8 (Mr. Williams).
[432] Cl. PHB, ¶ 41.

or market position of the RIVERSTONE brand."[433] The Claimants contend that such finding was "*incoherent and incomprehensible*," and could only be the result of "*incompetence or bad faith*."[434] This is so, the Claimants argue, because:

- The Supreme Court accepted Muresa's employees and Muresa's accounting expert's assertions that the Trademark Opposition Proceeding had caused RIVERSTONE sales to "*cease*," without providing any explanation for why that was the case; and failing to recognize that a trademark opposition does not prevent the applicant from continuing to make sales unless there is an injunction, which BSLS never sought.[435]

- The alleged loss for Muresa concerned sales in Central and South America, the Caribbean and elsewhere, when the opposition action was only in Panama.[436]

- The Supreme Court ignored contrary documentary evidence, and evidence from BSLS's expert and the Court's own expert.[437] There was a "*serious procedural defect*," and a "*fundamental breach of due process*," as the Supreme Court made a conscious decision to ignore evidence contrary to its findings, as shown by the fact that such evidence was cited by the dissenting judge.[438]

- The Supreme Court's finding (that the sales had decreased) was contrary to the allegations in Muresa's own pleadings (that the sales had ceased).[439]

356. Finally, the Claimants' submit that the Supreme Court finding on loss, by which BSJ and BSLS were ordered to pay Muresa and TGFL US$ 5 million has no explanation, either explicit or implicit, and in any event, the damages analysis must be explicit.[440] Accordingly, the Claimants' argue, the Supreme Court Judgment in this respect is "*impossible to understand*."[441]

[433] Cl. PHB, ¶ 50 (citing **R-0034**, Supreme Court Judgment, pp. 14-15).
[434] Tr., Day 1, 89:12-15 (Mr. Williams)
[435] Tr., Day 1, 89:16-90:20 (Mr. Williams). *See also*, Cl. PHB, ¶ 53.
[436] Tr., Day 1, 90:21-91:4 (Mr. Williams). *See also*, Cl. PHB, ¶ 53.
[437] Tr., Day 1, 91:5-8 (Mr. Williams). *See also*, Cl. PHB, ¶ 54.
[438] Tr., Day 1, 92:20, 93:4-9; 96:22-97:3 (Mr. Williams). *See also*, Cl. PHB, ¶ 58.
[439] Tr., Day 1, 92:14-19 (Mr. Williams). *See also*, Cl. PHB, ¶ 59.
[440] Tr., Day 1, 101:4-102:9 (Mr. Williams). *See also*, Cl. PHB, ¶ 60.
[441] Cl. PHB, ¶ 60.

(iii) The Supreme Court Judgment's Serious Errors of Panamanian Law Constitute Violations of International Law and This Case Is Not an Appeal

357. The Claimants submit that, contrary to the Respondent's contention, the serious errors of Panamanian law that led to the Supreme Court Judgment are violations of international law standards; but explain that it is necessary for the Tribunal to understand the Panamanian law standards to determine whether the Supreme Court adhered to them.[442] The Claimants go on to argue that "[s]*erious errors in the application of Panamanian law and violations of Panamanian standards of due process may be internationally unlawful if they represent '[l]ack of due process, a tainted background, or even bad faith*.'"[443]

358. Contrary to the Respondent's contentions, the Claimants deny that their denial of justice claim amounts to an appeal of the Supreme Court Judgment.[444] They explain that their submissions about inconsistency of the Supreme Court Judgment with Panamanian law are intended to demonstrate that the judgment "*was arbitrary, unjust, and irrational*" and in breach of the TPA fair and equitable treatment standard.[445] According to the Claimants, each of the grave breaches of Panamanian due process identified also constitute violations of international law standards of due process.[446]

359. While the Claimants do not deny that they have made similar arguments to those made by BSLS and BSJ in the local courts, they contend that this is unsurprising, and it does not make the present case an appeal. That is, the Claimants say, "*because the question before the Tribunal is not merely whether the Supreme Court erred, but whether it transgressed the applicable standards under international law.*"[447]

[442] Cl. Reply, ¶ 37.
[443] Cl. Reply, ¶ 37.
[444] Cl. Reply, ¶¶ 14, 49; Cl. PHB, ¶ 17.
[445] Cl. Reply, ¶ 14.
[446] Cl. Reply, ¶ 15.
[447] Cl. PHB, ¶ 17.

360. Relying on the expert reports of Mr. Arjona and Mr. Molino, the Claimants further argue that the Respondent's attempt to portray the Supreme Court Judgment as a correct and logical application of Panamanian law is "*simply not right*."[448]

b. The Respondent's Position

361. The Respondent submits that the claim for denial of justice here boils down to one single argument: "*the Supreme Court Judgment was wrong as a matter of Panamanian law.*"[449] But that claim fails, Panama argues, because denial of justice entails a high standard requiring more than misapplication of domestic law.[450] For the Respondent, "*the Claimants have utterly failed to make the requisite showing*" for a denial of justice, and "[a]*ll they are doing is appealing*" the Supreme Court's judgment.[451]

(i) The Standard for Denial of Justice

362. The Respondent's position is that the threshold for a finding of denial of justice under international law is "*extremely high*," and it entails "*the failure of the entire domestic legal system*."[452] It requires "*the failure of a national legal system to provide due process*;" it necessarily entails a systemic failure;[453] and the factual circumstances must be "*egregious*."[454]

363. This said, the Respondent agrees with the Claimants that there is no definitive test for establishing denial of justice. It argues, however, that there *are* mandatory elements and procedural prerequisites, and a variety of definitive tests to prove that *no* denial of justice has occurred.[455]

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[448] Cl. Reply, ¶ 17.
[449] Resp. C-Mem., ¶ 47.
[450] Resp. C-Mem., ¶ 47.
[451] Tr., Day 1, 212:21-22 (Ms. Silberman).
[452] Resp. C-Mem., ¶ 48.
[453] Resp. Rej., ¶ 152. *See also*, Tr., Day 5, 1335:4-21 (Mr. Debevoise).
[454] Resp. Rej., ¶ 152.
[455] Resp. Rej., ¶ 149.

364. Among the tests that confirm that a denial of justice must fail, Panama stresses that (i) claims consisting of violations of domestic law/amounting to an appeal must fail; (ii) an international tribunal does not have authority to overturn a local court's appreciation of the evidence or the evidentiary rules; and (iii) in evaluating a denial of justice claim an international tribunal is not permitted to "*sit in appeal*" of a domestic court's judgment.[456] Therefore, Panama argues, it is not the role of an international tribunal to determine whether in its view the domestic court misapplied domestic law;[457] nor can the tribunal correct errors of domestic procedural or substantive law or revisit evidentiary rulings.[458] Relying on Professor Paulsson's treatise, the Respondent submits that the mere violation of domestic law may "*never*" justify an international claim for denial of justice.[459] What is required, the Respondent argues, is a finding of a "*violation of* ***international*** *law, such as 'a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety*.'"[460]

365. The Respondent opposes the contention that serious errors in the substance of a court judgment may amount to denial of justice; and it submits instead that "*the substance of a judicial decision may be relevant to the extent that it demonstrates a due process violation or malice*."[461] The Respondent thus relies on Professor Paulsson's statement that:

> "Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. […] Extreme cases should [] be dealt with on the footing that they are so unjustifiable that they could have

[456] Resp. Rej., ¶ 157; Resp. C-Mem., ¶ 49; Resp. PHB, ¶ 17. *See also*, Tr., Day 5, 1262:1-12 (Ms. Silberman).
[457] Resp. C-Mem., ¶ 49.
[458] Resp. PHB, ¶ 17.
[459] Resp. C-Mem., ¶ 49; Resp. Rej., ¶ 157.
[460] Resp. C-Mem., ¶ 49 (emphasis in original) (citing **RLA-0112**, *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, 1989 ICJ Reports 15, Judgment, 20 July 1989 ("***ELSI***"), ¶ 128; **CLA-0069**, *Loewen*, ¶ 132).
[461] Resp. C-Mem., ¶¶ 50-51 (citing **RLA-0113**, Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005), pp. 82, 98).

been only the product of bias or some other violation of the right of due process."[462]

366. The Respondent submits that the above standard has also been confirmed by case law stating that the standard for denial of justice is procedural, and that the substance of a decision is only relevant if demonstrates bad faith, which will "*only*" be the case if the domestic judgment is one that "*no reasonably competent judge could render*."[463]

367. With regard to the standard for the various "*categories*" of argument in which the claim has been structured in this case,[464] the Respondent submits as follows:

- *Arbitrariness*. The bar for success is high, and in the words of the International Court of Justice ("**ICJ**"), it is "*not so much something opposed to **a** rule of law, as something opposed to **the** rule of law*."[465] It is not satisfied by a judgment which is merely incorrect as a matter of law, or a decision on which reasonable people may differ. It must be shown that "*no reasonable decision-maker could have reached that decision.*"[466] Because the standard is procedural and not substantive, when evaluating a claim of arbitrariness, the tribunal should not and need not consider the merits of the decision.[467]

- *Due Process*. It requires evidence of "*fundamental*" breaches of due process, that is, "*serious*" breaches.[468] For example, "*lack of access to **any** court, absence of an impartial decision maker; absence of any opportunity to be heard; and absence of a reasoned decision (i.e., no reasons given).*"[469]

- *Corruption*. It entails an extremely high standard of proof, and the claiming party bears the burden of presenting "*clear and convincing*" evidence.[470]

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[462] Resp. C-Mem., ¶ 51 (citing **RLA-0113**, Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005), pp. 82, 98).

[463] Resp. C-Mem., ¶ 52 (citing **CLA-0070**, *Rumeli*, ¶ 653; **CLA-0073**, *Mondev*, ¶ 136; **CLA-0072**, *Jan de Nul*, ¶ 209; **RLA-0134**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017 ("***Fouad***"), ¶ 471; **RLA-0135**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 ("***Mamidoil***"), ¶ 769).

[464] Resp. Rej., ¶ 153.

[465] Resp. Rej., ¶ 154 (citing **RLA-0112**, *ELSI*, ¶ 128 (emphasis added by the Respondent).)

[466] Resp. Rej., ¶ 154.

[467] Resp. Rej., ¶ 154.

[468] Resp. Rej., ¶ 155.

[469] Resp. Rej., ¶ 155 (emphasis in original).

[470] Resp. Rej., ¶ 156.

(ii) The Denial of Justice Claim Fails

368. Panama asks the Tribunal to reject the denial of justice claim in this case.[471] The Respondent submits that "*Claimants' merits theory is meritless*" because "[BSAM] *lacks standing to assert a denial of justice claim, and the claim by* [BSLS] *fails for legal and factual reasons*."[472]

369. The Respondent's allegations concerning BSAM's lack of standing are addressed *supra* at Section V.A.1.a. But the Respondent adds that, even if BSAM had standing (which is denied), its claim would still fail as it would be identical to BSLS's baseless denial of justice claim.[473]

370. As an initial matter, Panama submits that this claim is based almost entirely on alleged errors in the application of Panamanian law, and that all four categories of the Claimants' denial of justice argument are no more than appeals of an unfavourable decision on the basis of Panamanian law.[474] The Respondent adds that that there is no question that the Claimants' arguments here are nothing but an appeal, as demonstrated by the fact that their theories consist of positions taken from BSJ and BSLS's pleadings in the Civil Proceeding, or of assertions that any contrary position is "*impossible to understand.*"[475]

371. Responding to the allegations as made in the Memorial, Panama argued that: (i) all of the purported "*due process*" arguments are about the misapplication of Panamanian law, alleged violations of the Panamanian Judicial Code and do not apply *international* standards of due process; (ii) the alleged "*arbitrariness*" arguments are based on the application of Article 781 of the Judicial Code, rather than the international law standard for arbitrariness; and (iii) the arguments regarding "*incompetence*" of the Supreme Court

[471] Resp. C-Mem., ¶ 64.
[472] Resp. Rej., ¶ 135.
[473] Resp. Rej., ¶ 137.
[474] Resp. C-Mem., ¶¶ 53, 63, 160, 296; Resp. Rej., ¶ 158.
[475] Resp. PHB, ¶ 18.

are duplicative.[476] It follows, Panama says, that these three categories are nothing but "*impermissible appeals of the Supreme Court Judgment*."[477]

372. In the Rejoinder, Panama argues that while the complaints about the Supreme Court Judgment have shifted over time, the Claimants appear to have settled on five: (i) lack of reasoned examination of evidence and reliance on unsupported witness evidence contradicted by documents; (ii) finding on the basis of a provision of law not contained in the claim; (iii) reliance on evidence not properly admitted (*i.e.* the Foley Letter); (iv) finding on the basis of grounds not raised by Muresa's complaint; and (v) a damages determination not based on any evidence or assessment.[478] And for Panama, although the Claimants have labelled the first complaint as one of arbitrariness and the others as due process violations, the labels do not change the fact that all but point (ii) were made in the Civil Proceeding, and point (ii) is exactly the opposite to what was argued there.[479] According to the Respondent, these arguments fail for these "*threshold reasons*" alone.[480]

373. At the Hearing, Panama argued that, while the Claimants' case had again shifted over the course of the Hearing,[481] their theories still failed.

- *First*, the Respondent submitted that the Claimants' theory that a denial of justice occurred because no other court in history had ever held that *"an existing trademark owner should be penalized for merely filing an opposition application*" failed,

[476] Resp. C-Mem., ¶ 54.

[477] Resp. C-Mem., ¶ 54. The Respondent's Rejoinder suggests that the Claimants' Reply appears to have abandoned one of the categories ("incompetence"), but submits that, in any event, those arguments were duplicative of the other categories. Resp. Rej., n. 522.

[478] Resp. Rej., ¶ 160 (referring to Cl. Reply, ¶ 39).

[479] Resp. Rej., ¶ 161. *See also*, Resp. PHB, ¶ 8. In the Post-Hearing Brief, the Respondent also refers to some arguments that it says were improperly unveiled during the Hearing (and are time-barred pursuant to Article 10.18.1 of the TPA). Thus, the Respondent submits that while the Claimants appeared to contend at the Hearing that the Supreme Court should not have applied Panamanian law, during the Civil Proceeding BSJ and BSLS argued otherwise. Similarly, while at the Hearing the Claimants suggested that the court had misinterpreted the ground for cassation for "*error of fact as to the existence of evidence*," according to Panama, during the Civil Proceeding they accepted in principle that ignoring evidence amounts to such an error, which is also an interpretation accepted in Panamanian law. Resp. PHB, ¶¶ 8-9 (table, 4th argument).

[480] Resp. Rej., ¶ 162.

[481] Tr., Day 5, 1274:7-11 (Ms. Silberman).

because that is not what the Supreme Court Judgment held; and even if it was unprecedent, that alone cannot amount to denial of justice.[482]

- *Second,* the Respondent opposed the Claimants' allegation that a denial of justice occurred here because either the Supreme Court judges were incompetent or dishonest; arguing that there was no evidence to support such serious and pejorative accusation.[483]

- *Third,* Panama argued that Claimants' third theory that a denial of justice occurred because BSLS did not have an opportunity to respond to the Foley Letter, was a "*false*" assertion.[484]

- *Fourth,* the Respondent argued that the Claimants' fourth theory that the Supreme Court Judgment was "*impossible to understand*" fails because all the arguments on which it is based were made in the context of the Civil Proceeding, and the theory just amounts to an appeal.[485] Panama submits that the Supreme Court Judgment is indeed possible to understand.[486]

374. This said, the Respondent has addressed more particularly the various complaints against the Supreme Court Judgment, as summarized below.

(a) Due Process

375. The Respondent submits that all of the strands of the due process argument lack merit.[487]

376. *First*, with regard to the application of Article 217 of the Judicial Code, the Respondent submits that, the reality is that BSLS had "***every** opportunity*" to address the issue.[488] Panama argues that BSLS and BSJ were the first to raise Article 217, arguing before the First Instance Court that it should apply; repeated this argument throughout the Civil Proceeding; and defended the decision of the appellate court that had applied Article

[482] Tr., Day 5, 1275:17-1276:10 (Ms. Silberman).
[483] Tr., Day 5, 1276:11-1277:10 (Ms. Silberman).
[484] Tr., Day 5, 1278:8-12 (Ms. Silberman).
[485] Tr., Day 5, 1310:3-1312:7 (Ms. Silberman).
[486] Tr., Day 5, 1313:8-9 (Ms. Silberman).
[487] Resp. Rej., ¶ 167.
[488] Resp. Rej., ¶ 168 (emphasis in original). *See also*, Resp. Rej., ¶¶ 99, 108; Tr., Day 1, 211:20-212:3 (Ms. Silberman).

217.[489] The Respondent adds that BSLS and BSJ presented merits defences on this topic and had an opportunity to confront the plaintiffs' evidence.[490]

377. *Second*, with regard to the admission of the Foley Letter, the Respondent contends that:

- The criticism of the Supreme Court is misdirected, as it was the First Instance Court which admitted the Foley Letter into the record, a decision never challenged by BSLS and BSJ.[491]
- The Foley Letter was properly admitted into evidence under Panamanian law; and while the Claimants complain arguing that the letter was produced only with Muresa's expert report, in fact it was admitted as evidence by the First Instance Court on two other occasions (with L.V. International's *Coadyuvante* Petition and with the court-appointed expert's report), in respect of which the Claimants have not advanced an argument of impropriety.[492]
- The Respondent further observes that the First Instance Court did not rule on the objections to the admission of the Foley Letter as an attachment to Muresa's expert report, and therefore, the evidence is considered admitted by operation of law.[493]
- BSLS had multiple opportunities to address the admission and significance of the Foley Letter, including before the First Instance Court; and in fact, BSLS and BSJ made arguments on those subjects on several occasions, although neither the First Instance Court, nor the Appellate Court or the Supreme Court upheld their arguments about admission of the Foley Letter.[494]

378. Panama further submits that (i) the authenticity of the Foley Letter has never been questioned;[495] (ii) because the letter refers to trademarks around the world, other Bridgestone entities must have been involved (because BFS did not have rights to FIRESTONE and BRIDGESTONE everywhere in the world);[496] (iii) it is not sufficient to state that the letter only involved BFS Brands and L.V. International, because, the letter

[489] Resp. Rej., ¶ 169. *See also*, Tr., Day 1, 158:12-21 (Ms. Silberman).

[490] Resp. Rej., ¶ 170.

[491] Resp. Rej., ¶ 172. *See also*, Resp. Rej., ¶ 75.

[492] Resp. Rej., ¶ 173. *See also*, Resp. Rej., ¶ 75; Tr., Day 1, 178:9-179:1; 186:13-187:7 (Ms. Silberman); Tr., Day 5, 1293:15-21 (Ms. Silberman).

[493] Tr., Day 1, 180:3-12 (Ms. Silberman).

[494] Resp. Rej., ¶ 174. *See also*, Resp. Rej., ¶ 99; Resp. PHB, ¶ 7; Tr., Day 1, 186:3-9; 212:5-17 (Ms. Silberman).

[495] Tr., Day 1, 142: 5-13 (Ms. Silberman).

[496] Tr., Day 1, 142:19-143:2 (Ms. Silberman); Tr., Day 5, 1298:1-6 (Ms. Silberman).

itself refers to Bridgestone/Firestone which is a trade name that many of the Bridgestone companies were using;[497] and (iv) the purpose of the letter was to intimidate, as the text of the letter demonstrates.[498]

379. Panama adds that the Claimants' argument at the Hearing questioning the Supreme Court's application of Panamanian law and arguing that the court should have conducted a conflict of law analysis in connection with the Foley Letter, was a brand-new argument, as in the Civil Proceeding BSJ and BSLS's position was that the court should apply Article 217 of the Judicial Code.[499]

380. *Third*, as to the complaint that the Supreme Court decided that BSLS and BSJ were reckless and intimidating in filing opposition actions against RIVERSTONE in other countries although Muresa's complaint had only referred to the Panama Trademark Opposition Proceeding, the Respondent argues that:

- The Supreme Court Judgment did not violate the principle of consistency in Article 991 of the Judicial Code, because that Article provides that the judgments must "*be in accordance with the petitions made in the claim, or subsequently alleged in cases specifically foreseen* […] *if so required by Law*;" and one such case is a *coadyuvante* petition. Under Article 603 of the Judicial Code, a court is required to review, consider and resolve the issues raised in a *coadyuvante* petition, and L.V. International had raised the opposition actions worldwide, and the Foley Letter.[500]

- BSLS had a number of opportunities to be heard on the issue of the Bridgestone Group's conduct outside of Panama during the Civil Proceeding.[501]

381. *Fourth*, Panama also opposes the allegation that the Supreme Court did not support its ruling on damages on evidence or assessment. It contends that the Supreme Court based its conclusion that RIVERSTONE sales had decreased during the relevant period on expert opinions (Muresa's expert report and the court-appointed expert's findings), and on the

[497] Tr., Day 5, 1296:20-1297:5 (Ms. Silberman).
[498] Tr., Day 1, 144:5-145:4 (Ms. Silberman).
[499] Resp. PHB, ¶ 19.
[500] Resp. Rej., ¶¶ 176, 61.
[501] Resp. Rej., ¶ 177. *See also*, Resp. Rej., ¶¶ 99, 108; Tr., Day 1, 212:3-4 (Ms. Silberman).

consistent testimony of seven witnesses.[502] According to Panama, by the time the case reached the Supreme Court there "*was substantial evidence in the record that could support a conclusion that* […] *Muresa and* [TGFL] *had suffered a sizable amount of damages.*"[503] Further, Panama explains that the damages award was capped at US$5,000,000.00 because under Article 991 of the Judicial Code, a defendant cannot be ordered to pay more than it was requested in the complaint.[504] Finally, Panama suggests that the length and detail of the Supreme Court is not unusual, given the amount of decisions rendered by the court every year, which are not treated as precedents (as they are in a common law jurisdiction).[505]

382. In conclusion, Panama argues that a chronological review of the facts of this case confirms that BSJ and BSLS were afforded due process throughout the Civil Proceeding.[506]

(b) Arbitrariness

383. Panama contends that the only argument on arbitrariness is that "[t]*he Supreme Court did not conduct a reasoned examination of the evidence* […] *and relied on unsupported witness evidence that was contradicted by documentary evidence*."[507] And, according to Panama, that argument fails for the following reasons: *first*, it is within the discretion and mandate of a domestic court to weigh the evidence to reach a decision in favour of one party; *second*, an international tribunal does not have competence to retrace the evidence; and *third*, the Supreme Court did conduct a reasoned examination of the evidence.[508] Panama submits that the Supreme Court relied on the evidence that it considered dispositive, namely, the Foley Letter, BSLS's withdrawal of its appeal of the ruling of the circuit court in the Panama Trademark Opposition Proceeding, the consistent testimony of seven witnesses on

[502] Resp. Rej., ¶ 179. *See also*, Resp. Rej., ¶ 119.
[503] Resp. Rej., ¶ 87.
[504] Resp. Rej., ¶ 179.
[505] Resp. Rej., ¶ 180. *See also*, Resp. PHB, ¶ 22.
[506] Resp. PHB, ¶ 6.
[507] Resp. Rej., ¶ 164.
[508] Resp. Rej., ¶ 164.

the issue of tire sales, and two expert reports addressing decrease in RIVERSTONE tire sales.[509]

(c) Corruption

384. The Respondent argues that the Claimants' accusation of corruption fails for various reasons articulated both in the Counter-Memorial and in the Rejoinder.[510]

385. *First*, according to the Respondent the Claimants have not satisfied the high standard of proof for corruption in international arbitration, which requires that the party alleging corruption provides "*clear and convincing evidence*."[511] Moreover, the Respondent argues, the Claimants must substantiate any corruption claim with evidence that demonstrates that there was corruption *in the specific case* giving rise to the denial of justice allegation.[512]

386. However, Respondent argues, the Claimants have acknowledged that they do not have any evidence of corruption in the context of the Civil Proceedings.[513] Panama submits that the Claimants' only "*evidence*" is comprised of allegations in the witness statements of a Bridgestone employee (Mr. Akey, Vice-President of BSAM) and a hired-consultant (Mr. Lightfoot, a consultant hired by the Claimants' counsel), regarding statements at a meeting with the Panamanian Ambassador on 13 March 2015, which are inconsistent with what the Request for Arbitration initially alleged, and which are "*flatly denied*" by the Panamanian

[509] Resp. Rej., ¶ 165.

[510] Resp. C-Mem., ¶ 55; Resp. Rej., ¶¶ 181-188.

[511] Resp. C-Mem., ¶ 56 (citing **RLA-0115**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 ("***Fraport***"), ¶ 479; **RLA-0116**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 ("***Wena***"), ¶¶ 77, 117; **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 ("***EDF***"), ¶ 221; **RLA-0117**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("***Karkey***"), ¶ 492; **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 ("***Jan Oostergetel***"), ¶ 303; **RLA-0100**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 ("***Liman***"), ¶¶ 422, 424; **RLA-0064**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Cases No. ARB/08/1 and ARB/09/20, Award, 16 May 2012 ("***Unglabe***"), n. 8); Resp. Rej., ¶¶ 188-189; Resp. PHB, ¶ 24.

[512] Resp. Rej., ¶ 189.

[513] Resp. Rej., ¶ 189.

Ambassador who has submitted a witness statement in this proceeding too.[514] The Respondent observes that the Claimants have not presented any contemporaneous records of the alleged statement by the Ambassador;[515] and the Ambassador's recollection is consistent with an "*ayuda memoria*" prepared immediately after the meeting by the Embassy's commercial attaché.[516]

387. The Respondent observes that while the Claimants have relied on arbitral decisions which state that a tribunal may consider "*circumstantial evidence*," neither of those awards have absolved the party alleging corruption from the burden of providing evidence (circumstantial or otherwise) "*in the case or situation at hand*."[517] Panama goes on to submit that the purported circumstantial "evidence" of corruption relied upon by the Claimants (i.e., (i) general NGO reports giving Panama a low score on "*perceived*" levels of corruption; and (ii) complaints filed against Supreme Court Justices in cases other than the Civil Proceeding) does not meet the standard.[518] The Respondent observes that the NGO reports are based on perceived levels of corruption, and Panama scores similarly to every other State in Central and South America;[519] and the complaints against Supreme Court justices concern cases "*unrelated*" to the Civil Proceeding at issue, with no nexus to this specific case, and therefore they cannot provide evidence that the Supreme Court Judgment was procured through corruption and should be disregarded.[520]

388. Finally on this point, the Respondent submits that there is no basis in this case to shift the burden of proof to Panama to establish that the Supreme Court Judgment was *not* the product of corruption, as the Claimants are attempting to do by asking the Tribunal to draw

[514] Resp. C-Mem., ¶¶ 57-59 (citing RWS-Gonzalez Revilla, ¶¶ 6-7). *See also*, Resp. Rej., ¶¶ 190-191; Resp. PHB, ¶ 26.
[515] Resp. PHB, ¶ 26.
[516] Resp. C-Mem., ¶ 59 (citing **R-0035**, *Ayuda Memoria* of the Embassy of Panama (13 March 2015), p. 1).
[517] Resp. Rej., ¶¶ 192-193.
[518] Resp. Rej., ¶¶ 192, 195. *See also*, Resp. PHB, ¶¶ 25, 27.
[519] Resp. Rej., ¶ 195.
[520] Resp. Rej., ¶ 196.

adverse inferences.[521] In any event, Panama "*emphatically denies that the Supreme Court Judgment was procured through corruption.*"[522]

389. *Second,* relatedly, according to Panama, the claim for corruption is not supported by any specific factual allegations, let alone evidence.[523] The Claimants have not identified any factual allegation about what the alleged corruption supposedly entailed.[524] According to the Respondent, the Claimants are asking the Tribunal to either make a general finding of corruption without finding any specific facts, or to fashion a factual narrative of corruption, neither of which is a viable option.[525]

390. In this sense, Panama cautions that under Article 48(3) of the ICSID Convention the Tribunal is required to render an award that "*states the reasons upon which it is based*," which requires making findings of fact, law and stating the Tribunal's conclusions. Inventing a narrative of corruption when the Claimants have presented none, the Respondent argues, would amount to an annullable error.[526]

391. *Third*, Panama submits that the claim for corruption is duplicative, and it fails for the same reason as the other alleged categories of denial of justice, given that the Claimants are asking the Tribunal to "*infer*" corruption in the Supreme Court Judgment because the Judgment was "*so clearly and manifestly wrong*" (i.e. for the same arguments about arbitrariness and incompetence).[527] The Respondent submits that (i) it is "*wholly inappropriate for a tribunal to infer the existence of corruption in the absence of 'clear and convincing evidence*;'" (ii) the alleged violations of Panamanian law do not constitute valid international claims, and (iii) in any event, the alleged errors would never justify a finding of corruption.[528]

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[521] Resp. Rej., ¶ 197.
[522] Resp. Rej., ¶ 197.
[523] Resp. Rej., ¶¶ 182-183.
[524] Tr., Day 1, 136:7-10 (Ms. Silberman).
[525] Resp. Rej., ¶ 184.
[526] Resp. PHB, ¶ 24.
[527] Resp. C-Mem., ¶ 61.
[528] Resp. C-Mem., ¶ 61.

392. *Fourth*, in the Respondent's submission, the alleged statement by the Ambassador does not bind the State, because: (i) the context of the meeting (informal and private) dilutes the potential effect of the alleged statement; (ii) the Ambassador has testified that at the time of the meeting he did not know the specific parties to the litigation or the names of the Supreme Court Judges, and therefore he was unable to admit that they were corrupt in this case; and (iii) in case of doubt about the effect of declarations by a State official under international law, the Tribunal must interpret them restrictively.[529]

393. *Fifth,* the Claimants first purported to complain of corruption after this arbitration began, and a lapse of time from the alleged acts of corruption and the first claim of corruption, raises doubt as to why the allegation was not raised before.[530] Indeed, the Respondent argues, the theory of corruption was not even put forward with the Notice of Arbitration or the Request for Arbitration, and it first featured in the Memorial.[531] The Respondent goes on to submit that if the alleged admission of corruption in the March 2015 meeting with the Ambassador had actually occurred, presumably it would have featured in the pleadings long before the Memorial.[532]

(d) The Panamanian Checks and Balances System

394. The Respondent argues that, to the extent the Claimants' criticisms to the Panama's system for investigating and impeaching Supreme Court justices (the National Assembly Complaint Mechanism) was intended to constitute a denial of justice claim, that claim would fail for various reasons, and should be dismissed by the Tribunal.[533]

395. *First*, it is outside the scope of the TPA, which does not authorize the Tribunal to judge Panama's system of government in the abstract.[534] Panama explains that this follows from Article 10.1.1 of the TPA, which provides that Chapter 10 applies to "*measures*" adopted

[529] Resp. C-Mem., ¶ 62. *See also*, Resp. Rej., ¶ 191; Resp. PHB, ¶ 26.
[530] Resp. Rej., ¶ 185 (citing **CLA-0137**, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 ("***Union Fenosa***"), ¶ 7.53).
[531] Resp. Rej., ¶ 186.
[532] Resp. Rej., ¶ 187.
[533] Resp. Rej., ¶ 198.
[534] Resp. Rej., ¶ 198.

by a TPA Party "*relating to*" investors of the other TPA Party and covered investments. Therefore, absent such a measure there can be no breach and no viable claim.[535] For Panama, as BSLS did not exercise its right to invoke the mechanism for investigating Supreme Court justices, it is unable to demonstrate that the mechanism somehow failed it and, therefore, there are no legal or factual bases for finding that Panama breached an international obligation.[536]

396. *Second,* local remedies have not been exhausted in connection with this claim. This is a requirement for asserting a denial of justice.[537]

397. *Third*, in any event, the allegations based on the National Assembly Complaint Mechanism are without merit, because (i) they rely on abstract and structural complaints about the system; and (ii) they are based on misrepresentations of the three complaints chosen by the Claimants, none of which relates to the Civil Proceeding at issue in this case.[538] Panama submits that the reality of the system is that justices are actually investigated and held accountable for wrongdoing as shown by two recent examples discussed in the Rejoinder.[539]

(iii) The Criticisms of the Supreme Court Judgment Are Based on Mischaracterizations and Are Unfounded

398. According to Panama, the complete story of the Civil Proceeding in Panama is not one that proves a denial of justice, but rather one of a routine domestic litigation, which shows that (i) BSLS and BSJ had ample opportunity to present their arguments; (ii) in its context, the outcome was understandable; (iii) the present case is nothing but an unfounded and improper appeal; and (iv) the underlying events had nothing to do with BSAM.[540] The Supreme Court Judgment accords with Panamanian law, the record, and common sense;[541]

[535] Resp. Rej., ¶ 199.
[536] Resp. Rej., ¶ 201.
[537] Resp. Rej., ¶¶ 198, 202.
[538] Resp. Rej., ¶¶ 198, 203, 212-213.
[539] Resp. Rej., ¶ 207.
[540] Resp. Rej., ¶¶ 131-132. *See also*, Resp. Rej., ¶ 50.
[541] Resp. PHB, ¶ 19.

and a review of the documents confirms that the logic of the judgment can be followed.[542] According to Panama, and contrary to the Claimants' submissions, there is nothing "*shocking*" about the Supreme Court Judgment.[543]

399. Among others, the Respondent denies the Claimants' repeated contention that the Supreme Court found that it was reckless to oppose a trademark if the applicant was already marketing the product. Panama submits that the Supreme Court explicitly limited the scope of its ruling to the facts at hand by saying: "*It is not this Chamber's intention to say that initiating a legal action to claim a right may be interpreted as a synonym for the damages that may be caused to a plaintiff.*"[544]

400. The Respondent further takes issue with the allegation in the Memorial that the Supreme Court Judgment misapplied various provisions of Panamanian law. Panama's primary view is that the Tribunal does not need to consider those issues because even if the Supreme Court had misapplied certain aspects of Panamanian law (which it did not), that would not amount to a denial of justice.[545] That is because "*a denial of justice requires a violation of* international *law.*"[546]

401. That said, Panama finds it important to "*set the record straight*" on the subject of its law and the application of it by the Supreme Court.[547] It submits that the Claimants "*fantastical picture*" of alleged flaws and due process violations in the Supreme Court Judgment does not reflect the reality of the proceeding or the Judgment.[548] The Respondent argues that a "*complete and accurate description of the local proceedings demonstrates that the Supreme Court did not misapply Panamanian law*" which in any event is "*an issue which is not relevant to the claim under Article 10.5.*"[549] Panama submits that the following chart

[542] Resp. PHB, ¶ 21. *See also*, Tr., Day 1, 197:20-198:2; 202:7-18 (Ms. Silberman).
[543] Tr., Day 1, 203:19-207:3 (Ms. Silberman).
[544] Resp. Rej., ¶ 118 (quoting **R-0034**, Supreme Court Judgment, p. 13). *See also*, Resp. PHB, ¶ 9 (table, 6th item).
[545] Resp. C-Mem., ¶ 65.
[546] Resp. C-Mem., ¶ 160 (emphasis in original).
[547] Resp. C-Mem., ¶ 65.
[548] Resp. C-Mem., ¶ 67.
[549] Resp. C-Mem., ¶ 68.

"*thoroughly debunk*[s]" the Claimants' allegations about the application of Panamanian law by the Supreme Court, and demonstrates that the Supreme Court did not misapply Panamanian law:[550]

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
The Supreme Court applied Article 217 to Muresa and Tire Group's claims, even though Muresa and Tire Group did not invoke Article 217.[417]	Bridgestone Licensing first invoked Article 217 in its response to Muresa and Tire Group's complaint and requested that the court apply Article 217.[418] The Bridgestone Defendants again invoked Article 217 as the "govern[ing]" law during the appeal proceeding.[419] The Bridgestone Defendants subsequently praised the appellate court for its application of Article 217 and asked the Supreme Court to likewise apply Article 217.[420] Bridgestone Licensing's current position thus represents a total about-face. Furthermore, pursuant to the principle of *iura novit curia* principle, a court can apply the law it deems relevant to allegations of abuse of process, which in the case the court did by applying Article 217.[421]

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
"The Supreme Court Judgment found BSLS and BSJ liable simply for having exercised their right to claim protection from the courts in relation to the application for registration of a potentially confusing similar trademark."[422]	The Supreme Court did not penalize the Bridgestone Defendants simply for initiating the Trademark Challenge Proceeding; it found them liable for abusive conduct under Panamanian tort law based on the totality of the circumstances.[423] The Supreme Court also expressly disclaimed the notion that the mere filing of an opposition proceeding created liability in tort and explicitly limited its findings to the specific circumstances of this case.[424]
The Supreme Court considered the Bridgestone Defendants' conduct in other countries (*i.e.*, the Demand Letter), but the Bridgestone Defendants did not have an opportunity to properly respond to this evidence "because it was not made in Muresa's [original] complaint."[425]	The Demand Letter was submitted with the Plaintiff's expert report ***and with the court-appointed expert's report*** during the first instance of the Civil Proceeding, on 24 May 2010.[426] Notably, the regular rules of evidence do not apply to documents submitted with expert reports under Panamanian law.[427] The Bridgestone Defendants thus had ample time to address this evidence before the Supreme Court Judgment of 28 May 2014. Furthermore, (i) Bridgestone Licensing first raised the subject of its trademark opposition proceedings abroad, and (ii) it did so during the first instance on 13 October 2008.[428] Bridgestone Licensing cannot now claim that it was surprised by the relevance of or did not have time to submit evidence related to its conduct abroad.[429]

[550] Resp. C-Mem., ¶¶ 159 (citations omitted), 160.

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
The Supreme Court ruled in favor of Muresa and Tire Group, despite the fact that the Bridgestone Defendants had presented evidence in support of their defense.[430]	In most cases, the parties to a litigation will present contradictory evidence; it is within the discretion of a domestic court to weigh that evidence and reach a decision in favor of one party.
The Supreme Court relied on the Plaintiff's allegations that Muresa and Tire Group had been forced to halt sales of tires, which was inconsistent with the documentary evidence.[431]	The Supreme Court actually found — on the basis of the expert opinions and documentary evidence — that RIVERSTONE tire sales had decreased during the relevant period, which substantiated the Plaintiff's claim of loss.[432] This is confirmed by Magistrate Mitchell in his dissenting opinion.[433]

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
"The amount of damages was not assessed at all" by the Supreme Court.[434]	By the time the case reached the Supreme Court, there was an extensive record of documentary and expert evidence on the subject of damages, upon which the Supreme Court relied. As affirmed by Former Supreme Court Magistrate Lee, the Supreme Court does examine damages and its analysis is typical for a cassation proceeding.[435] Further, the fact that the Judgment rendered was for exactly USD 5 million results from the legal restriction that a judgment may not exceed the amount sought in the complaint. The record contained evidence of damages in excess of USD 5 million,[436] but the Supreme Court capped them.

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
The Supreme Court relied upon the Demand Letter, even though the Letter: (i) was not properly authenticated or verified; (ii) was not properly admitted; (iii) was not sent by Bridgestone Corporation or Bridgestone Licensing; (iv) was submitted in a foreign language; and (v) was not relevant.[437]	Bridgestone Licensing's attempts to complain about the admission and relevance of the Demand Letter represent precisely the types of appeal arguments that are not denial of justice claims. In any event, Bridgestone Licensing: (i) does not — and cannot — dispute the authenticity of the Letter, as the Supreme Court found;[438] (ii) failed to mention that the Demand Letter was submitted with the court-appointed expert's report; (iii) cannot deny that the parent company and its subsidiaries are considered a single corporate family;[439] (iv) admits that the Letter was accompanied by a translation;[440] and (v) fails to mention that the Bridgestone Defendants admitted that the Letter was a "warning,"[441] which is clearly relevant to the charges of tortious conduct (including anti-competitive threats and warnings). In any event, the articles invoked by Bridgestone Licensing with respect to the Demand Letter do not apply to the evidence that experts provide because they consider it relevant to their report,[442] and Bridgestone Licensing had an opportunity to cross-examine the experts on the subject of the Letter.[443]

2. The U.S. Submission

402. The United States observe that Article 10.5.1 of the TPA includes the obligation to provide FET, which is an obligation circumscribed by the customary international law minimum standard of treatment,[551] as shown by Article 10.5.2 of the TPA and Annex 10-A of the TPA.[552] Put another way, "*the fair and equitable treatment obligation in the TPA is the customary international law obligation.*"[553] And given that under Article 10.5.2(a) of the TPA the obligation not to deny justice is included "*as part of the concept of fair and equitable treatment*," it is also a customary international law obligation.[554] In other words, Article 10.5.2(a) of the TPA "*includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.*"[555]

403. It follows, the United States argue, that in order to establish a breach of Article 10.5.1. for denial of justice "*a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law.*"[556]

404. Answering the question of how a covered investment is accorded treatment in an adjudicatory proceeding for the purpose of a denial of justice claim, the United States submit that, for a claim under Article 10.16.1(a) of the TPA, "*a Claimant, investor,* […] *must establish that the Claimant was, or sought to be but was prohibited from becoming, a party to an adjudicatory proceeding in order for that treatment to result in a denial of justice by virtue of that proceeding.*"[557]

405. As to the standard for denial of justice, the United States submit that:

> "Denial of justice in its historical and 'customary sense' denotes 'misconduct or inaction of the judicial branch of the government' and involves 'some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.' A

[551] U.S. Third Sub., ¶ 3; Tr., Day 1, 19:19-20:4 (Ms. Thornton).
[552] Tr., Day 1, 20:5-21 (Ms. Thornton).
[553] Tr., Day 1, 20:22-21:1 (Ms. Thornton).
[554] Tr., Day 1, 21:2-8 (Ms. Thornton).
[555] U.S. Third Sub., ¶ 3.
[556] U.S. Third Sub., ¶ 3.
[557] Tr., Day 1, 24:11-21 (Ms. Thornton).

> denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a 'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety.' More specifically, a denial of justice exists where there is, for example, an 'obstruction of access to courts,' 'failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.' A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust. […] [T]o be manifestly unjust a court decision must amount 'to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man[.]' Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process. At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law."[558]

406. The United States also add that it is well-established that international tribunals, such as tribunals under the TPA, "*are not empowered to be supranational courts of appeal on a court's application of domestic law*."[559]

407. As to burden of proof, the United States explain that pursuant to Article 10.22 of the TPA, the Tribunal shall decide the issues in dispute in accordance with the TPA and applicable rules of international law. Accordingly, under general principles of international law, a claimant must prove its claims by "*preponderance of the evidence*;" but when there are allegations of corruption, those general principles of international law require that the party asserting the corruption provide "*clear and convincing*" evidence.[560]

[558] U.S. Third Sub., ¶ 4 (citations omitted).

[559] U.S. Third Sub., ¶ 4. The United States also made submissions concerning Articles 10.3 and 10.4 of the TPA. U.S. Third Sub., ¶¶ 5-12. However, the claims under those provisions were subsequently withdrawn. Cl. Reply, ¶ 75.

[560] Tr., Day 1, 25:17-26:16 (Ms. Thornton).

3. The Tribunal's Analysis

a. Introduction

408. The Claimants' case that their investments were harmed by a denial of justice focuses exclusively on the decisions taken by the Majority of the Supreme Court (for the most part we shall speak simply of "the Court" when referring to this Majority). The gravamen of the Claimants' attack is on the result reached by the Court, which they claim was shockingly perverse.

409. This attack is allied to, and overlaps with, allegations of breach of due process. As to these there has been a vigorous dispute, supported by expert evidence on each side, as to whether the various allegations of breach of due process are well founded. As to this dispute what matters is not whether the Supreme Court disregarded procedural requirements but whether, if they did, this supports the Claimants' case that there was a denial of justice under international law. Do they support the case that, taken as a whole, the decision reached by the Court was one that no honest and competent court could have reached?

410. It is not possible to give a satisfactory answer to the latter question without considering the merits of the allegations made by the Claimants of procedural deficiencies. This we shall do, although we emphasize that, consistent with the view of a tribunal's function taken in many other cases, we are not purporting to exercise an appellate function.

411. Some of the attacks made by the Claimants on the Supreme Court Judgment allege both a failure to comply with procedural rules and a failure properly to appraise the evidence. The Foley Letter is a good example of this. The Claimants make a purely procedural attack on the admission of the Foley Letter as evidence, and combine this with an attack on the significance attached by the Supreme Court to the Foley Letter. The Tribunal proposes first to consider attacks that are purely procedural before proceeding to consider the allegations made by the Claimants in relation to the appraisal of the evidence. We shall approach these matters in the following order:

<u>Allegations of Breach of Due Process</u>

- Application of the wrong ground for cassation.
- Wrongful application of Article 217 of the Judicial Code.
- Wrongful admission of the Foley Letter.

Allegations of Errors in Appraisal of the Evidence: Liability

- Significance attached to the Foley Letter.
- Significance attached to withdrawal of the appeal in the Trademark Opposition Proceeding.
- Disregard of finding of good faith in the Trademark Opposition Proceeding.
- Finding of recklessness.
- Finding of causation.

Allegations of Errors in Appraisal of the Evidence: Damages

- Disregard of discrepancy between pleading and evidence of loss.
- Disregard of evidence contradicting Muresa's case on loss.

b. Allegations of Breach of Due Process

(i) Alleged Application of the Wrong Ground for Cassation[561]

412. Article 1169 of the Judicial Code sets out the grounds upon which cassation can be obtained. These include "*error of fact about the existence of evidence*" and error of "*the rule of law in terms of the appreciation of the said evidence*."[562] Muresa applied for cassation on the former ground.[563] In the course of oral submissions on the first day of the Hearing, Mr. Williams for the Claimants took a novel point.[564] The Supreme Court had ordered cassation on the ground of "*error of fact about the existence of evidence*" in relation to six categories of evidence. It was, however, quite clear that the Appeal Court was aware of the existence of that evidence. The submissions that had led to cassation were not that

[561] See *supra*, ¶¶ 352-353.
[562] **R-0138**, Judicial Code of the Republic of Panama (10 September 2001), Art. 1169.
[563] See *supra*, ¶ 291.
[564] Tr., Day 1, 52-55 (Mr. Williams).

the Appeal Court had been unaware of the existence of the evidence in question, but rather that the Appeal Court had ignored this evidence. That fell properly within the ground of error of law "*in the appreciation of evidence*," but no application had been made on that ground. Cassation had been ordered on a ground that had not been made out. This submission was in due course supported by Mr. Arjona, the Claimants' expert on Panamanian law.[565]

413. Mr. Lee, Panama's expert on Panamanian law, did not agree. Giving evidence in chief, he stated that the jurisprudence of the Civil Chamber establishes that there is "*an error of fact about the existence of evidence*" when the Appeal Court ignores or takes no account of evidence, not when it is unaware that the evidence exists.[566]

414. Mr. Lee was cross-examined strenuously and at length about this evidence,[567] but stuck to his guns. Asked, however, to refer to a specific decision that supported his evidence he was unable to do so from memory, because unlike in the common law, where cases are referred to by the names of the parties, in Panama, cases are referred to by the date of decision and he knew of no lawyer in Panama who has the ability to recall cases by date of decision. That said, he stated that he could find one if permitted to search his library.[568]

415. By the end of the Hearing no supporting decision had been produced by Mr. Lee. In his closing submissions, Mr. Williams submitted that, in these circumstances, the Tribunal should prefer the evidence of Mr. Arjona to that of Mr. Lee on this point, the more so because this accorded with the natural meaning of Article 1169 of the Judicial Code. The Supreme Court had allowed the cassation recourse even though it had been brought under the wrong ground:

> "We say that it is clear that no competent and honest court could have made the findings that the Supreme Court did on the Cassation Recourse."[569]

[565] Tr., Day 2, 374-377 (Mr. Arjona).
[566] Tr., Day 2, 444-445 (Mr. Lee).
[567] Tr., Day 2, 558-581 (Mr. Williams / Mr. Lee).
[568] Tr., Day 2, 580-581 (Mr. Lee).
[569] Tr., Day 5, 1224:9-12 (Mr. Williams).

416. After the Hearing, on 24 September 2019, with the permission of the Tribunal, Panama submitted the report of a decision and an extract from a textbook that Mr. Lee had produced. These supported the evidence that he had given. The former, *G.A.S., S.A. v. Cano*,[570] is an application for cassation. In it the Supreme Court draws a distinction between the two grounds for cassation:[571]

> "When a judgment under appeal does not consider a means of evidence, it is worth noting, an assumption of underlying grounds is set up other than the grounds invoked, namely, 'error of fact in the existence of evidence.' The fact that certain evidence had no impact on a decision of a case because it was disregarded by a judge in his ruling shows error of fact regarding the existence of evidence. Therefore, to claim an evidentiary defect the concept of 'error of law in the assessment of the evidence' is not suitable, but rather 'error of fact in the existence of evidence.'"

417. The textbook on Cassation and Review, states under the heading "*Error of Fact Regarding the Existence of Evidence*," that "[a]*n error of fact about the existence of evidence occurs when evidentiary means or elements are ignored* […]."[572]

418. Throughout the Cassation proceedings all concerned, including the dissenting Judge, proceeded on the basis that "*Error of Fact Regarding the Existence of Evidence*" was the appropriate ground of recourse to found an allegation that the Appeal Court had ignored relevant evidence. The Tribunal is satisfied that this accorded with established practice. The Claimants' contention that the Supreme Court applied the wrong ground when allowing the Cassation Application is without merit.

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[570] **RLA-0226**, G*.A.S., S.A. v. Magalis Gaitán Cano and Maribel Gaitán Cano*, Supreme Court, File No. 424-12, Judgment (10 March 2014).

[571] **RLA-0226**, G*.A.S., S.A. v. Magalis Gaitán Cano and Maribel Gaitán Cano*, Supreme Court, File No. 424-12, Judgment (10 March 2014), p. 5.

[572] **RLA-0225**, J. Fábrega and A. Guerra de Villalaz, *Civil, Criminal, and Labor, Casación y Revisión*, Sistemas Jurídicos, S.A. (2001), p. 109 (p. 4 translation).

(ii) Alleged Wrongful Application of Article 217 of the Judicial Code[573]

419. The Claimants, relying particularly on the evidence of Mr. Arjona, allege (i) that Muresa's claim was founded on an alleged breach by BSJ and BSLS of Article 1644 of the Civil Code; (ii) that at all stages BSJ and BSLS challenged Muresa's claim on the ground that it had been brought under Article 1644 of the Civil Code when it should have been brought under Article 217 of the Judicial Code; and (iii) that the Supreme Court wrongly found in favour of Muresa on the basis of breach by BSJ and BSLS of Article 217, notwithstanding that this was not the claim that Muresa had advanced.[574]

420. Panama, relying particularly on the evidence of Mr. Lee, responds by alleging (i) that in the Civil Proceedings the Claimants had invited the several courts to apply Article 217 of the Judicial Code; (ii) that the Appeal Court had accepted that invitation and dismissed Muresa's appeal on the ground that breach of Article 217 was not made out; (iii) that the Claimants had supported the decision of the Appeal Court; and (iv) that the Supreme Court had correctly applied Article 217 of the Judicial Code in conjunction with Article 1644 of the Civil Code.[575]

421. In order to resolve this conflict, it is necessary to make a short resume of the relevant parts of the proceedings that we have set out above.

422. BSJ's and BSLS's Petition for Nullification[576] alleged that Article 1644 of the Civil Code did not bear on the facts of the complaint. The law that did bear on them was Article 217 of the Judicial Code. They further alleged that the claim under Article 217 of the Judicial Code should have been brought in the course of the Trademark Opposition Proceeding.[577] When the Court finally dismissed this Petition, it treated the claim as one properly brought

[573] See *supra*, ¶¶ 325-329

[574] CER-Arjona First, ¶¶ 30-37; CER-Arjona Second, ¶¶ 18-39.

[575] RER-Lee First, ¶¶ 69-73.

[576] See *supra*, ¶ 245.

[577] **C-0186 / R-062**, Motion for Dismissal for Lack of Jurisdiction and Violation of Due Process, Eleventh Circuit Civil Court (18 August 2009), p. 3.

under Article 1644 of the Civil Code and made no mention of Article 217 of the Judicial Code.

423. The Concluding Arguments[578] on behalf of BSJ and BSLS in the First Instance Proceedings averred that Article 1644 of the Civil Code did not apply to the suit because it was a "*generic norm for compensation of damages and losses in cases of noncontractual civil liability*."[579] They contended that Article 217 of the Judicial Code applied to the suit.[580] They went on to deal at length with the merits of the claim, treating it as one in which the good faith of BSJ and BSLS was in issue. They ended by seeking a declaration that the claim was "*unproven, and therefore, denied*."[581]

424. The First Instance Judgment turned, as we have explained,[582] on Muresa's failure to prove that it had suffered the damages claimed. The "*Legal Grounds*" referred to Article 1644 of the Civil Code. No reference was made to Article 217 of the Judicial Code.

425. In their Opposition to the Appeal, BSJ and BSLS took the point that Article 217 of the Judicial Code and not Article 1644 of the Civil Code governed the claim. They then went on to deal with the merits of the claim, ending with the following submission:

> "[…] the simple act of filing a claim does not generate damages in and of itself, as established by Article 217 of the Judicial Code, and therefore no unlawful civil act has been committed […]."[583]

[578] **C-0200**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Closing Arguments Before the Eleventh Civil Circuit Court (11 June 2010).
[579] **C-0200**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Closing Arguments Before the Eleventh Civil Circuit Court (11 June 2010), ¶ 2.4.
[580] **C-0200**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Closing Arguments Before the Eleventh Civil Circuit Court (11 June 2010), ¶ 2.3.
[581] **C-0200**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Closing Arguments Before the Eleventh Civil Circuit Court (11 June 2010), § IX.
[582] See *supra*, ¶ 273.
[583] **C-0023**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Opposition to Appeal (14 January 2011), p. 38.

426. It is plain from its judgment, and in particular the passage quoted at paragraph 288 *supra*, that the Appeal Court accepted BSJ's and BSLS's submission that liability was governed by Article 217 of the Judicial Code.

427. In its application for Cassation, Muresa for the first time averred that Article 217 of the Judicial Code was in play.[584] Their subsequent submissions to the Supreme Court repeatedly averred "*reckless behaviour*" on the part of BSJ and BSLS.[585]

428. BSJ and BSLS for their part, in opposing the application for Cassation[586] observed that Muresa was relying on both Article 217 of the Judicial Code and Article 1644 of the Civil Code and that these had been applied by the Appeal Court when rejecting Muresa's appeal. In their subsequent submissions to the Supreme Court,[587] BSJ and BSLS set out verbatim the passage of the Appeal Court's Judgment in which it had applied Article 217 of the Judicial Code in dismissing the appeal.

429. This is the background to the application by the Majority of the Supreme Court of "*Article 1644 Civil Code in accordance with Article 217 of the Judicial Code.*"[588] By the time that the case reached the Supreme Court both parties were *ad idem* that liability fell to be determined by the application of Article 217 of the Judicial Code. BSJ's and BSLS's submissions proceeded on this basis. It is not correct to say that they had no opportunity to address the test of liability under Article 217, for they did so. The Tribunal notes that the dissenting judge, whose judgment the Claimants have relied upon as a model of that which the Majority should have produced, applied Article 217 of the Judicial Code.

430. The Tribunal would add that it sees no conflict between the original claim advanced under Article 1644 of the Civil Code and a claim under Article 217 of the Judicial Code. BSJ and BSLS had been right to submit in the First Instance Proceedings that Article 1644 of

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[584] See *supra*, ¶ 293.

[585] See *supra*, ¶ 296.

[586] **R-0047**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.' Objection to the Admission of the Cassation Recourse (16 September 2013).

[587] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.' Response to the Cassation Recourse (14 January 2014).

[588] **C-0027 / R-0034**, Supreme Court Judgment, p. 13 (as translated in R-0034).

the Civil Code was "*a generic norm for compensation of damages and losses in cases of noncontractual civil liability*."[589] Article 1644 of the Civil Code is a broad provision which imposes liability for causing damage "*by action or omission through fault or negligence.*"[590] Article 217 of the Judicial Code is a more specific provision. It imposes liability for causing damage by "*reckless or bad faith*" conduct of legal proceedings.[591] There would seem to be no reason why a claim under Article 1644 of the Civil Code should not embrace loss or damage through fault consisting of recklessness or bad faith in judicial proceedings in breach of Article 217 of the Judicial Code.

431. For all these reasons the Tribunal finds devoid of merit the Claimants' allegation that the Supreme Court was wrong to apply Article 217 of the Judicial Code when determining liability. There was no breach of due process in that respect.

(iii) Alleged Wrongful Admission of the Foley Letter

432. The focus of attention on the procedural requirements for the admission into evidence of the Foley Letter has been wholly disproportionate to their significance. The letter is set out at paragraph 232 *supra*. It was written by a lawyer acting for two members of the Bridgestone Group, which had opposed the registration of the RIVERSTONE mark, to lawyers who had acted for L.V. International in proceedings in the United States.

433. The Foley Letter formed no part of the case originally advanced by Muresa in support of its claim. Nor was it introduced into the evidence by Muresa or TGFL. It formed part of the evidence that L.V. International sought to place before the First Instance Court when it applied to intervene. It was also annexed both to the Reports of Muresa's expert witnesses on damages and to the Report of the Court's expert.[592] It had been produced to the expert witnesses by Muresa personnel as an explanation for the apprehension that they claimed to have had that RIVERSTONE branded tires would be subject to seizure.

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[589] **C-0200**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Closing Arguments Before the Eleventh Civil Circuit Court (11 June 2010), ¶ 2.4.

[590] **C-0205**, Civil Code of the Republic of Panama (9 May 1904), Art. 1644.

[591] **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 217.

[592] See *supra*, ¶¶ 259-260.

434. In these circumstances, there was a fundamental disagreement between Mr. Arjona and Mr. Lee as to whether, under the relevant procedural rules, it had been open to the Supreme Court to treat the Foley Letter as evidence. Mr. Arjona's evidence was that doing so infringed a number of procedural rules. Mr. Lee expressed the opinion (i) that these rules simply had no application to evidence that was introduced by experts; and (ii) that the Foley Letter was legitimately introduced into the evidence by L.V. International when that company joined as *Coadyuvante*.

435. The rules that Mr. Arjona alleged were violated were Articles 783, 792, 856, 857 and 871 of the Judicial Code.[593] The Tribunal will look briefly at each in turn.

(a) Article 783 of the Judicial Code

436. This Article provides:[594]

> "Evidence must relate to the subject of the proceeding and those that do not refer to the facts being discussed are inadmissible, as well as legally ineffective. […]"

437. This is a general principle of evidence that must, we believe, be universal. Whether it is applicable in the present case is a matter that will become clear when the Tribunal discusses the significance given to the Foley Letter by the Supreme Court.

(b) Article 792 of the Judicial Code

438. This Article provides:[595]

[593] CER- Arjona Second, ¶ 51.

[594] **C-0188**, Extracts from the Judicial Code of the Republic of Panama (30 August 2001), Art. 783. *See also*, **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 783 ("*The evidence must adhere to the matter of the proceedings at issue, and any evidence that is not related to the facts being discussed, as well as that which is legally invalid, is inadmissible*.")

[595] **C-0188**, Extracts from the Judicial Code of the Republic of Panama (30 August 2001), Art. 792. *See also,* **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 792 ("*In order to be assessed in a proceeding, evidence must be requested, examined and incorporated to the proceeding within the terms and time established in this Code*.")

> "In order for the evidence to be assessed in the proceeding, it must be requested, examined and incorporated in the proceeding within the terms and periods stipulated for that purpose in this Code. […]"

439. Mr. Arjona states that this Article was violated because the Foley Letter was not incorporated into the proceedings at the proper stage under the Code, namely the evidence stage at the start of the proceedings.[596]

(c) Articles 856 and 857 of the Judicial Code

440. Article 856 sets out various provisions for the authentication of a private document, but provides that it will suffice:[597]

> "3. If having been submitted to the proceeding it has not been deleted or challenged pursuant to the provisions set forth in [A]rticle 861."[598]

441. Article 857 makes procedural provisions for the authentication of copies of a private document. These include:[599]

> "1. Where the party against whom a copy is submitted explicitly or tacitly acknowledges it to be genuine."

442. Mr. Arjona states that these articles were violated because the Foley Letter had not been submitted as an original, nor was it a copy that had been authenticated or recognized in its content and signature by the person who allegedly had signed it.[600]

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[596] CER-Arjona Second, ¶ 55.

[597] **C-0188**, Extracts from the Judicial Code of the Republic of Panama (30 August 2001), Art. 856. *See also*, **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 856 ("*If having contributed to the proceedings, it has not been challenged or objected to under the terms of article 861.*")

[598] *See*, **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 861.

[599] **C-0188**, Extracts from the Judicial Code of the Republic of Panama (30 August 2001), Art. 857. *See also*, **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 857 ("*When the party before whom the copy is presented recognizes it as genuine, expressly or tacitly*.")

[600] CER-Arjona Second, ¶ 58.

(d) Article 871 of the Judicial Code[601]

443. This Article provides that documents of a testimonial character originating from third parties shall be admitted by the judge only through the formalities established for the evidence of witnesses. Mr. Arjona states that this article was violated because the Foley Letter was a private document originating from a third party who never appeared in Court to ratify its contents.[602]

444. Mr. Lee's answer to all these points was that the provisions of the Judicial Code relied on by Mr. Arjona had no application to documents incorporated into the proceedings by expert witnesses. Article 973 of the Judicial Code made provision for expert witnesses to include in their reports information received from third parties.[603] The provisions relied upon by Mr. Arjona applied to evidence tendered by the parties, not evidence included by an expert in his report:[604]

> "[…] The Letter or Reservation of Rights is not an autonomous piece of evidence, but an integral part of the corresponding expert report. The evidence is the expert report, which is a means of evidence different from documentary evidence. Thus, the exhibits included by the expert are not considered documentary evidence, and are not subject to the requirements applicable to documentary evidence."[605]

445. Mr. Arjona's answer to this was that if documents introduced by an expert were to be used as evidence rather than simply as part of his Report, the requirements of the Judicial Code had to be complied with. Mr Lee's proposition was "*entirely erroneous*."[606]

446. Mr. Lee had a further point.[607] Article 603 of the Judicial Code provided that, when a *Coadyuvante* applied to intervene, he had to attach the relevant evidence. L.V.

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[601] **C-0188**, Extracts from the Judicial Code of the Republic of Panama (30 August 2001), Art. 871. *See also*, **R-0067**, Judicial Code of the Republic of Panama (10 September 2001), Art. 871.

[602] CER-Arjona Second, ¶ 60.

[603] RER-Lee First, ¶ 91.

[604] RER-Lee First, ¶¶ 101-105.

[605] RER-Lee First, ¶ 105.

[606] CER-Arjona Second, ¶ 42.

[607] RER-Lee Second, ¶¶ 37-44.

International had attached the Foley Letter as evidence when applying to intervene. When the Appeal Court reversed the decision of the First Instance Court and allowed L.V. International to intervene, the Foley Letter was introduced as part of that company's evidence.

447. L.V. International's role as *Coadyuvante* was to assist Muresa and TGFL. It was in a position to set their claim in the international perspective. The Foley Letter was a relevant piece of evidence in so doing – as to which see the next section of this Award. The unusual feature is that L.V. International, with its evidence, only joined the proceedings after the decision of the First Instance Court. It seems to the Tribunal that there is force in the submission that at this point there was a further introduction of the Foley Letter into the proceedings. This point appears, however, to have been overlooked in the Supreme Court where the expert reports were treated as the sole sources from which the Foley Letter entered the proceedings.

448. No jurisprudence has been cited to the Tribunal which clearly defines the approach of the Supreme Court to documentary evidence that has been introduced into proceedings by an expert witness, nor as to the position in relation to the evidence of a *Coadyuvante* who has been refused permission to intervene, and whose appeal against that refusal is only allowed after the First Instance Court has given judgment. The Tribunal has not been able to resolve the conflict between the evidence of Mr. Arjona and that of Mr. Lee. It has reached the conclusion, however, that the issue as to the status of the Foley Letter that was so hotly canvassed in the Civil Proceedings is both artificial and irrelevant.

449. The Judicial Code has a number of provisions that deal with the authentication of documents and of the translation of documents that are in a foreign language. These provisions normally come into play at the Notice of Evidence phase of the proceedings, where each party adduces the evidence upon which it proposes to rely, and has the opportunity to challenge the evidence adduced by its opponent. Where no issue arises as to the authenticity of a document, or the translation of a document, the party adducing it will not normally be required by the opposing party to go through the processes that the

rules would otherwise require in order to authenticate it. This appears to be reflected by the provisions of Articles 856 and 857 that we have quoted above.

450. The Foley Letter is a straightforward document. At no stage have BSJ and BSLS challenged its authenticity, or its translation into Spanish. Because it was not introduced at the Notice of Evidence phase, when the Tribunal believes that no challenge would have been made to its authenticity, BSJ and BSLS have been in a position to take the technical points that they have as to its admissibility. Had there been grounds to challenge its authenticity or the accuracy of its translation, the Tribunal is confident that a challenge could and would have been made. Mr. Lee gave evidence to this effect,[608] citing Articles 473 and 793 of the Judicial Code as giving the Judge ample powers to investigate such a challenge. The Tribunal accepts that evidence.

451. In their Opposition to the Admission of the Cassation Appeal, BSJ and BSLS made the following submission:[609]

> "[…] The appellant must inform the Court of what the connotations are that this document has and why, if it had been taken into consideration, it would have reversed the decision made. It must additionally be stated that the Court cannot recognize a document that was not admitted to the process in due form, but beyond the merely procedural circumstances surrounding this document, the main point of our disagreement stems from the fact that, even if the [Appeal Court] had taken this evidence as valid, it would not have come to different conclusions […] a document that allegedly establishes 'threats and warnings,' given in another country without further execution in Panama and which don't even involve the parties in this process, cannot be considered as evidence of 'harmful conduct.'"

452. In this submission BSJ and BSLS realistically focused not on "*merely procedural circumstances*" but on the extent to which the Foley Letter had an impact on the merits. In

[608] Tr., Day 2, 515-517 (Mr. Lee).

[609] **R-0047**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Objection to the Admission of the Cassation Recourse (16 September 2013), pp. 3-4.

their subsequent written submission,[610] however, BSJ and BSLS focused almost exclusively, and at length, on these procedural circumstances.

453. The Majority of the Supreme Court dealt with the admissibility of the Foley Letter by remarking that the evidence relied on by the appellants, which included the Foley Letter, had been "*duly and timely submitted to the Court*" and did not seem to have been challenged "*as to its authenticity and truthfulness*."[611] The dissenting judge dealt first with the significance of the Foley Letter, concluding that it did not advance Muresa's claim.[612] He went on to comment that the copies of the letter did not "*meet the necessary requirements to be considered evidence*."[613]

454. The Tribunal does not propose to express a definitive view as to whether the Majority of the Supreme Court was strictly correct to view the introduction of the Foley Letter through expert reports as having been duly made and timely. It observes that the fact that it was also introduced by the *Coadyuvante* appears to have been overlooked by all at this stage. It believes that the Majority was correct to state that the authenticity of the letter did not seem to have been challenged. If the Supreme Court was reluctant to shut out on what were merely procedural grounds, evidence that it considered relevant, this was understandable.

455. The Majority of the Supreme Court concluded that the Foley Letter properly formed part of the evidence in the case. They may well have been correct in so doing, though possibly for the wrong reason. If this conclusion was erroneous this was not an egregious error of the kind that could amount to, or contribute to, a denial of justice under the relevant principles of international law. It lends no support to the Claimants' case that the decision of the Majority of the Supreme Court was one that no honest and competent court could have reached.

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[610] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Response to the Cassation Recourse (14 January 2014).

[611] See, *supra* ¶ 304; **C-0027 / R-0034**, Supreme Court Judgment, pp. 12-13 (as translated in R-0034).

[612] **C-0027 / R-0034**, Supreme Court Judgment, p. 19 (as translated in R-0034).

[613] **C-0027 / R-0034**, Supreme Court Judgment, p. 20 (as translated in R-0034).

c. Allegations of Errors of Appraisal of the Evidence: Liability

(i) Significance Attached to the Foley Letter

456. It was and is the Claimants' case that the Foley Letter had no relevance to the claim brought by Muresa and TGFL against BSJ and BSLS in Panama. The letter was written in English in the United States by lawyers acting, not for BSJ or BSLS, but for other companies in the Bridgestone Group in the context of proceedings between those companies and L.V. International in the United States.

457. The Claimants complain that the Supreme Court treated the Foley Letter as if it had been written on behalf of BSJ and BSLS to Muresa. Questions asked to Mr. Lee when he was cross-examined by Mr. Williams suggested that the Supreme Court had treated the writing of the Foley Letter in the United States as a separate cause of action, putting in play principles of conflict of laws.[614] It is necessary at the outset to consider the significance attached by the Supreme Court to the Foley Letter.

458. The act on which Muresa and TGFL founded their claims was the commencement of the Trademark Opposition Proceeding before the Eighth Circuit Court. No independent claim was made at any stage in relation to the Foley Letter or any other behaviour. By the time the proceeding reached the Supreme Court it was common ground that the cause of action arose under Article 217 of the Judicial Code.

459. This was clearly recognized by the terms of the Supreme Court Judgment:[615]

> "The Plaintiff's claim is aimed at obtaining compensation from the Respondents for damages caused by a proceeding filed with reckless intentions […]."[616]
>
> "[…] Specifically, Plaintiff [Muresa] was subject to a Request to Oppose the Registration of the RIVERSTONE tire brand. […]"[617]

[614] Tr., Day 2, 608:3-12 (Mr. Williams).

[615] **C-0027 / R-0034**, Supreme Court Judgment.

[616] **C-0027 / R-0034**, Supreme Court Judgment, p. 7 (as translated in R-0034).

[617] **C-0027 / R-0034**, Supreme Court Judgment, p. 13 (as translated in R-0034).

> "The Appellants point out that violation of the above rules [Article 1644 of the Civil Code and Article 217 of the Judicial Code] was carried out by the Respondents, in the sense of damages caused to the Plaintiffs by virtue of an Opposing Proceedings against the registration of the RIVERSTONE tire brand. […]"[618]
>
> "[…] The Respondents filed an action lacking in legal grounds against the current Plaintiffs in the present Ordinary Process by opposing the registration of the RIVERSTONE tire brand. […]"[619]

460. It is fair to say that the Supreme Court treated the Foley Letter as if it were addressed to Muresa and TGFL. The relevance that the Foley Letter had in the eyes of the Supreme Court was the implications that it had in relation to BSJ's and BSLS's action in bringing the Trademark Opposition Proceeding. The applicants' complaint was that:

> "[…] [T]he plaintiffs' legal representatives stated, in an intimidating manner, that opposition proceedings were going to be filed in various countries against the registration of the RIVERSTONE tire brand. They also added, without any legal basis, at least under Panamanian law, that the Plaintiffs should abstain from selling the product. This is obviously intimidating and reckless conduct."[620]

461. This passage raises the following issues:

(i) Was there justification for treating the Foley Letter as if written to Muresa and TGFL?

(ii) Was there justification in treating the Foley Letter as intimidating?

(a) For Whom was the Foley Letter Intended?

462. The Foley Letter was written in the context of "*a world-wide battle between the Luque Group and the Bridgestone Group.*" The second paragraph of the letter could naturally be read as restricted to the parties to the proceedings that had just taken place in the United States. The third paragraph of the letter related, however, to the use of the RIVERSTONE mark throughout the world. L.V. International had been given the role of representing the Luque Companies in relation to the registration and commercialization of RIVERSTONE

[618] **C-0027 / R-0034**, Supreme Court Judgment, p. 14 (as translated in R-0034).

[619] **C-0027 / R-0034**, Supreme Court Judgment, p. 17 (as translated in R-0034).

[620] **C-0027 / R-0034**, Supreme Court Judgment, p. 15 (as translated in R-0034).

products on a world-wide basis. As BSJ and BSLS stated in their opposition petition, the Bridgestone Companies operated as a single corporate group representing a single group of economic interests.[621] The Tribunal considers that the Foley Letter was intended to come to the attention of all members of the Luque Group of companies. Indeed, a record of the closing submissions of counsel for BSJ and BSLS explicitly referred to the U.S. proceedings, and argued that this showed "*that the prior-use rights held by plaintiffs are not unknown to L.V. INTERNATIONAL, INC. and based on what L.V. INTERNATIONAL, INC. alleged, they should also be known by Defendant MURESA INTERTRADE, S.A. by virtue of their presumed relationship*."[622]

463. In short, in the Trademark Opposition Proceeding, BSJ and BSLS *themselves* submitted that Muresa should have known of what were alleged to be the former's "*superior rights*" by reason of Muresa's relationship with L.V. International.[623]

464. For these reasons, the Tribunal considers that the Supreme Court was justified in treating the Foley Letter as if it had been addressed to Muresa and TGFL.

(b) Did the Supreme Court Attach Too Much Significance to the Foley Letter?

465. Evidence was given to the Tribunal by experts in the law and practice of intellectual property. This evidence extended to letters that are customarily exchanged between lawyers in circumstances where their clients are, or may be, in dispute as to the registration or use of rival trademarks. In particular, the experts sought to draw a distinction between a "Reservation of Rights" letter and a "Cease and Desist" letter. The Claimants' expert, Ms. Jacobs-Meadway, described the first as "*not an immediate threat but a statement that any rights that might be asserted on the sender's behalf at some future time are not waived*"

[621] See, *supra*, ¶ 234; **C-0150**, Complaint in Opposition to the Registration of the Trademark RIVERSTONE and Design (5 April 2005), p. 3.

[622] See **R-0124**, Panamanian Opposition Proceeding Evidentiary Hearing (11 May 2006), p. 2. This document was put to the Parties for comment (Tr., Day 5, 1235-1237 (Mr. Thomas)); the Tribunal did not find the Claimants' attempt to narrow the Foley Letter's effect and the use to which counsel for BSJ and BSLS sought to use it in the Trademark Opposition Proceeding to be persuasive (Tr., Day 5, 1255:21-1258:11 (Mr. Williams)).

[623] See, *supra*, ¶ 238; **R-0124**, Panamanian Opposition Proceeding Evidentiary Hearing (11 May 2006).

in contrast to the latter, which constitutes a threat that may be the basis for legal action.[624] Ms. Jacobs-Meadway asserted that the Foley Letter was a Reservations of Right letter. The Respondent's expert, Ms. Jacobson, opined that it was a Cease and Desist Letter. She postulated:[625]

> "There are both factual and legal elements which must be considered to evaluate whether the Bridgestone Demand Letter […] was a mere reservation of rights letter […] or instead is more properly characterized as a demand letter […]."

She then proceeded to embark on that consideration.

466. This is a good example of a false issue of expert evidence that does nothing to assist the Tribunal. As Ms. Kepchar for the Claimants remarked at the Hearing,[626] it does not matter what you call the Foley Letter, all that matters is what it actually says and you do not need trademark experts to understand that.

467. Looking at the letter itself, it falls into two parts. The first part is consequential upon the Bridgestone Group's success in the U.S. Trademark Proceedings. It clearly falls into the category of a Cease and Desist letter, implicitly threatening action in the event that the RIVERSTONE brand should be used in the United States. The Tribunal observes that, whether or not such a letter is sent, a party that has been defeated in registration proceedings in a particular jurisdiction can reasonably anticipate that any use of that brand in the jurisdiction in question is likely to provoke further legal proceedings.

468. The second part of the Foley Letter relates to the use of the RIVERSTONE brand outside of the United States. It does not merely purport to reserve Bridgestone's rights in relation to this territory. It states that Bridgestone is opposed to the use of the RIVERSTONE brand throughout the world and warns that if L.V. International used that mark it will do so "*at its own peril.*"[627] This threat is, however, qualified by the statement that Bridgestone had

[624] CER-Jacobs-Meadway First, ¶ 36.
[625] RER-Jacobson First, ¶ 41.
[626] Tr., Day 1, 123:4-15 (Ms. Kepchar).
[627] **C-0013**, Letter from Foley & Lardner LLP ("**Foley Letter**") (3 November 2004).

not carried out a country-by-country analysis and was not making any specific demand aimed at the use of the RIVERSTONE mark in any particular foreign country.

469. The Tribunal refers to its findings at paragraphs 458-459 *supra*. The Supreme Court did not find that the act of sending the Foley Letter gave rise, of itself, to any liability. The relevance of the letter was its bearing on the significance to be attached to the bringing of the Trademark Opposition Proceeding, which was the act that the Supreme Court held gave rise to liability. There are two aspects of that act to which the Foley Letter has relevance.

470. The first is the bearing that it has on the attitude of BSJ and BSLS in bringing the Trademark Opposition Proceeding. Does the Foley Letter lend support to Muresa's allegation that bringing the Trademark Opposition Proceeding was reckless? The Tribunal gives detailed consideration to the issue of recklessness below. We consider that the Foley Letter is relevant in this respect. The letter implicitly recognizes that the position in a particular country requires analysis before a specific demand is made not to use the RIVERSTONE mark. No such analysis was carried out before the Trademark Opposition Proceeding was brought.

471. The second aspect on which the Foley Letter is relevant is the bearing that it has on Muresa's reaction to the bringing of the Trademark Opposition Proceeding. That reaction receives further consideration below under the heading of causation. The bringing of the Trademark Opposition Proceeding was a first step in the implementation by Bridgestone of the provisional threat made in the Foley Letter. The relevant issues in the Civil Proceedings in relation to that first step were (i) whether it caused Muresa and TGFL to cease selling RIVERSTONE tires; and (ii) whether, if it did, that reaction was reasonable.

472. It does not seem to the Tribunal that the Foley Letter had much impact on either of these two aspects of Muresa's case. The Foley Letter was one incident in the world-wide battle that was taking place between the Bridgestone and the Luque Groups. The Tribunal does not consider that the letter itself can properly be described as reckless. Nor does the evidence suggest that the letter had causative effect. Had the letter had a significant impact on Muresa's reaction to the bringing of the Trademark Opposition Proceeding one would

expect some mention to have been made of this when Muresa made its claim, and that Muresa would have sought to introduce the letter at the Notice of Evidence Phase.

473. The Majority of the Supreme Court held that the Foley Letter was relevant on the first aspect referred to above, namely recklessness. They commented that in the letter Bridgestone's legal representatives stated in an intimidating manner that opposition proceedings were going to be filed in various countries against the registration of the RIVERSTONE brand, and added "*without any legal basis, at least under Panamanian law, that the Plaintiffs should abstain from selling the product.*"[628] They described this as "*obviously intimidating and reckless conduct*" which raised doubts about their good faith when they commenced the Trademark Opposition Proceeding.[629]

474. The Tribunal would not draw the same conclusions in relation to the Foley Letter. The implication of the letter was that analysis would take place before proceedings were commenced in individual countries. The gravamen of the case on recklessness was that no such analysis was carried and that BSJ and BSLS "*lack*[ed] […] *legal grounds*" for bringing the Trademark Opposition Proceeding, as the Majority went on to find.[630]

475. Thus, the Tribunal considers that the Supreme Court gave unjustified weight to the Foley Letter. This is perhaps not surprising having regard not merely to the prominence given to the letter by Muresa and TGFL but to the lengths to which BSJ and BSLS went in an attempt to persuade the Court that the letter had been wrongly admitted in evidence. This was not the type of error that could possibly constitute, *of itself*, any indication of the lack of competence or bad faith that would have to be established before a denial of justice under international law could be made out. Nonetheless, it forms part of the overall picture that the Tribunal will have to consider in due course.

[628] **C-0027 / R-0034**, Supreme Court Judgment, pp. 15-16 (as translated in R-0034).
[629] **C-0027 / R-0034**, Supreme Court Judgment, p. 15 (as translated in R-0034).
[630] **C-0027 / R-0034**, Supreme Court Judgment, p. 17 (as translated in R-0034).

(ii) Did the Supreme Court Err in Attaching Significance to BSJ's and BSLS's Withdrawal of Their Appeal in the Trademark Opposition Proceeding?

476. The third matter that, in the application for Cassation, Muresa alleged had been ignored by the Appeal Court was the withdrawal by BSJ and BSLS of their appeal in the Trademark Opposition Proceeding. In setting out the factors that led to the conclusion that BSJ and BSLS had acted recklessly in bringing the Trademark Opposition Proceeding, the Majority stated: "*Then, after spending a significant amount of time in litigation, they withdrew the appeal they had filed* […]."[631]

477. The dissenting judge observed:[632]

> "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 proceeding. […] Punishing a party for a procedural decision[] such as this, qualifying it as recklessness and abuse of a right, is inappropriate."

478. The Claimants adopted this argument, arguing that it is the very opposite of reckless to withdraw an appeal at an early stage.[633]

479. The Majority did not state why BSJ's and BSLS's withdrawal of the appeal supported Muresa's case that they had been reckless in bringing the Trademark Opposition Proceeding. The Tribunal considers that the dissenting judge, together with the Claimants, was wrong to conclude that the Majority had held that the withdrawal of the appeal was reckless. The significance of the withdrawal of the appeal was that it was a tacit admission that the Trademark Opposition Proceeding should never have been brought in the first place. In the view of the Tribunal this was legitimate reasoning, for reasons that will be explained when the Tribunal comes to deal with recklessness. At this stage, it suffices to say that there is no merit in this criticism.

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[631] **C-0027 / R-0034**, Supreme Court Judgment, p. 16 (as translated in R-0034).

[632] **C-0027 / R-0034**, Supreme Court Judgment, p. 25 (as translated in R-0034).

[633] Cl. PHB, ¶ 39.

(iii) Disregard of the Finding of Good Faith in the Trademark Opposition Proceeding

480. In the Trademark Opposition Proceeding, the Eighth Circuit Court released BSJ and BSLS from liability to pay attorneys' fees on the ground that they had "*acted with evident good faith* […] *without abusing the right to litigate.*"[634] This criterion was applied pursuant to Article 196 of Law 135 of 10 May 1966, which provides:

> "In any judgment or court order, the party against whom it is pronounced shall be ordered to pay the costs, unless, in the opinion of the judge, it has acted with evident good faith, which the resolution shall expressly substantiate."[635]

481. In the Civil Proceedings, BSJ and BSLS argued that this finding constituted *res judicata* and thus provided a defence to the claim. The First Instance Court rejected that plea on the ground that the requirements for *res judicata* under Panamanian law were not satisfied.[636] Before the Supreme Court, BSJ and BSLS accepted this ruling.[637] In these proceedings, however, the Claimants resurrected the argument that a finding of bad faith on their part should have been precluded under the principle of *res judicata*. Mr. Lee refuted this allegation at length in his First Report,[638] and Mr. Arjona responded in his Second Report,[639] contending, surprisingly, that the requirements for *res judicata* had no application where the principle was relied upon in two different types of process.[640] Mr. Williams sensibly abandoned reliance on *res judicata* in his closing submissions at the Hearing.[641]

482. This lengthy exchange of views between the experts was all the more surprising as BSJ and BSLS had accepted the decision on *res judicata* of the First Instance Court in its

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[634] **C-0014 / R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 23 (as translated in C-0014).

[635] CER, Arjona Second, ¶ 98 (quoting Law 35/1966, Art. 196).

[636] **R-0036**, Judgment No. 70, Eleventh Civil Circuit Court, First Judicial Circuit (17 December 2010), pp. 7-8.

[637] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Response to the Cassation Recourse (14 January 2014), p. 3.

[638] RER-Lee First, ¶¶ 111-135.

[639] CER-Arjona Second, ¶¶ 93-106.

[640] CER-Arjona Second, ¶ 103.

[641] Tr., Day 5, 1230:6-14 (Mr. Williams). *See also*, Tr., Day 6, 1402:12-16 (Mr. Williams).

submissions to the Supreme Court.[642] The dissenting judge commented that no reason was given by the Majority "*about what to do with a final decision, by the specialized court, ruling that the party's conduct was not reckless.*"[643]

483. Mr. Williams correctly observed[644] that the decision of the Supreme Court was in stark conflict with the finding of the Eighth Circuit Court that BSJ and BSLS had acted in good faith, and one might have expected the Supreme Court to remark upon that fact. But as the principle of *res judicata* did not apply, the Tribunal considers that the Supreme Court had a duty to reach its own judgment on the material before it. No criticism can be made of it for failing to apply the finding of the Eighth Circuit Court that BSJ and BSLS had acted in good faith.

(iv) The Finding of Recklessness

484. At page 14 of the Supreme Court Judgment the Majority states in relation to the Trademark Opposition Proceeding: "*The legal action was reckless and intimidating in order to cause harm.*"[645] While the position is not entirely clear, the Tribunal considers that this statement formed part of the summary of the Appellants' submissions, as it formed the end of a short paragraph that began: "*The Appellants point out* […]." The Court's own appraisal begins on the following page.

485. The Court described the Foley Letter as "*obviously intimidating and reckless conduct.*"[646] Of the Trademark Opposition Proceedings themselves the Court said that BSJ and BSLS:

> "[W]ent to extremes to oppose the registration of a product brand that was conveniently commercially competitive. Then, after spending a significant amount of time in litigation, they withdrew the appeal they had filed against an adverse Decision."[647]

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[642] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Response to the Cassation Recourse (14 January 2014), p. 3.

[643] **C-0027 / R-0034**, Supreme Court Judgment, pp. 24-25 (as translated in R-0034).

[644] Tr., Day 1, 70:5-71:2 (Mr. Williams).

[645] **C-0027 / R-0034**, Supreme Court Judgment, p. 14 (as translated in R-0034).

[646] **C-0027 / R-0034**, Supreme Court Judgment, p. 15 (as translated in R-0034).

[647] **C-0027 / R-0034**, Supreme Court Judgment, p. 16 (as translated in R-0034).

486. The Court went on to hold that BSJ and BSLS had filed an action lacking legal grounds against Muresa with the motive of causing damage to a commercial rival.[648] It stated that: "*The Respondents* [sic] *behavio*[u]*r cannot be held as good faith behavio*[u]*r; indeed, it is negligent behavio*[u]*r. The Respondents filed an action lacking in legal grounds* […]."[649]

487. The Majority expressed the following reasons for concluding that BSJ and BSLS had acted in bad faith by bringing the Trademark Opposition Proceeding: (i) they sent the Foley Letter; (ii) they filed an action having no legal grounds; (iii) they withdrew their appeal; (iv) they brought the proceedings against a commercial rival who was carrying on a substantial business.

488. The Tribunal has already dealt with the Foley Letter and differs from the Supreme Court's view as to its significance.[650] Equally, the Tribunal does not consider that the fact that Muresa was a commercial rival was a reason to criticize the bringing of the Trademark Opposition Proceeding. By the nature of things this is always likely to be the case where the registration of a trademark is opposed.

489. The Tribunal has, however, concluded that the Supreme Court was justified in criticizing BSJ and BSLS for bringing proceedings without legal grounds, and without having conducted a Panamanian law analysis of their prospects for success (*i.e.* of a country-by-country analysis which the Foley Letter had stated had not been conducted when it stated its clients' opposition to the use of the RIVERSTONE trademark anywhere in the world). Whether that conduct can be called "reckless" depends upon whether it was likely to have serious consequences – a matter that the Tribunal will address when dealing with causation. But the bringing of the Trademark Opposition Proceeding was certainly ill-considered.

490. A powerful indication that the bringing of the Trademark Opposition Proceeding was ill-considered lies in the fact that, having been unsuccessful at first instance and appealed, BSJ and BSLS withdrew their appeal.

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[648] **C-0027 / R-0034**, Supreme Court Judgment, p. 17 (as translated in R-0034).

[649] **C-0027 / R-0034**, Supreme Court Judgment, p. 17 (as translated in R-0034).

[650] See *supra*, ¶¶ 473-475.

491. In civil law countries where legal procedures include appeals as of right, litigants will normally contemplate the likelihood of an appeal. A party will be unlikely to commence legal proceedings unless prepared to pursue the claim to an appeal, whether as appellant or respondent. This is certainly the case in Panama.[651] The Tribunal asked Mr. Lee how often a claim that failed at first instance would be taken to appeal. His answer was that he had only experienced a handful of cases that were not taken to appeal. In 99.9 percent of cases the losing party proceeds with an appeal so that a court with more experienced judges can consider the case.

492. In the light of this, the question arises of why BSJ and BSLS took the decision not to pursue an appeal when their Trademark Opposition Proceeding failed at first instance. In their Memorial the Claimants stated that they decided to withdraw their appeal because they understood that they were "*very unlikely to succeed*."[652] There would seem to be only two possibilities. Either BSJ and BSLS commenced the Trademark Opposition Proceeding when they knew or ought to have known that they were very unlikely to succeed, or facts emerged in the course of those proceedings, of which BSJ and BSLS could not reasonably have been aware, that demonstrated that an appeal would be hopeless.

493. The Tribunal is satisfied that the former of these two possibilities represents the true position. The judgment of the Eighth Circuit Court included the following passage:

> "In practice, the trademarks in conflict already had occasion to coexist in the market (between […] May 6 2002 and […] February 4 2005); in the trademark scenario, heavy investments in money have been made, by both sides and there is no evidence that their coexistence has caused error, confusion, mistake, mislead or deception in the consumer public, or caused damage to BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICE, INC. or dilute the distinctive force of the trademarks BRIDGESTONE FIRESTONE."[653]

494. The fact that the rival brands had been co-existing in the market for several years, without any evidence of confusion was, so it seems to the Tribunal, a fatal impediment to an

[651] Tr., Day 2, 481:12-482:8 (Mr. Lee).

[652] Cl. Mem., ¶ 43.

[653] **C-0014 / R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 22 (as translated in C-0014).

application based on the risk of confusion. This conclusion receives support from the witness statement of Audrey Williams, a Panamanian practitioner in the field of intellectual property who gave evidence on behalf of BSJ and BSLS. She gave examples of the evidence that a licensee of a trademark might be in a position to give when assisting the trademark owner to resist, inter alia, opposition proceedings:[654]

> "Such evidence may include proof that the confronted marks can coexist if goods bearing the marks are found in the market (in which case the action would be dismissed because there would be no likelihood of confusion or association) […]."

495. When BSJ and BSLS commenced the Trademark Opposition Proceeding they knew, or ought to have known, of the co-existence of the rival brands in the Panama market. Had they sought advice as to the prospects of success of the proceedings, there is no reason to believe that the advice would have been any different from that subsequently given to them in respect of the prospects of a successful appeal. The Trademark Opposition Proceeding would be "*very unlikely to succeed.*"

496. To bring the Trademark Opposition Proceeding in these circumstances was ill-considered, indeed reckless if the potential consequences were significant. It was conduct that gave effect to a blanket policy of opposing the registration of any trademark bearing the suffix "STONE," regardless of the circumstances of the individual case. In their Memorial,[655] the Claimants acknowledged that it was their policy to monitor trademark applications all over the world and to oppose any applications that had the "STONE" suffix. Mr. Kingsbury, BSAM's Chief Counsel, stated that Bridgestone had opposed the registration of the RIVERSTONE trademark in almost all jurisdictions in which an application for registration had been brought, in accordance with this policy.[656]

[654] CWS-Williams, ¶ 14.
[655] Cl. Mem., ¶ 18.
[656] CWS-Kingsbury Third, ¶ 6.

497. For these reasons, the Tribunal concludes that the Majority of the Supreme Court was justified in concluding that BSJ and BSLS had brought the Trademark Opposition Proceeding against Muresa when these were without legal merit.

(v) The Finding of Causation

498. At the heart of the Claimants' attack on the Supreme Court's Judgment is the issue of causation. On what basis did the Supreme Court find that the lawful practice of opposing the registration of the RIVERSTONE trademark caused Muresa and TGFL to stop, or reduce, their sales of RIVERSTONE tires? The Claimants contend that the Supreme Court's Judgment was simply incomprehensible.

499. The Supreme Court appears to have accepted that evidence of Muresa's witnesses that had been ignored by the Appeal Court established that the act of bringing the Trademark Opposition Proceeding caused Muresa and TGFL to cease selling RIVERSTONE tires. The Court quoted from evidence that was part of the fourth reason for Cassation set out at paragraph 292 *supra* given by Mr. Medina, Muresa's Sales Manager. The emphasis is that of the Supreme Court:

> "[…] QUESTION 5. […] [W]hat happened after the company became aware of the opposition to the registration of the trademark in Panama. Please explain.
>
> ANSWER: When we found out about the opposition to the trademark registration, ***we had to create contingency plans to try to maintain the same volume of sales; as a result, we had to choose to enter the market with other brands to meet the needs of our customers*** […] ***When entering the market with these brands, unknown at the time, we had to offer them at lower prices, to the detriment of the company's profit margin***. In addition, there was a denial by many customers about a product that they did not know; they cancelled orders for fear of a product of inferior quality." [657]

500. The Court referred to similar witness statements and commented:

> "The Court noticed from all witness statements that, coincidentally, due to the process opposing the registration of the RIVERSTONE brand, filed against MURESA INTERTRADE, SA, by

[657] **C-0027 / R-0034**, Supreme Court Judgment, p. 10 (as translated in R-0034) (emphasis in original).

> BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE CORPORATION, the Plaintiff suffered recurrent damages because they found themselves in a situation of having to improvise with other brands, even lower quality brands, to meet sales demand in the market."[658]

501. The Court subsequently summarised the position as follows:

> "The Respondents filed an action lacking in legal grounds against the current Plaintiffs in the present Ordinary Process by opposing the registration of the RIVERSTONE tire brand. Such action caused irreversible damages to the key part of the Plaintiffs' business activities."[659]

502. None of this provides any explanation as to why the bringing of the Trademark Opposition Proceeding caused Muresa and TGFL to stop, or reduce, the sale of RIVERSTONE tires. The dissenting judge was alive to this point. His analysis of the evidence was that Muresa was afraid that Bridgestone would have the RIVERSTONE tires seized and for that reason unilaterally decided to reduce sales of that brand. He cited a more pertinent passage from the evidence of Mr. Medina:

> "QUESTION 3. What was the cause of the contingency plan?
>
> ANSWER (Witness): Actually, there was a fear that BRIDGESTONE CORPORATION would order a seizure of RIVERSTONE tires, or prevent the sale of said tires. It was a very delicate situation, having inventory in the warehouse, goods in transit, and goods being manufactured with the RIVERSTONE brand that we may not be able to sell ***owing to a Decision against us***."[660]

503. The Tribunal considers that the dissenting judge's criticism of this part of the Majority judgment was well founded. There was no logical reason for Muresa to fear that the Trademark Opposition Proceeding would be *accompanied by* seizure of RIVERSTONE tires. There was discussion between the experts as to whether seizure of RIVERSTONE tires might be ordered as a "precautionary measure"[661] pending determination of the

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[658] **C-0027 / R-0034**, Supreme Court Judgment, p. 11 (as translated in R-0034).

[659] **C-0027 / R-0034**, Supreme Court Judgment, p. 17 (as translated in R-0034).

[660] **C-0027 / R-0034**, Supreme Court Judgment, p. 23 (as translated in R-0034) (emphasis added).

[661] Tr., Day 3, 722-726 (Ms. Lasso de la Vega).

Trademark Opposition Proceeding, but there was no evidence that such a step had ever been taken in such circumstances.

504. It is possible that Muresa and TGFL were concerned about the implications of the Trademark Opposition Proceeding because they feared that they might lose them.[662] This possibility gains support from the fact that, for unexplained reasons, L.V. International had, on 13 August 2004, withdrawn its application to register the RIVERSTONE mark in the United States, in the face of a Notice of Opposition from members of the Bridgestone Group.[663] If BSJ and BSLS succeeded in the Trademark Opposition Proceeding in Panama, they were plainly likely then to take steps to prevent Muresa and TGFL's continued use of the RIVERSTONE mark. But if that apprehension was the reason why Muresa and TGFL reduced production and/or sale of RIVERSTONE tires it was not one for which they could reasonably hold Bridgestone responsible.

505. For these reasons, the Tribunal has concluded that the Majority of the Supreme Court was in error in attributing to BSJ and BSLS responsibility for any decision on the part of Muresa and TGFL to cease or reduce the sale of RIVERSTONE tires. This error forms part of the overall picture that the Tribunal considers below in relation to the allegation of denial of justice.

d. Allegations of Errors in the Appraisal of the Evidence: Damages

(i) Disregard of Discrepancy Between Pleading and Evidence of Loss

506. The claim initially filed by Muresa and TGFL alleged that "*the product of the brand RIVERSTONE Y DISENO stopped being commercialized (sold) as a consequence of*" the Trademark Opposition Proceeding.[664] The evidence that they subsequently adduced in support of their claim did not support a case that sales of tires bearing the RIVERSTONE brand had been wholly suspended. Rather their evidence was that there had been a

[662] See the words that we have emphasized at *supra*, ¶ 502.

[663] See *supra*, ¶ 229.

[664] **C-0016**, Civil Complaint by Muresa Intertrade S.A. and Tire Group of Factories Ltd. Inc. v. Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 September 2007), p. 7.

significant reduction in sales of RIVERSTONE tires by comparison with the sales that had been estimated.

507. BSJ and BSLS took the point in their submissions to the Supreme Court[665] that all the accounting experts agreed that there had been no total cessation of sales of RIVERSTONE brand tires.

508. The Majority of the Supreme Court found that there was evidence that there had been a loss of sales of RIVERSTONE tires to the value of over US$ 5 million. They made no mention of the alleged discrepancy between a loss of sales and a reduction of sales.

509. The Tribunal is not persuaded that this pleading point is one of significance. Muresa did not adduce evidence of a total stoppage of sales of RIVERSTONE tires, but of a partial stoppage of sales of RIVERSTONE tires which were replaced by sales of inferior tires, resulting in a loss of over US$ 5 million. Had there been evidence that Bridgestone had wrongly caused that loss, the Tribunal would not criticize the Supreme Court for disregarding the fact that the wording of the initial claim had not clearly spelt out Muresa's case.

(ii) Disregard of Evidence Contradicting Muresa's Case on Loss

510. The expert accountancy evidence that Muresa and TGFL relied upon as the sixth category of evidence ignored by the Appeal Court was contradicted by other evidence of fact and expert evidence, including that of the court-appointed expert.[666] This evidence is referred to in the dissenting judgment of Judge Mitchell.[667] It is evidence that the First Instance Court preferred when rejecting Muresa and TGFL's claim.

[665] **R-0052**, Bridgestone Corporation and Bridgestone Licensing Services, Inc. Response to the Cassation Recourse (14 January 2014), p. 8.

[666] *See* the summary of this evidence at *supra*, ¶¶ 262-263.

[667] **C-0027 / R-0034**, Supreme Court Judgment, pp. 24-26 (as translated in R-0034).

511. The Majority makes no reference to this evidence. Indeed, the Majority appears to have proceeded on the premise that the six categories of evidence that were ignored by the Appeal Court constituted all the relevant evidence, remarking:[668]

> "The Chamber notes that the aforementioned evidence, on whose grounds the merits are based, was duly and timely submitted to the Court, and does not appear to have been challenged as to its authenticity and truthfulness. Thus, such evidence may be assessed jointly."

512. The Tribunal finds that the Claimants' criticism of this aspect of the Supreme Court's Judgment is made out. It was a serious oversight to proceed on the premise that the relevant evidence was restricted to that which was the subject of the Cassation recourse and to proceed on the premise that there was no challenge to this evidence.

513. Mr. Williams[669] picked out the following question and answer in Professor Paulsson's Report:[670]

> "QUESTION 10. Claimants allege that the Supreme Court did 'not conduct a reasoned examination of the evidence when it ignored the documentary evidence in the case file that showed huge quantities of sales of RIVERSTONE tires during the relevant period.' Please indicate, in your opinion, whether this failure would reach the level of a denial of justice under Article 10.5 of the TPA.
>
> […] Any enquiry into such treatment of evidence is fact-specific, but an international tribunal would have to be convinced that there is no explanation for the failure to refer to that piece of evidence except for bias, fraud, dishonesty, lack of impartiality, or gross incompetence, and not merely *bona fide* error. If the tribunal does form this conviction, then the conscious failure to conduct an examination of the evidence and a decision to ignore critical documentary evidence could, in principle, form an element of proof for a denial of justice."

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[668] **C-0027 / R-0034**, Supreme Court Judgment, pp. 12-13 (as translated in R-0034).

[669] Tr., Day 1, 92:14-93:9 (Mr. Williams).

[670] RER-Paulsson, ¶ 66.

514. Mr. Williams submitted that this passage was applicable to the Supreme Court's failure to refer to the evidence that conflicted with Muresa's case on loss. That it deliberately ignored evidence that conflicted with the conclusion that it was determined to reach.

515. The Tribunal notes that Professor Paulsson said that the conduct described could form "*an element*" of proof of a denial of justice. It is necessary to consider all the relevant facts in the round. This the Tribunal now turns to do.

e. The Judgment of the Majority of the Supreme Court Viewed in the Round

(i) Introduction

516. In these proceedings the Supreme Court Judgment, and the context in which it was given, have been examined by the lawyers on each side and by the Tribunal in minute detail. Thousands of hours have been devoted to the task. The Supreme Court had neither the time nor the resources to approach its task in the same depth. Mr. Arjona, who served on the Supreme Court, was only able to give the Tribunal a rough estimate of the number of decisions that the Civil Chamber would hand down in a year. This was between 300 and 600.[671] The Appeal Court would have had a similar case load.[672]

517. Most appeals would be dealt with on the papers, without an oral hearing, and the Courts would plainly have assistance in handling the documents involved – in the Muresa claim the record exceeds 3000 pages. Plainly, a State cannot rely upon lack of resources to justify a defective justice system, but the Tribunal does not believe that the caseload of the Supreme Court of Panama is untypical of other civil Supreme Courts. The handling of appeals in such systems will necessarily be rapid and robust and judgments necessarily concise.

(ii) The Application for Cassation

518. It has not been in the interest of either Party to criticize the judgment of the Appeal Court. Mr. Lee suggested that the concision of that judgment exemplified the required explanatory

[671] Tr., Day 2, 390:16-391:6 (Mr. Arjona).
[672] Tr., Day 1, 189:19-190:9 (Ms. Silberman).

standard.[673] This was somewhat ironic as the Supreme Court, the adequacy of whose judgment Mr. Lee was supporting, had itself criticized the judgment of the Appeal Court on the ground that:

> "The Upper Court only pointed out that a review of the body of evidence did not support the Plaintiff's claim. The Upper Court did not conduct a thorough analysis of the evidence, and did not identify any evidentiary elements, referring to it in a general and global way."[674]

519. The Tribunal understands the Supreme Court's dissatisfaction with the judgment of the Appeal Court. It is hard to believe that it was all written by the same hand: In the first part there is citation of jurisprudence in support of the importance of establishing damage, followed by the statement that it is a precondition to examine the evidence in the file to this end. There follows a bald statement that the necessary recklessness and bad faith are not established. This is then followed by a statement that it is impossible to examine the alleged damage. Why cite jurisprudence about the seminal importance of establishing damage in circumstances where the court does not proceed to do so?

520. In these circumstances, the Tribunal can understand why all three members of the Supreme Court were persuaded that lengthy evidence in relation to the damage suffered by Muresa and TGFL was properly the subject of an application for Cassation.

(iii) The Overall Picture

521. The evidence that fell to be considered in the Cassation proceedings accurately painted the following picture:

(i) The Bridgestone Group and the Luque Group were commercial rivals in the manufacture and sale of tires on an international scale.

(ii) The Bridgestone Group was pursuing an aggressive campaign of challenging the use of the RIVERSTONE trademark in various jurisdictions around the world.

(iii) The lawyers acting for the Bridgestone Group in the U.S. proceedings had sent to L.V. International a letter, the Foley Letter, intended to come to the notice of the

[673] RER-Lee Second, ¶ 92.

[674] **C-0027 / R-0034**, Supreme Court Judgment, p. 7 (as translated in R-0034).

Luque Group around the world. The letter aimed at discouraging the use of the RIVERSTONE trademark around the world inasmuch as it included the threat that such use would be "*at* [your] *own peril*."

(iv) BSJ and BSLS had brought the Trademark Opposition Proceeding in Panama that had no reasonable prospect of success. They had recognized this by withdrawing their appeal after losing at first instance.

522. There was also evidence that was subject to the Cassation claim to the effect that Muresa and TGFL had cut back on the sale of tires bearing the RIVERSTONE brand to the value of US$ 5,168,270.56. It was this evidence that was not accepted by the First Instance Court, which accepted conflicting expert evidence that the loss of sales was not made out.

523. The Tribunal is not aware that it has ever been contended that Muresa's claim was fraudulent and that Muresa and TGFL did not cut back on production and sales of RIVERSTONE tires in response to the Trademark Opposition Proceeding. Rather, the points that were taken by BSJ and BSLS in the Civil Proceedings were that the evidence was that Muresa and TGFL did this of their own volition out of apprehension that RIVERSTONE tires would be seized, that the bringing of the Trademark Opposition Proceeding did not justify this reaction, that the original claim that sales stopped was not made out, and that the extent of any diminution in sales was not proved.

524. In these circumstances it is not correct to allege, as the Claimants have, that the Supreme Court held that:

> "[S]imply bringing a trademark opposition action, in circumstances where the trademark applicant was a competitor, was unlawful because there was a risk [that] the competitor might thereby suffer loss."[675]

525. The Supreme Court was at pains to state:

> "It is not this Chamber's intention to say that initiating a legal action to claim a right may be interpreted as a synonym for the damages that may be caused to a plaintiff – thus creating a coercion element

[675] *See*, *e.g.*, Cl Mem., ¶ 25(p).

> for anyone who feels entitled to a claim and to use the means provided by the law to do so."[676]

526. The Supreme Court's Judgment was founded on the premise that BSJ and BSLS had brought the Trademark Opposition Proceeding without legal grounds, with the intention of damaging a trade rival. This premise was correct in as much as (i) the Trademark Opposition Proceeding were doomed to failure; and (ii) the purpose of bringing the Trademark Opposition Proceeding was to prevent a trade rival from marketing tires bearing the RIVERSTONE brand. Where the Supreme Court misread the situation was by accepting that the act of bringing the Trademark Opposition Proceeding was, of itself, calculated to cause loss to the Muresa Group, whereas that loss would only follow, quite lawfully, if the Trademark Opposition Proceeding were successful.

527. The Supreme Court proceeded on the false premise that there was a causal nexus between BSJ and BSLS making an unjustified opposition to the registration of the RIVERSTONE brand, and the Muresa and TGFL's actions in cutting back on the production and sales of RIVERSTONE tires when there was no such nexus. In reaching this conclusion the Supreme Court attached undue weight to the Foley Letter, which reflected the prominence given to that letter in the pleadings of the parties. The Supreme Court made the further error of assuming that the evidence in relation to Muresa and TGFL's losses was unchallenged.

528. The onus lies on the Claimants to demonstrate that these were not mere errors or oversights, but a demonstration of either incompetence or corruption on the part of the Majority judges. The onus is a high one. On the facts of this case, the Tribunal is satisfied that it is not discharged.

529. So far as causation is concerned, all the Muresa witnesses of fact and, indeed their accountancy experts, proceeded on the basis that it was axiomatic that Muresa and TGFL had to take measures to cut back on production and sale of RIVERSTONE tires as a consequence of BSJ and BSLS bringing the Trademark Opposition Proceeding in the

[676] **C-0027 / R-0034**, Supreme Court Judgment, pp. 16-17 (as translated in R-0034).

context of the Foley Letter. The Supreme Court proceeded on the premise that this was correct. That was a mistake, but not one that demonstrates incompetence or corruption.

530. The Supreme Court also accepted that the evidence that was the focus of the Cassation proceedings was a reliable, indeed unchallenged, basis for assessing loss. It was wrong to do so, but once again this error cannot found a finding to incompetence or corruption.

531. It is necessary, however, to say something further about the allegation that the decision of the Majority was procured by corruption.

f. The Allegation of Corruption

532. There are two different bases on which the Claimants invite the Tribunal to find that the judgment of the Majority of the Supreme Court was procured by corruption. The first is that the breaches of due process and the delivery of an incomprehensible judgment were so egregious, that they lead inexorably to the conclusion that the Majority who were responsible for this were either incompetent or bribed. The Claimants argue that while the Tribunal does not have to choose between the two, there are a number of peripheral matters that lend plausibility to the conclusion that the judgment was procured by corruption.

533. The second basis on which the Tribunal is invited to make a finding of corruption is altogether different in kind. The Claimants allege that Mr. Gonzalez-Revilla, at a time when he held the office of Panamanian Ambassador to the United States, made a formal admission on behalf of Panama that the Majority judgment had been procured by corruption.

(i) Alleged Indications of Corruption

534. In the unchallenged Report of Professor Paulsson he says this about corruption:[677]

> "The Claimants must substantiate any serious charge of corruption with evidence that demonstrates there was corruption in the specific case where denial of justice is alleged […] A mere suspicion of

[677] RER-Paulsson, ¶ 79.

> corruption is never enough, let alone a mere suspicion of corruption in the state in general."

535. Professor Paulsson cites in support of this proposition a passage from the award in *Vanessa Ventures*:[678]

> "Allegations of a lack of independence and impartiality are more difficult to deal with. They often amount to allegations of violations of professional rules, or even of criminal laws, and it is not to be expected that evidence will be readily available. Such allegations would, if proven, constitute very serious violations of the State's treaty obligations. But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case."

536. The Claimants have put forward a number of matters that they submit support a finding that the Majority judgment was procured by corruption. They include the perception of corruption in the judiciary of Panama in Transparency International's Global Corruption Monitor, and complaints of corruption made against the reporting judge in the present case, Justice Oyden Ortega. These complaints have not been upheld, but the Claimants allege that this is because the only body empowered to investigate Supreme Court Justices is the National Assembly, and there is a non-aggression pact between that body and the Supreme Court Judiciary under which one never investigates the other.

537. The Claimants do not suggest that these matters, if free standing, would suffice to found a finding of corruption in this case. They are relied upon to explain, on the basis of corruption, a judgment that the Claimants submit can only be explained as resulting from corruption or incompetence.

538. The Tribunal has rejected the Claimants' case that the Supreme Court Judgment gives rise to a presumption that the Majority of the Court was incompetent or corrupt. In these circumstances, the Tribunal does not consider it desirable to ventilate further matters that

[678] **RLA-0195**, *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/04/06, Award, 16 January 2013, ¶ 228.

might lend some peripheral support to a finding of corruption but that do not, of themselves, suffice to found such a finding, the more so as some of these matters involve Restricted Information.

(ii) The Alleged Admission of the Ambassador

539. Bridgestone representatives arranged a meeting with Mr. Gonzalez-Revilla, the Panamanian Ambassador to the United States, in order to discuss the implications of the Supreme Court Judgment. The meeting took place on 13 March 2015. In their Request for Arbitration, the Claimants described what transpired at this meeting as follows:

> "During this meeting, Bridgestone expressed concern over the Supreme Court decision and inquired as to domestic remedies available in addition to the two post-judgment appeals it had filed. Despite comments from the Ambassador indicating that he did not believe the decision could be changed, he offered to follow up with Bridgestone to discuss other potential domestic remedies. Unfortunately no follow up ever took place."[679]

540. The Bridgestone representatives at this meeting were Mr. Jeffrey Lightfoot, a lawyer who had arranged the meeting, Mr. Charles Johnson and Mr. Stephen Kho, two partners of Akin Gump and Mr. Steven Akey, Vice President for Government Affairs of BSAM. The Ambassador was accompanied by Mr. Heilbron and Ms. Gonzalez.

541. In his witness statement dated 30 April 2018, Mr. Akey described what occurred as follows:

> "[…] I could see that the Ambassador had been well-briefed and already knew about the case. He interrupted Steve after only a short time, since (so it appeared) he did not need to hear any more because he knew the facts already. The Ambassador said that the Supreme Court judgment was the result of corruption. The specific words he used were 'You know what this is, right? It's corruption.' He did not say that it sounded like it could be corruption or that there was any uncertainty – he said it was corruption. I was astonished. The Ambassador continued by explaining that the previous

[679] Request for Arbitration, ¶ 50

> administration had been very corrupt, and that this corruption had extended to the Supreme Court."[680]

542. This statement was corroborated by the witness statement of Mr. Lightfoot dated 9 May 2018. This included the following passage:

> "While Steve was explaining about the Supreme Court judgment that Bridgestone had received, the Ambassador interrupted, and said that the judgment was the result of corruption, and promised that with the new administration (a new President had been elected in 2014), there would be much less corruption."[681]

543. In their Memorial,[682] the Claimants allege that under the Vienna Convention on Diplomatic Relations an Ambassador is "*the person charged by the sending State with the duty of acting in that capacity*," and is a diplomat of highest rank with full representative powers, so that it follows that the Ambassador's admission of corruption was Panama's admission.

544. In a witness statement made on 10 September 2018, the Ambassador flatly denied that he had said that the Supreme Court Judgment was the result of corruption.[683] He said that he could not have done so because he knew neither the names of the parties to the litigation, nor the names of the judges who had sat on the case.[684]

545. On 28 August 2019, Mr. Gonzalez-Revilla, who had retired from his post as Ambassador, gave evidence by video link. It was put to him by Mr. Williams that at the meeting on 13 March 2015 he said that the judgment had been obtained by corruption. He denied this.[685] It was suggested that corruption might have been a topic of conversation and he said that he had no recollection of this.[686]

546. The Tribunal would not discount the possibility that at the meeting on 13 March 2015 some casual mention might have been made of corruption, of a kind that would not necessarily

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[680] CWS-Akey, ¶ 8.
[681] CWS-Lightfoot, ¶ 11.
[682] Cl. Mem., ¶ 115 (referring to **CLA-0065**, Vienna Convention on Diplomatic Relations, 1961, Art. 1).
[683] RWS-Gonzalez-Revilla, ¶ 7.
[684] RWS-Gonzalez-Revilla, ¶ 7.
[685] Tr., Day 6, 1392:7-1393:21 (Mr. Williams, Ambassador Gonzalez-Revilla).
[686] Tr., Day 6, 1390:19-1391:22 (Mr. Williams, Ambassador Gonzalez-Revilla).

have lingered in the memory. It is equally confident that if the Ambassador had made a statement that the Supreme Court Judgment had been obtained by corruption, he would have remembered this. Furthermore, it would have led Bridgestone's representatives to further immediate protest, and it would have been a prominent feature of the Request for Arbitration. The Tribunal accepts the Ambassador's evidence that he made no such statement.

4. Conclusion on Liability

547. A judgment that had held BSJ and BSLS liable in damages simply for exercising their procedural right to file an objection to an application to register the RIVERSTONE trademark would have been startling indeed. This was not such a case, however. After the detailed analysis that this Arbitration has involved, the Tribunal understands the reasoning that led the Majority of the Supreme Court to reach its decision. It has identified defects in that reasoning, but these are no more than errors of judgment. They fall far short of demonstrating that the judgment was the product of incompetence or corruption. For these reasons, the claims of BSAM and BSLS must be dismissed.

VII. DAMAGES

548. In its Counter Memorial, Panama remarked that to award damages the Tribunal had first to determine that Panama had breached its obligations under the TPA.[687] As we have found that Panama did not do this, the question of damages does not arise. Nevertheless, because so much of the Hearing was devoted to quantum, and because the Tribunal has formed a firm view in relation to this, it proposes briefly to set out its findings.

[687] Resp. C-Mem., ¶ 161.

A. The Claim for Damages Awarded by the Supreme Court

1. The Issue

549. The Supreme Court awarded in favour of Muresa and TGFL damages and advocates fees in the sum of US$ 5,431,000 against BSJ and BSLS jointly and severally. BSLS discharged the whole of this judgment debt.

550. BSLS claims that the whole of this sum constitutes "*loss or damage by reason of, or arising out of*"[688] the Supreme Court Judgment that it has incurred.

551. Panama claims that no part of this sum constitutes loss incurred by BSLS. This is because the funds used by BSLS to discharge the debt were provided in their entirety by BSAM, in circumstances where BSLS will not be required to repay this sum unless it succeeds in its current claim.

552. Should this argument not succeed, Panama alleges that it has a partial answer to the claim. Panama contends that as BSJ and BSLS were equally responsible for the payment of the Supreme Court Judgment, BSLS cannot recover the entire amount paid.[689] Panama accuses the Claimants of falsely asserting to the Tribunal that there are no documents demonstrating a formal agreement between BSLS and BSJ as to the appointment of loss, and argues that internal communications in May 2016 and a 2016 Resolution of BSLS's Board of Directors demonstrate the opposite.[690] According to Panama, at the time of the Supreme Court Judgment, an agreement existed between BSLS and BSJ under which the cost of discharging the judgment debt fell to be shared equally between them. That agreement was varied so as to provide that the entire liability would be notionally borne by BSLS. By agreeing to that variation, BSLS acted in breach of its obligation to mitigate its

[688] **R-0001**, TPA, Art. 10.16.1.

[689] Resp. C-Mem., ¶¶ 40-41.

[690] Resp. Rej., ¶¶ 244-245 (citing **R-0203**, Bridgestone Corporation Email Correspondence Regarding Bridgestone Licensing Services, Inc. Loan (20 May 2016); **R-0095**, Bridgestone Licensing Services, Inc. Written Consent of the Board of Directors for Action Without a Meeting (20 July 2016)). *See also*, Tr., Day 1, 232:2-234:6 (Ms. Gehring Flores).

loss. In those circumstances, its loss is restricted to 50% of the judgement debt.[691] Put another way, Panama argues that BSLS had an opportunity to mitigate its loss and instead of doing so, it took action designed to ensure that it sustained the entire loss; in consequence any award should be reduced so as to restrict BSLS' recovery to 50% of the loss.[692] Moreover, Panama "*emphatically*" opposes the Claimants' contention that BSLS made the payment of the Supreme Court Judgment in full because FIRESTONE is the historically more significant brand, and it argues that the evidence shows that the funds were funnelled through BSLS for reasons that had to do with this arbitration, namely, that only BSLS (and not BSJ) could bring a claim against Panama under the TPA.[693]

553. In turn, the Claimants oppose Panama's contention that BSLS should not recover for the full amount. The Memorial appears to argue that BSLS is entitled to recover the whole sum, on the basis of the international law principle of full reparation.[694] The Claimants have further explained that the full payment ordered by the Supreme Court Judgment was made by BSLS alone (with no role by BSJ) "*because that was what it agreed with BSJ*" given that in the Americas FIRESTONE has historically been the more significant brand.[695] According to the Claimants, as both BSJ and BSLS had been held jointly and severally liable by the Supreme Court, they were at liberty to decide which one should pay depending on their corporate needs.[696] The Claimants further submit that it was BSLS (not BSJ) who was facing the imminent enforcement actions; BSLS took into account tax issues;[697] and finally, that "*BSLS took into account that it had standing to bring the present arbitration claim to recover the sum paid, whereas BSJ did not.*"[698]

[691] Tr., Day 5, 1319-1324 (Ms. Gehring-Flores).
[692] Resp. Rej., ¶ 246. *See also*, Tr., Day 1, 234:9-235:12; 237:9-12 (Ms. Gehring Flores); Tr., Day 5, 1324:5-7 (Ms. Gehring Flores).
[693] Resp. Rej., ¶¶ 40, 242-246. *See also*, Resp. PHB, ¶ 10; Tr., Day 1, 220:18-21 (Ms. Gehring Flores).
[694] Cl. Mem., ¶¶ 225-228.
[695] Cl. Reply, ¶¶ 19-20, 32.
[696] Tr., Day 1, 116:12-19 (Mr. Williams).
[697] Tr., Day 1, 118:22-119:4 (Mr. Williams).
[698] Tr., Day 1, 119:5-7 (Mr. Williams).

554. The Claimants go on to argue that in the absence of guidance in the TPA, the Tribunal may look to any agreement between the two jointly liable parties to determine how to apportion loss, but explain that there are no documents demonstrating such formal agreement between BSJ and BSLS.[699] This said, the Claimants submit that the loan agreement between BSLS and BSAM as well as Mr. Kingsbury's testimony demonstrate the Bridgestone's Group approach, *i.e.* that BSAM and BSLS are generally responsible for matters in the Americas (not BSJ).[700]

555. The Claimants further submit that there is no evidence that BSLS has any right to contribution (either contractual or non-contractual) from BSJ with respect to payment of the Supreme Court Judgment, and deny that the agreement between BSLS and BSJ of January 2010 or a 2016 BSLS board resolution indicate otherwise.[701] They go on to contend that, even if there were a right to contribution from BSJ, "*it does not make sense to suggest that BSLS should mitigate its loss by seeking to recover from BSJ*."[702]

556. The Claimants go on to argue that the Tribunal should simply assess whether BSLS has acted reasonably. They submit that "*it was reasonable for BSLS to pay the full USD $5.4 million*" and "[i]*f 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*," and it was not unreasonable in the circumstances.[703]

2. The Facts

557. The full facts have only emerged late in the course of the proceedings as a result of failure by the Claimants to make timely discovery of some of the relevant documentation.

558. On 1 January 2010, BSJ and BSLS entered into an agreement (the "**2010 Agreement**") under which they agreed to split 50-50 "*the entire disbursement cost of all the trademark*

[699] Cl. Reply, ¶ 83. *See also*, Tr., Day 1, 118:5-8 (Mr. Williams).
[700] Cl. Reply, ¶ 83 (citing CWS-Kingsbury Third, ¶ 2). *See also*, Tr., Day 1, 118:14-21 (Mr. Williams).
[701] Cl. PHB, ¶¶ 85-87.
[702] Cl. PHB, ¶ 89.
[703] Cl. PHB, ¶ 90. *See also*, Tr., Day 1, 119:18-21 (Mr. Williams).

actions taken against the third party in the name of BSJ and BSLS to protect both BRIDGESTONE and FIRESTONE trademarks."[704]

559. On 20 July 2016, the Board of BSLS passed a Resolution recording and authorizing (i) the entry into an agreement (the "**2016 Agreement**") with BSJ; and (ii) a loan agreement (the "**BSA Loan Agreement**") under which BSLS would borrow from BSAM the funds needed to give effect to the 2016 Agreement.[705]

560. The terms of the 2016 Agreement first recited the terms of the 2010 Agreement and then went on to provide:

> "WHEREAS, in connection with the payment of the Judgment Amount, the Corporation [BSLS] and the Parent [BSJ] propose to agree that (i) despite the 2010 Agreement the Corporation [BSLS] will pay, and bear the entire financial burden of, such payment, and (ii) the Corporation [BSLS] 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')."[706]

561. Pursuant to these agreements, BSAM advanced to BSLS and BSLS paid in discharge of the judgment debt the full amount of US$ 5,431,000.

3. The Tribunal's Analysis

562. The 2010 Agreement did not, in terms, purport to cover a liability to pay damages under a claim in tort brought by a third party against whom trademark proceedings had been brought. The 2016 Agreement was none the less concluded on the assumption that the 2010 Agreement applied to the judgment debt. The Tribunal considers that this was a reasonable implication, and proceeds on the basis that it was correct. Thus, but for the

[704] **C-0318**, Agreement between Bridgestone Corporation and Bridgestone Licensing Services, Inc. (1 January 2010).

[705] **R-0095**, Bridgestone Licensing Services, Inc. Written Consent of the Board of Directors for Action Without a Meeting (20 July 2016); **C-0271**, Loan Agreement Between Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc. (20 July 2016).

[706] **R-0095**, Bridgestone Licensing Services, Inc. Written Consent of the Board of Directors for Action Without a Meeting (20 July 2016), p. 1.

2016 Agreement, BSLS and BSJ would have been bound by an agreement to discharge the Supreme Court Judgment debt in equal shares.

563. The object of the 2016 Agreement was clearly to enable BSLS to seek to recover the entire amount of the Supreme Court Judgment debt from Panama in these proceedings.

564. The Tribunal does not consider the source of the funds used by BSLS to discharge its liability under the Supreme Court Judgment debt to be material to the question of whether this constituted a loss suffered by BSLS. Had the Supreme Court Judgment held BSLS alone liable to pay that sum, and had BSAM put it in funds to enable it to do so, BSLS would still have been entitled to rely on its payment as a loss that it had suffered as a result of the Judgment. Where it had obtained the funds would not have been relevant. To use a useful Latin phrase, this would have been "*res inter alios acta.*" The same is true of its joint and severable liability with BSJ.

565. What is material, however, is that at the time of the Supreme Court Judgment, BSLS had a contractual right to call upon BSJ to pay half of their joint liability. BSLS could have exercised that right in mitigation of its loss. Instead, it deliberately entered into an agreement that removed any right to make a claim against BSJ for 50% of the Supreme Court Judgment debt. Thus, it was not open to BSLS to rely upon its deliberate abandonment of its right to mitigate to seek to recover the additional 50% under the TPA. That 50% was not a loss it suffered by reason of the Supreme Court Judgment. It was a loss it suffered by reason of entering into the 2016 Agreement. Had BSLS succeeded on the issue of liability in this arbitration, its recovery in relation to the debt arising out of the Supreme Court Judgment would have been limited to 50% of the amount that it paid.

B. BSAM and BSLS' Joint Claim

566. The major claim in these proceedings has been the joint claim of BSAM and BSLS to alleged damage to their respective trademark rights. The Tribunal can deal with this claim very shortly.

567. The basis of this claim was a submission that the allegedly aberrant Supreme Court Judgment had an impact on the value of the BRIDGESTONE and FIRESTONE

trademarks, and indeed on the value of trademarks in general, in Panama and more widely. The Claimants have been unable to produce a scintilla of evidence to support this proposition.

568. At the Hearing, Ms. Kepchar for the Claimants told the Tribunal that Mr. Daniel would establish that the Claimants "*as rights-holders to the BRIDGESTONE and FIRESTONE marks*" had incurred damage as a result of the Supreme Court Judgment.[707] As Mr. Daniel gave evidence it became apparent that Mr. Daniel, the Claimants' principal expert on this aspect of the case, had been assuming that some other witness was going to prove that, as a result of the Supreme Court Judgment, the BRIDGESTONE and FIRESTONE marks fell to be valued as no longer exclusive. His task, as he had seen it, was simply to evaluate this change in money terms.

569. No evidence was given to justify the assumption upon which Mr. Daniel had proceeded. No witness gave evidence that the Supreme Court Judgment had affected the value of trademarks in Panama, or indeed that it had had any general effect at all. Mr. Molino, the Claimants' expert on patent law and practice in Panama, and Ms. Lasso de la Vega, Panama's expert in this field, were agreed that the Supreme Court Judgment had not been mentioned in any intellectual property case over the last five years.[708]

570. It would not be strictly accurate to state that the Claimants' case on damages collapsed at the Hearing, but rather that it became evident that it had always been built on sand. Had the Claimants succeeded in establishing liability their victory would have been pyrrhic.

[707] Tr., Day 1, 129:10-13 (Ms. Kepchar).
[708] Tr., Day 3, 692:18-693:21 (Mr. Molino); and 716:12-717:5 (Ms. Lasso de la Vega).

VIII. COSTS

A. The Parties' Positions

1. The Claimants' Position

571. In total, the Claimants have submitted that they have incurred in US$ 7,028,909.97 in costs and expenses in this proceeding. This total is composed of the Claimants' claim for: (i) costs and expenses associated with the Expedited Objections Phase (US$ 1,179,110.97);[709] and (ii) costs and expenses associated with the rest of the proceeding (US$ 5,849,799.00).[710] The Claimants request that the Tribunal "*order the Respondent to bear such fees and costs, with interest thereon at the rate of six-month LIBOR plus 2% per annum*."[711]

572. In their Statement of Costs for the Expedited Objections Phase dated 6 November 2017, the Claimants submitted the following break-down of their costs and expenses pertaining to the Expedited Objections Phase:[712]

Description	Amount Claimed (USD)	
Akin Gump Professional Fees	$	1,133,589.50[713]
Cost Disbursements	$	45,521.47[714]
Total	**$**	**1,179,110.97**

573. In their Statement of Costs dated 8 November 2019, the Claimants submitted the following break-down of their costs and expenses incurred for the rest of the proceeding (which

[709] Cl. Costs Exp. Obj., ¶ 10.

[710] Cl. Costs, ¶¶ 2, 5.

[711] Cl. Costs, ¶ 5. During the Expedited Objections Phase, the Claimants also requested that the Respondent be ordered to pay the Claimants' costs associated with those objections. Cl. Res. Exp. Obj., ¶¶ 20, 180; Cl. PHB Exp. Obj., ¶ 62.

[712] The Claimants submitted that this amount does not include: (i) all time and costs outside the relevant period (i.e., 30 May 2017-6 November 2017); and, (ii) all time and costs incurred within the relevant period that do not relate to the Expedited Objections. Cl. Costs Exp. Obj., ¶¶ 2-3, 10.

[713] Cl. Costs Exp. Obj., §§ III.A-III.E.

[714] Cl. Costs Exp. Obj., § III.F.

excludes those pertaining to the Expedited Objections Phase and the advances made to ICSID):[715]

Description	Amount Claimed (USD)	
Akin Gump Professional Fees	$	4,607,015.77
Cost Disbursements	$	642,783.00
Total	**$**	**5,249,798.77**

574. In addition, in their Statement of Costs dated 8 November 2019, the Claimants submitted the following claim for the advances made to ICSID to cover the costs of the proceedings:[716]

Description	Amount Claimed (USD)	
Advance Payments to ICSID	$	600,000.00

575. To assist the Tribunal in determining that their costs "*have been reasonably incurred*," the Claimants submit that:

- Akin Gump's professional fees pertain to: (i) the preparation and submission of the Request for Arbitration; (ii) arbitrator research; (iii) correspondence exchanged with the Tribunal and the Respondent; (iv) the pleadings; (v) the document requests; (vi) document review; (vii) the preparation and attendance at the pre-hearing organizational session and the Hearing; (viii) transcript review and corrections; and (ix) the Post-Hearing Briefs; (x) the Cost Statements; (xi) strategy meetings among counsel, and with the Claimants and experts.[717]

- The cost disbursements pertain to: (i) professional fees and travel costs paid to the experts; (ii) counsel travel costs; (iii) document translations; (iv) courier services; (v) document printing and storage; and (vi) disbursements to external counsel (Benedetti and Benedetti).[718]

2. The Respondent's Position

576. The Respondent asks the Tribunal to:

"[…]

[715] Cl. Costs, ¶¶ 2-3.

[716] Cl. Costs, ¶ 3.

[717] Cl. Costs, ¶ 4(a). *See also*, Cl. Costs Exp. Obj., ¶ 5(a)-(e).

[718] Cl. Costs, ¶ 4(b). *See also*, Cl. Costs Exp. Obj., ¶ 5(f).

> d. order Claimants, jointly and severally, to pay **USD 600,000** to cover Panama's costs advances to ICSID, and **USD 8,006,906.00** to cover the legal fees and expenses incurred by Panama during this proceeding, plus interest on these amounts at the Wall Street Journal Prime Rate plus 2% per annum from the date of the Award to the date of full payment; and
>
> e. order Claimants to pay any additional costs, including legal fees and expenses, incurred by Panama after 31 October 2019, but before the Tribunal renders its Award, plus interest at the rate specified in sub-paragraph (d) above."[719]

577. In their Statement of Costs dated 8 November 2019, the Respondent submitted the following break-down of their costs (legal fees and expenses) as of 31 October 2019 (which excludes the advances made to ICSID):[720]

Description	Amount Claimed (USD)	
Arnold and Porter Legal Fees	$	6,809,888.80
Lee Professional Fees	$	98,889.20
Paulsson Professional Fees	$	96,830.50
Lasso de La Vega Ferrari Professional Fees	$	259,980.60
Jacobson Professional Fees	$	391,245.49
Fried Professional Fees	$	25,071.41
Shopp Professional Fees	$	325,000.00
Total	**$**	**8,006,906.00**

578. Panama explains that its "*total costs*" figure comprises both costs that the Tribunal has not yet decided how to apportion; and costs that the Tribunal has in principle already awarded to the Respondent.[721] More particularly, the Respondent notes that the above total figure *includes* US$ 146,986.00 pertaining to the Claimants' Application to Remove Mr. Lee as

[719] Resp. Costs, ¶ 3(d)-(e) (emphasis in original and footnotes omitted). The Respondent notes that the U.S. Dollar LIBOR is scheduled to be phased out. Resp. Costs, n. 14. During the Expedited Objections Phase, the Respondent had quantified its costs and fees for that phase on US$ 1,691,447.72 (composed of US$ 1,541,447.72 on legal fees and expenses + US$ 150,000.00 on advance payments to ICSID), and it had asked the Tribunal to "*order Claimants (jointly and severally) to bear such costs and fees, with interest thereon at the rate of six-month LIBOR plus 2% per annum from the date of the Tribunal's ruling until the date of payment.*" *See*, Resp. Costs Exp. Obj., ¶¶ 1, 4.

[720] Panama "*reserve*[d] *its right to seek reimbursement of costs incurred after this date, and to apprise the Tribunal accordingly*." Resp. Costs, n. 5.

[721] Resp. Costs, ¶ 2.

an expert.[722] According to the Respondent, the Tribunal already decided that the Claimants should pay Panama "*its reasonable costs in relation to the Application* [to remove Mr. Lee as Panama's expert]."[723] Accordingly, Panama argues, irrespective of the allocation of any other costs incurred during this proceeding, the Respondent should be granted the payment of the US$ 146,986.00 for the costs derived from such application.[724]

579. In addition, in its Statement of Costs dated 8 November 2019, the Respondent submitted the following claim for the advances made to ICSID to cover the costs of the proceedings:[725]

Description	Amount Claimed	
Advance Payments to ICSID	$	600,000.00

580. The Respondent submits that the ICSID Convention authorizes a tribunal to award costs and legal fees against "*abusive or unsuccessful claimants*;"[726] and it asks the Tribunal to award "*full costs and attorney's fees to Panama with applicable compounding interest.*"[727]

581. According to Panama, "[i]*f ever there was a case for the award of full costs, this is it*."[728] Panama accuses the Claimants of engaging in "*a variety of abusive tactics*,"[729] including, *inter alia*, (i) channelling funds through a shell subsidiary for purposes of manufacturing a TPA claim;[730] (ii) "*approach*[ing] *representatives of Panama's Executive Branch in hopes of getting the Executive Branch to interfere with the independent judiciary*;"[731] (iii)

[722] Resp. Costs, ¶ 2, and nn. 7 and 8. More specifically, the Respondent has noted that the US$ 146,986.00 are part of the "*Arnold & Porter Legal Fees*" item. Resp. Costs, n. 7.

[723] Resp. Costs, ¶ 2; *citing* Decision on Claimant's Application to Remove Panama's Expert, 13 December 2018, ¶ 41. *See also*, Resp. Rej., ¶ 287(c)

[724] Resp. Costs, ¶ 2.

[725] Resp. Costs, § II.

[726] Resp. Rej., ¶ 288 (citing ICSID Convention, Art. 61(2); ICSID Arbitration Rules, Rule 28(1); **RLA-0215,** *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Allocation of Costs, 27 October 2010, ¶¶ 72-73).

[727] Resp. C-Mem., ¶ 299. *See also*, Resp. Rej., ¶ 288; Resp. PHB, ¶ 34.

[728] Resp. Rej., ¶ 288.

[729] Resp. C-Mem., ¶ 288.

[730] Resp. C-Mem., ¶ 288(a).

[731] Resp. C-Mem., ¶ 288(b).

distorting key aspects of the local litigation that led to the Supreme Court Judgment;[732] (iv) asserting a "*speculative and remote*" claim related to investments outside of Panama dismissed for lack of jurisdiction;[733] and (v) attempting to transform a courtesy meeting with the Panamanian Ambassador to the United States into a wild allegation of corruption and a binding admission by a sovereign State.[734]

582. The Respondent further submits that in this case it "*has confronted frivolous treaty claims*."[735] It observes that (i) BSLS and BSAM initially filed expropriation, national treatment and most-favoured nation claims which were later dropped;[736] (ii) BSAM has continued to pursue a "*hopeless denial of justice claim for which it has no standing* […];"[737] (iii) BSLS "*presses its denial of justice claim with total disregard for the well-established principle that denial of justice claims are not appeals and are not opportunities to revisit rulings on issues of evidence*;"[738] (iv) the Claimants have asserted loss when their financial statements show none;[739] (v) BSJ, BSAM and BSLS "*intentionally arranged for* [BSLS] *to pay* [sic] *make the full payment* [of the amount of the Supreme Court Judgment], *and then proceeded to hide this fact from the Tribunal in order to seek 100 percent recovery*;"[740] and (vi) the Claimants have shown "*contempt* […] *for Panama, its institutions, and senior officials throughout the case*" in multiple ways throughout this case, which Panama describes at length in its various submissions.[741] According to Panama, the latest category includes, *inter alia*, the Claimants' unsuccessful attempt to disqualify former Supreme Court Justice Jorge F. Lee as an expert,[742] unsupported

[732] Resp. C-Mem., ¶ 288(c).
[733] Resp. C-Mem., ¶ 288(e). *See also*, Resp. C-Mem., ¶ 294.
[734] Resp. C-Mem., ¶ 288(f).
[735] Resp. Rej., ¶ 284.
[736] Resp. Rej., ¶ 285. *See also*, Resp. C-Mem., ¶¶ 288(d), 294; Resp. Rej., ¶ 285 (b); Resp. PHB, ¶ 34.
[737] Resp. Rej., ¶ 285. *See also,* Resp. C-Mem., ¶ 295.
[738] Resp. Rej., ¶ 285. *See also,* Resp. C-Mem., ¶ 296.
[739] Resp. Rej., ¶ 286. *See also*, Resp. C-Mem., ¶¶ 288(g), 297.
[740] Resp. Rej., ¶ 287.
[741] Resp. Rej., ¶ 287 (referring also to Resp. C-Mem., ¶¶ 287-299).
[742] Resp. Rej., ¶ 287(c).

accusations against the Chief Justice of the Supreme Court of Panama,[743] gross mischaracterizations of documents to discredit Supreme Court Justices,[744] and inappropriate remarks about the credibility and character of a former Panamanian Ambassador to the United States.[745]

583. In its last written submission, the Respondent summarized the Claimants' conduct justifying a full award on costs and legal fees as follows:

> "[…] Claimants have raised claims only to abandon them; aggressively sought the production of – and expert access to – sensitive documents, which they never discussed at the hearing, and their expert did not even cite; made assertion after assertion without ascertaining its accuracy; misled the Tribunal about the existence of their own documents; pursued multiple meritless requests to disqualify Panama's experts; and […] propounded a new and twice-waived theory on a highly-technical question of Panamanian civil procedure, demanded that a civil law practitioner disprove their theory by citing 'precedent' from memory, sat silently and then objected on the two occasions on which Panama offered to provide the authorities, demanded two weeks to conduct the research that they should have had on hand before embarking on this folic and detour and labeling a former Supreme Court Justice 'unsatisfactory,' and then stated simply: 'Claimants have decided not to submit […] legal authorities.'"[746]

B. The Costs of the Proceeding

584. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US$):

Arbitrators' Fees and Expenses	
Lord Nicholas Phillips	US$ 227,198.26
Mr. Horacio A. Grigera-Naón	US$ 205,875.00
Mr. J. Christopher Thomas, QC	US$ 158,721.56
ICSID's Administrative Fees	US$ 158,000.00

[743] Resp. Rej., ¶ 287(d).
[744] Resp. Rej., ¶ 287(f).
[745] Resp. Rej., ¶ 287(g).
[746] Resp. PHB, ¶ 34.

Direct Expenses	US$ 132,376.63
Total	**US$ 882,171.45**

585. The above costs have been paid out of the advances made by the Parties in equal parts.[747] As a result, the expended portion of each Party's advances to cover the above costs of the arbitration was: US$ 441,085.72 (for the Claimants) and US$ 441,085.73 (for the Respondent).

C. The Tribunal's Decision

586. Article 61(2) of the ICSID Convention provides:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

587. There is a degree of hyperbole in Panama's submissions, but a degree of truth as well. BSJ and BSLS were unlucky to lose in the Supreme Court for the reasons that we have given, but they over-reacted. Faced with allegations of judicial corruption and incompetence of their highest court, Panama was justified in deploying lawyers and experts of high standing to meet the case made against it. There is, nonetheless a very significant difference between the costs incurred by the Claimants and those incurred by the Respondent.

588. The Tribunal has concluded that justice will be served by ordering the Claimants to reimburse the Respondent the expended portion of the advances paid by the Respondent to ICSID, and to pay US$ 6.5 million towards Panama's legal costs and expenses. The amount of US$ 6.5 million *includes* the costs associated with the Application to Remove Mr. Lee (which the Respondent has quantified in US$ 146,986.00).

[747] The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case account. The remaining balance shall be reimbursed to the Parties based on the payments that they advanced to ICSID.

589. Accordingly, the Tribunal declares that the Claimants are jointly and severally liable to pay the Respondent: (i) US$ 441,085.73 for the expended portion of the Respondent's advances to ICSID; and (ii) US$ 6,500,000.00 to cover a reasonable proportion of the Respondent's legal fees and expenses, together with interest on each of these sums at the Wall Street Journal Prime Rate plus 2% from the date of this Award to the date of full payment.

IX. AWARD

590. For the reasons set forth above, the Tribunal decides as follows:

(i) The Claimants' claim is dismissed;

(ii) The Claimants shall pay the Respondent **US$ 6,941,085.73** (being the total of (i) and (ii) in ¶ 589 *supra*) together with interest at the Wall Street Journal Prime Rate plus 2% from the date of this Award to the date of full payment.

[SIGNED]

_____	_____
Mr. Horacio A. Grigera Naón Arbitrator Date: [5 August 2020]	Mr. J. Christopher Thomas, QC Arbitrator Date:

_____

Lord Nicholas Phillips Baron of Worth Matravers
President
Date:

[SIGNED]

_____	_____
Mr. Horacio A. Grigera Naón	Mr. J. Christopher Thomas, QC
Arbitrator	Arbitrator
Date:	Date: [6 August 2020]

_____

Lord Nicholas Phillips Baron of Worth Matravers
President
Date:

_____	_____
Mr. Horacio A. Grigera Naón	Mr. J. Christopher Thomas, QC
Arbitrator	Arbitrator
Date:	Date:

[SIGNED]

_____

Lord Nicholas Phillips Baron of Worth Matravers
President
Date: [5 August 2020]

ANNEX A[1]

[1] The Supreme Court Judgment was filed as an Exhibit by each Party: C-0027-SPA and C-0027-ENG, and R-0034-SPA and R-0034-ENG. As each Party filed its own English translation, this Annex includes R-0034-SPA, R-0034-ENG and C-0027-ENG. Tribunal notes, however, that it has not identified any issue arising out of the Parties' respective English translations and has, for the most part, cited from R-0034-ENG.

R-0034

ENTRADA: N°313-13
MAGISTRADO PONENTE: OYDÉN ORTEGA DURÁN

MURESA INTERTRADE, S.A. Y TIRE GROUP OF FACTORIES LTD., INC. RECURREN EN CASACIÓN DENTRO DEL PROCESO ORDINARIO QUE LE SIGUEN A BRIDGESTONE CORPORATION Y BRIDGESTONE LICENSING SERVICES, INC.

CORTE SUPREMA DE JUSTICIA. – SALA DE LO CIVIL. – PANAMÁ, VEINTIOCHO (28) DE MAYO DE DOS MIL CATORCE.

VISTOS:

Mediante Resolución de cuatro (4) de diciembre de dos mil trece (2013), esta Sala de lo Civil admitió el Recurso de Casación interpuesto por la firma de abogados **BALLARD & BALLARD**, en su condición de apoderada judicial de la Sociedad Anónima **MURESA INTERTRADE, S.A.**, interpuesto en contra de la Resolución de veintitrés (23) de mayo de dos mil trece (2013), proferida por el Primer Tribunal Superior del Primer Distrito Judicial, la cual modifica la Sentencia No. 70 de 17 de diciembre de 2010, emitida por el Juzgado Undécimo de Circuito de lo Civil del Primer Circuito Judicial de Panamá, dentro del Proceso Ordinario que **MURESA INTERTRADE, S.A.** y **TIRE GROUP OF FACTORIES LTD., INC.** le siguen a **BRIDGESTONE CORPORATION** y **BRIDGESTONE LICENSING SERVICES, INC.**

Finalizada la fase de alegatos de fondo, la cual fue aprovechada por ambas partes del Proceso, lo que resulta visible de los distintos escritos que figuran de fojas 4736 a 4755 del expediente, procede la Sala a decidir el Recurso de Casación respectivo, previas las consideraciones que a continuación se expresan.

ANTECEDENTES

A través de apoderado judicial, las Sociedades Anónimas **MURESA INTERTRADE, S.A.** y **TIRE GROUP OF FACTORIES LTD.,**

INC., promovieron Proceso Ordinario de Mayor cuantía en contra de las Sociedades **BRIDGESTONE CORPORATION** y **BRIDGESTONE LICENSING SERVICES INC.**, a fin de que estas sean condenadas de forma solidaria a pagar la suma de **CINCO MILLONES DE DÓLARES (US. $/.5,000,000.00)** en concepto de daños y perjuicios. La Demanda Ordinaria se fundamentó en las siguientes pretensiones:

> 1."Que se condene a las demandadas, las sociedades BRIDGESTONE CORPORATION y BRIDGESTONE LICENSING SERVICES INC. a pagar a nuestras representadas las sociedades MURESA INTERTRADE, S.A. y TIRE GROUP OF FACTORIES LTD, INC. la suma de Cinco millones de dólares (US$5,000,000.00), moneda de curso legal de los Estados Unidos de América, en concepto de indemnización por responsabilidad extra-contractual.
>
> 2.Que se condene a las demandadas BRIDGESTONE CORPORATION y BRIDGESTONE LICENSING SERVICES INC. a pagar las costas y gastos que se originen durante el presente proceso."

Los hechos en que se fundamentó la Demanda interpuesta por **MURESA INTERTRADE, S.A.** y **TIRE GROUP OF FACTORIES LTD, INC.** fueron los siguientes:

> "**PRIMERO**: las sociedades demandadas BRIDGESTONE CORPORATION y BRIDGESTONE LICENSING SERVICES INC. el 5 de abril del 2005 presentaron demanda de oposición de la solicitud de registro No. 120823-01 de la marca demanda de oposición de la solicitud de registro No. 120823-01 de la marca RIVERSTONE y DISEÑO contra la sociedad MURESA INTERTRAD, S.A.
>
> **SEGUNDO**: La sociedad demandante MURESA INTERTRADE, S.A., celebró el día 27 de diciembre de 2001 un contrato de representación y distribución con la sociedad TIRE GROUP OF FACTORIES LTD, INC. para los diferentes países de Europa, Asia, Africa y cualquier otra (sic) país del área, para el registro y la comercialización de los Productos

de la Marca RIVERSTONE Y DISEÑO (llantas o neumáticos).

TERCERO: Las sociedades demandante MURESA INTERTRADE, S.A., celebró el día 27 de diciembre de 2001 un contrato de representación y distribución con la sociedad LV INTERNACIONAL INC. para los diferentes países del continente americano, entre ellos de Estados Unidos de América, Estados Unidos Mejicanos, Guatemala, el Salvador, Honduras, Belice, Costa Rica, Canadá, Nicaragua, Venezuela, Ecuador, Uruguay, Paraguay, Haití, Argentina, Bolivia, Perú, República Dominicana y Colombia para el registro y la comercialización de los Productos de la Marca RIVERSTONE Y DISEÑO (llantas o neumáticos)

CUARTO: Que La Sociedad MURESA INTERTRADE, S.A. es la propietaria exclusiva de la marca RIVERSTONE Y DISEÑO, tal como lo establece la ley 35 de 10 de mayo de 1996 aprobados en nuestro país por la ley 41 de 13 de julio de 1995, el convenio de Paris y el acuerdo sobre los ADPIC, aprobado mediante la ley 23 de 15 de julio de 1997.

QUINTO: Que la sociedad MURESA INTERTRADE, S.A. autorizó a las sociedades LV INTERNATIONAL INC. y TIRE GROUP OF FACTORIES LTD, INC. a registrar la marca RIVERSTONE Y DISEÑO a nivel internacional; siendo estos productos (neumáticos) comercializados (vendidos) en América, Europa, Asia y África.

SEXTO: Que a raíz de la demanda instaurada por las hoy demandadas BRIDGESTONE CORPORATION y BRIDGESTON LICENSING SERVICES INC. se causaron daños y perjuicios a nuestras representadas toda vez que se dejo de comercializar (vender) el producto de la marca RIVERSTONE Y DISEÑO, como consecuencia de la demanda incoada."

El presente Proceso quedó radicado en el Juzgado Undécimo de Circuito de lo Civil del Primer Circuito Judicial de Panamá, el cual a través de Auto No. 1293-07 admitió la Demanda respectiva, corriéndola

en traslado a las demandadas, quienes en su contestación negaron los hechos y la cuantía demandadas.

Luego del cumplimiento de las etapas procesales correspondientes, el A quo resolvió en primera instancia el presente Proceso a través de la Sentencia No. 70 de 17 de diciembre d 2010, en cuya parte resolutiva se expone lo siguiente:

> "La suscrita, JUEZ UNDÉCIMA DE CIRCUITO DE LO CIVIL DEL PRIMER CIRCUITO JUDIIAL DE PANAMÁ, administrando justicia en nombre de la República y por autoridad de la Ley, dentro del proceso Ordinario por responsabilidad Civil propuesto por MURESA INTERTRADE, S.A. y TIRE GROUP OF FACTORIES LTD., INC., contra BRIDGESTONE CORPORATION y BRIDGESTONE LICENSING SERVICES, INC., RESUELVE lo siguiente:
>
> PRIMERO: Declara probada la Excepción de Ilegitimidad en la Causa de la sociedad TIRE GROUP OF FACTORIES LTD, S.A., alegada por las demandadas BRIDGESTONE CORPORATION y BRIDGESTONE LICENSING SERVICES, INC.
>
> SEGUNDO: NIEGA LA PRETENSIÓN condenatoria solicitada por la sociedad MURESA INTERTRATE, S.A., dentro del presente proceso.
>
> Condena en costas a la actora mismas que se tasan en la suma de TRESCIENTOS SETENTA Y UN MIL SETECIENTOS BALBOAS CON 00/100 (B/.371,700.00)."

En el ejercicio de sus derechos procesales, la parte Demandante oportunamente interpuso Recurso de Apelación en contra de la Sentencia de primera instancia, siendo de conocimiento dicho Recurso por parte del Primer Tribunal Superior del Primer Distrito Judicial de Panamá, quien resolvió la alzada a través de la Resolución de 23 de mayo de 2013, exponiéndose en la parte resolutiva de dicho fallo lo siguiente:

> "Por lo antes expuesto, el PRIMER TRIBUNAL SUPERIOR, administrando justicia en nombre de

> la República y por autoridad de la Ley, MODIFICA la Sentencia No. 70 del 17 de diciembre de 2010, dictada por el Juzgado Undécimo de Circuito del Primer Circuito Judicial de Panamá, Ramo Civil; en el sentido de Declarar NO PROBADA la Excepción de Ilegitimidad en la Causa de la sociedad TIRE GROUP OF FACTORIES LTD, S.A., alegada por las demandadas.
> SE CONFIRMA en todo lo demás."

Es contra esta decisión de segunda instancia que la Recurrente ha interpuesto el presente Recurso de Casación que esta Sala de lo Civil se avoca a resolver.

RECURSO DE CASACIÓN

El Recurso de Casación interpuesto es en el fondo y se invoca un concepto de la Causal de Infracción de Normas Sustantivas de Derecho, el que corresponde al de error de hecho en cuanto a la existencia de la prueba.

Este concepto invocado se fundamenta a través de seis Motivos que se exponen a continuación:

> "**PRIMERO**: El Primer Tribunal Superior del Primer Distrito Judicial de Panamá, al emitir el fallo ignoró completamente el documento en idioma inglés y debidamente traducido al español mediante traductor público autorizado, y que se lee de foja 2622 a foja 2628 y de foja 2955 a foja 2958 del expediente, en la cual los abogados de Transnacional BFS Brands, LLC, amenazan y le advierten a L.V. INTERNATIONAL, INC, marca de fábrica Riverstone, representante de MURESA INTERTRADE, S.A., que se abstenga de cualquier registro y uso de la marca Riverstone, tanto dentro de los Estados Unidos de América como en cualquier otro país; y de usar la marca, L.V. INTERNATIONAL INC., lo hacia abajo su propio riesgo. Al no tomar en cuenta esta prueba importante del proceso el Primer Tribunal Superior del Primer Distrito Judicial de Panamá, incurrió en error de hecho sobre la

existencia de la prueba, lo cual influyó sustancialmente en lo dispositivo de la resolución recurrida, toda vez que dicha prueba, ignorada demuestra el dolo y la temeridad de las demandantes.

SEGUNDO: Tampoco el Primer Tribunal Superior del Primer Distrito Judicial de Panamá, tomó en cuenta, al ignorar completamente las certificaciones expedidas y suscritas por la Contadora Pública Autorizada MIRMA R. MOREIRA, con número CPA 307-2005, reconocida su firma ante notario público, contadora de la empresa MURESA INTERTRADE, S.A. y TIRE GOUP OF FACTORIES LTD, INC. dejaron de vender a nivel internacional la suma de cinco millones ciento sesenta y ocho mil doscientos setenta dólares con cincuenta seis centavos (USD$5,168,270.56), incurriendo en error de hecho sobre la existencia de la prueba lo cual influyó sustancialmente en lo dispositivo de la resolución recurrida, toda vez que si no hubiera ignorado esta prueba importante del proceso hubiera reconocido que la parte demandada le causó a nuestras representadas graves perjuicios económicos con su conducta.

TERCERO: El Primer Tribunal Superior del Primer Distrito Judicial de Panamá no valoró, sino que ignoró completamente, lo que consta en la resolución de 8 de septiembre de 2006 del Tercer Tribunal Superior del Primer Distrito Judicial de Panamá consultable de fojas 37 a foja 38 del expediente, en donde consta el hecho o conducta dolosa y de mala fe de la parte demandada, quien luego de oponerse al registro de la marca Riverstone de nuestras representadas y de anunciar apelación contra el fallo que le negó la oposición desistió de dicho recurso. Al no tomar en cuenta esta prueba documental que es un documento, al ad-quem incurrió en error de hecho sobre la existencia de la prueba, influyendo sustancialmente en lo dispositivo de la resolución recurrida, y que de haberlo tomado en cuenta hubiese dado por probado el daño causado por la demanda a nuestras representadas.

CUARTO: El Primer Tribunal Superior del Primer Distrito Judicial de Panamá ignoró las pruebas testimoniales de los señores JOSE ORESTES MEDINA SAMANIEGO, consultable de foja 553 a foja 564; DOMINGO ESTEBAN ROMERO CEVALLOS, foja 565 a foja 569; GRICELDA

PINEDA CASTILLO, consultable de foja 575 a 585; AMINTA JULISA VEGA DE BARRERA, consultable de foja 586 a foja 594; AIXA YADIRA RAMÍREZ GONZÁLEZ, de foja 622 a foja 628, MIRNA RAQUEL MOREIRA MARTINEZ, consultable de foja 634 a foja 643, LAURA ESTHER MURGAS DE BRACHO, de foja 647 a foja 655 del expediente, todos empleados de nuestras representadas y que conocen del movimiento de venta de llantas, quienes concuerdan en modo tiempo y lugar, que nuestras representadas no pudo efectuar sus ventas de sus llantas Riverstone, por causa de la oposición a la solicitud del registro de l misma marca y las amenazas de la Transnacional BRIDGESTONE, por lo que incurrió el ad-quem en error de hecho sobre la existencia de la prueba, que influyó sustancialmente en lo dispositivo de la disposición recurrida, al no dar por acreditado el daño causado por las demandadas

QUINTO: Tampoco el Primer Tribunal Superior del Primer Distrito Judicial de Panamá tomo en cuenta la declaración testimonial rendida por FERNAN JESÚS LUQUE GONZALEZ, ver de foja 603 a foja 616 y JORGE ALBERTO LUQUE GONZALEZ, consultable de foja 657 a 661 del expediente, quienes en su deposición manifestaron que les consta que hubo una amenaza mediante una carta proveniente de BFS BRANDS , LLC (BRIDGESTONE) en los Estados Unidos de América, así como la acción de secuestro y de impugnación contra la marca RIVERSTONE en República Dominicana, Chinas y otros países, lo que condujo a nuestras representadas a temer por acciones en su contra, que impidió la venta de las llantas d ela marca RIVERSTONE, durante la oposición al registro de la misma, con lo cual incurrió el ad-quem en error de hecho sobre la existencia de la prueba que influyó en lo dispositivo de la resolución recurrida, debido a que por ignorar dicha prueba no dio por probado el dolo y la mala fe de las demandadas, así como los daños y perjuicios causados.

SEXTO: El Primer Tribunal Superior del Primer Distrito Judicial de Panamá tampoco tomó en cuenta en su fallo el informe pericial contable rendido por el perito PSIQUIES DE LEON Y JOSE ANTONIO AGUILAR, consultable de foja 2635 a foja 2642 del expediente y la deposición e interrogatorio a dichos peritos que se lee de foja

> 3639 a foja 3663, quienes concluyeron que nuestras representadas tuvieron una notoria disminución en las ventas durante el período 2005-2008, por daños causados por BRIDGESTONE valorado en cinco millones ciento sesenta y ocho mil doscientos sesenta dólares con cincuenta y seis centavos (USD$5,168,270.56) con motivo de la oposición al registro de la marca RIVERSTONE y a las amenazas de las demandadas, con lo cual incurrió el ad-quem en error de hecho sobre la existencia de la prueba que influyó en lo dispositivo de la resolución recurrida, debido a que por ignorar dicha prueba no dio por probado el dolo y la mala fe de ls demandadas así como los daños y perjuicios causados."

Como normas de derecho consideradas infringidas, se citan los artículos 780 y 217 del Código Judicial, al igual que el artículo 1644 del Código y el artículo 1 de la Ley No. 57 de 1978.

CRITERIO DE LA SALA

Como bien se ha señalado anteriormente, el Recurso de Casación es en el fondo y se invoca la Causal de Infracción de normas sustantivas de derecho, por el concepto de error de hecho en cuanto a la existencia de la prueba.

El concepto probatorio invocado, se produce cuando una prueba que obra en el Proceso, no ha sido valorada por el Ad quem dentro de la Resolución recurrida, para lo cual es obligante que su valoración influya en lo dispositivo del fallo atacado.

Así las cosas, una minuciosa revisión de la Resolución recurrida evidencia que en efecto, las prueba a las que hacen referencia los seis Motivos en que se fundamenta el concepto probatorio invocado, no fueron valoradas dentro de dicha Resolución. Esto es así, toda vez que el Ad quem únicamente se limitó a señalar que de la revisión del caudal probatorio que obra dentro del Proceso, no se desprende la pretensión

de las demandantes, sin realizar un análisis minucioso del mismo, ni identificar los elementos probatorios de forma específica; refiriéndose a las pruebas en forma general y global.

Lo antes expuesto deja en evidencia para esta Sala que sí se configuran los cargos de ilegalidad expuestos en los Motivos, al demostrarse que las pruebas señaladas no han sido valoradas por el Tribunal Superior dentro de la Resolución recurrida, por lo que ahora le toca a esta Sala determinar si del análisis y adecuada valoración probatoria de dichas pruebas se demuestra la pretensión de las demandantes, influyéndose con esto lo dispositivo de la Resolución recurrida en Casación.

En ese sentido, para esta Sala la pretensión del presente Proceso Ordinario incoado por las demandantes, es el procurar de las demandadas una indemnización por daños y perjuicios ocasionados en virtud de un Proceso que, con intenciones temerarias, las Sociedades **BRIDGESTONE LICENSING SERVICES INC.** y **BRIDGESTONE CORPORATION** interpusieron en contra de **MURESA INTERTRADE, S.A.** y en donde fungieron como terceros coadyuvantes, las Sociedades **TIRE GROUP OF FACTORIES LTD. INC. y L.V. INTERNATIONAL INC.,** lo cual les causó un perjuicio en la comercialización y venta del producto que consiste en neumáticos marca RIVERSTONE.

Así las cosas, se desprende del primer Motivo en que se fundamenta el presente Recurso de Casación, que las Recurrentes denuncian las pruebas documentales que obran de fojas 2622 a 2628 y de fojas 2955 a 2958, siendo que en ambos grupos de fojas se desprende la misma prueba documental que representa una traducción al idioma español de una correspondencia emitida por las apoderadas

judiciales de las demandadas a los abogados de las demandantes. El contenido de dicha nota es del tenor siguiente:

> "Estimado Sr. Sanchelima:
>
> Como es de su conocimiento, la Junta de Litigios y Apelaciones de Marcas de Fábrica ha emitido juicio en contra de su cliente, sustentando nuestra oposición y denegando la solicitud presentada por su cliente respecto al registro de la marca RIVERSTONE para llantas.
>
> **Favor notar que Bridgestone/Firestone objetan cualquier registro de la marca RIVERSTONE no solo para su uso por llantas sino para cualquier uso que se le de a esta marca de fábrica.** Si bien no estamos al corriente respecto al uso de la marca RIVERSTONE para llantas en Estados Unidos, Bridgestone/Firestone **por este medio le hace llegar a su cliente nuestra *formal* solicitud en el sentido de que se abstenga de utilizar la marca RIVERSTONE en los Estados Unidos ya sea a la fecha de la presente o en cualquier momento futuro.**
>
> Respecto al uso de la marca RIVERSTONE en otros países, favor también tomar nota de la posición de Bridgestone/Firestone en el sentido de que nuestro formal requerimiento dirigido a L.V. International Inc. al efecto de que se abstenga de utilizar la marca RIVERSTONE no se limita únicamente a los Estados Unidos. Antes de llevar a cabo un análisis país por país y sin ánimos de hacer ninguna demanda en estos momentos dirigida al uso de la marca RIVERSTONE en cualquier otro país en particular, tanto usted como su cliente deben estar al tanto de que Bridgestone/Firestone objetan y de ninguna manera aprueban el uso o registro de la marca RIVERSTONE para llantas en ningún lugar del mundo. Por lo tanto, L.V. International Inc. está actuando en su propio riesgo si decide utilizar la marca RIVERSTONE en otros países.
>
> Atentamente,
> Peter G. Mack
> Adjunto(s)
> PGMA/ras
> **(lo resaltado es de la Sala)**

Dentro del Motivo tercero, se denuncia la omisión en la valoración de la copia de una Resolución judicial (fs. 37 a 39) emitida por el Tercer Tribunal Superior de Justicia del Primer Distrito Judicial de Panamá, en la cual se resuelve admitir el desistimiento presentado por parte de la firma de abogados BENEDETTI & BENEDETTI, apoderados judiciales de la parte opositora, dentro del "Proceso de Oposición a la solicitud de registro No.120823-01 de la marca RIVERSTONE Y DISEÑO, en Clase 12, propuesto por las Sociedades BRIDGESTONE CORPORATION y BRIDGESTONE LICENSING SERVICE, S.A., en contra de la empresa MURESA INTERTRADE, S.A., que tiene como terceros Coadyuvantes a las sociedades L.V. INTERNATIONAL INC. y TIRE GROUP OF FACTORIES LTD., INC."

Se desprende de la valoración de la Resolución previamente citada, que tal como así lo mencionan las Recurrentes en el tercer Motivo en que se fundamenta el concepto probatorio de error de hecho en cuanto a la existencia de la prueba, el Proceso de Oposición al registro de marca respectivo, se encontraba en el Tercer Tribunal Superior de Justicia del Primer Distrito Judicial de Panamá en virtud de Recurso de Apelación interpuesto por la firma BENEDETTI & BENEDETTI, en su condición de apoderados judiciales de las Sociedades **BRIDGESTONE CORPORATION** y **BRIDGESTONE LICENSING SERVICES, INC.**, siendo en esta etapa procesal en la que se presentó desistimiento.

Respecto al cuarto Motivo, lo que se denuncia es la omisión en la valoración de ciertas pruebas testimoniales, siendo la primera de estas denunciada, la que corresponde al testigo JOSE ORESTES MEDINA SAMANIEGO (fs. 553 a 564), quien se identificó como empleado de la

demandante MURESA INTERTRADE, S.A. y de cuyo testimonio se desprende lo expuesto a continuación:

> "PREGUNTA #3: Diga el declarante si ha tenido conocimiento, si contra el registro de la marca de llanta RIVERSONTE se presentó algún tipo de oposición a su registro en Panamá y en otros países.
> CONTESTO: En el año de 2005 **recién ingresado a MURESA INTERTRADE como Gerente de Venta de la empresa, se me informa que existía una objeción del registro de la marca RIVERSTONE propuesta dicha objeción por BRIGSTONE CORPORATION, que dicho proceso estaba siendo ventilado en tribunales de Panamá. En ese momento se conversó con la firma de abogados para verificar si existía oposición en algún otro país. Con base a eso se determinaba que se estaban deteniendo los procesos de registro en china y Estados Unidos.**
> PREGUNTA #4: Diga el declarante dado que ha manifestado que es Gerente de Venta de MURESA INTERTRADE, S.A. donde se distribuía o en que países se distribuía las llantas de la marca RIVERSTONE antes de la oposición a su registro en la República de Panamá.
> CONTESTO: **RIVERSTONE TIRE era una marca ya posesionada en países como Colombia, Costa Rica, Nicaragua, Hondura, Salvador, Guatemala, República Dominicana, Haití, muy posesionada en Cuba, Venezuela.** Del lado de Asia y Europa se vendía mucho en Singapur, Correa, Africa, Portugal e internamente en China.
> PREGUNTA #5 Diga el declarante en su calidad de Gerente de MURESA INTERTRADE, S.A., y dado que ha manifestado en respuesta anterior, que la marca de llanta RIVERSTONE estaba muy bien posesionada a nivel internacional, si lo sabe , que ocurre después que tuvieron conocimiento de la oposición al registro de la marca en Panamá, explique.
> CONTESTO: Cuando nos enteramos de la oposición del registro de marca, **tuvimos que crear planes de contingencia dentro de la empresa para tratar de manejar el mismo volumen de venta o el volumen de venta de la compañía; a raíz de esto, tuvimos que optar por ingresar con otras marcas para satisfacer las necesidades de nuestros clientes; dichas marcas como DOUBLE**

> **ESTART, JINYU, ingresar como marcas JAPPINES, ingresamos con marcas como CHAOYAN. Al ingresar con estas marcas las cuales en su momento no poseían el nombre o el conocimiento en el mercado de ellas, nos lleva a tener que introducirlas como precios más bajos en detrimento del margen de utilidad de la empresa,** adicional la negativa de mucho clientes de ser producto que ellos no conocían, a lo cual cancelaban los pedidos por temor a que fueran productos de inferior calidad. MURESA INTERTRADE toma la responsabilidad de homologar la garantía que ofrecía sobre RIVERSTONE y trasladarlas estas garantía a estas otras marcas, asumiendo el riesgo que conllevaba vender un producto que no se conocía su calidad" **(lo resaltado es de la Sala)**

De igual manera se denuncia dentro del Motivo cuarto las declaraciones testimoniales de los señores DOMINGO ESTEBAN ROMERO CEVALLOS (fs. 565 - 569), GRICELDA PINEDA CASTILLO (fs. 575 - 585), AMINTA JULISA VEGA DE BARRERA (fs. 586 - 594), AIXA YADIRA RAMÍREZ GONZÁLEZ (fs. 622 - 628), MIRNA RAQUEL MOREIRA MARTINEZ (fs. 634 - 643 9 y LAURA ESTHER MURGAS DE BRACO (fs. 647 – 655), pudiendo verificar esta Sala que de todos los testimonios denunciados se desprende de forma coincidente el hecho que, por motivo del Proceso de oposición al registro de la marca RIVERSTONE interpuesto en contra la Sociedad MURESA INTERTRADE, S.A., por parte de BRIDGESTONE LICENSING SERVICES, INC. y BRIDGESTONE CORPORATION, se generó un perjuicio comercial a la demandante – recurrente, toda vez que se vio en la situación de improvisar con otras marcas, incluso de calidad inferior, a efectos de cumplir con la demanda de venta que le exigía el mercado.

Se observa de lo denunciado en el Motivo sexto, que la valoración del informe pericial que obra de fojas 2635 a 2642 del

expediente, se desprende respecto a la demandante MURESA INTERTRADE, S.A., lo siguiente:

> "Pregunta 7: Cuáles fueron los daños que se causaron a la empresa MURESA INTERTRADE, S.A., por no poder vender sus productos, las llantas RIVERSTONE y cuál fue el resultado.
> Respuesta 7; Las ventas de las llantas RIVERSTONE realizadas por la empresa MURESA INTERTRADE, S.A., durante el año 2004 se incrementaron en un 32% con relación a las ventas del año 2003, y en el año 2005 se incrementaron en un 18% con relación al año 2004, a pesar de que en el año 2005 fue el año en que se interpuso la demanda de Oposición de solicitud de registro 120823-01 de la Marca RIVERSTONE Y DISEÑO, por BRIDGESTONE CORP. Y BRIGESTONE LICENSING SERVICES, INC. presentada el 5 de abril de 2005.
> En los años 2006, 2007 y 2008 las ventas disminuyeron en relación al año 2005 en la siguiente forma:

	VENTAS (En Balboas)	DIMINUSIÓN (En Balboas)
2005	5,364,132.54	
2006	3,971,353.40	1,392,779.14
2007	4,717,299.89	646,832.65
2008	4,563,294.20	800,838.34
Disminución 3 años		2,840,450.13
Más incremento de 18%		511,281.02
Disminución total		3,351,731.15

> Pregunta 8: Cuáles eran las ventas programadas por la sociedad MURESA INTERTRAD, S.A. durante los años 2007 y 2008.
> Respuesta 8: Las ventas programadas por la sociedad MURESA INTERTRADE, S.A. durante los años 2007 y 2008 según las actas de junta directiva acreditadas en el proceso fueron las siguientes:

2007	B/.23,000,000.00
2008	B/.23,000,000.00

> Según la documentación presentada por la empresa las ventas de las llantas RIVERSTONE representaban el 35% de las ventas programadas.

> Pregunta 9: Cuáles fueron las ventas efectuadas durante los años 2007 y 2008 de la empresa MURESA INTERTRADE, S.A.

Respuesta 9: Las ventas efectuadas durante los años 2007 y 2008 de la empresa MURESA INTERTRADE, S.A. fueron las siguientes:

	VENTAS TOTALES (En Balboas)	VENTAS LLANTAS RIVERSTONE (En Balboas)	%
2007	17,186,091.25	4,717,299.89	32
2008	20,197,735.61	4,563,294.20	23

Pregunta 10: A qué se debió que no se realizaran las ventas programadas por la sociedad MURESA INTERTRADE, S.A. en los años 2007 y 2008.
Respuesta 10: Las ventas programadas por la sociedad MURESA INTERTRADE, S.A. no se realizaron debido a que la Marca de Fábrica RIVERSTONE, principal producto vendido por la empresa MURESA INTERTRADE, S.A. fue objeto de una demanda de Oposición a la solicitud de registro 120823-01 de la Marca RIVERSTONE Y DISEÑO interpuesta por BRIGESTONE CORP. Y BRIGESTONE LICENSING SERVICES INC., presentada el 5 de abril del 2005. Y a pesar de que la venta de las llantas RIVERSTONE, se ha ido incrementando para los años 2007 y 2008, no han podido recuperar los niveles de incremento que traían antes de la demanda."

Así también puede comprobarse de dicho informe pericial contable, la disminución en las ventas de la otra parte demandante, la Sociedad **TIRE GROUP OF FACTORIES LTD., INC.,** indicándose que para el año 2005 las ventas de las llantas RIVERSTONE representaron el 56% de las ventas totales, en el año 2006 disminuyó a un 33%, en el año 2007 a un 35% y en el año 2008 a un 25%, especificándose que, como causa de esta disminución se le acreditaba al hecho de la Demanda de Oposición al Registro de Marca respectivo.

Advierte esta Sala que de las pruebas antes destalladas y sobre las cuales se ha fundamentado la Causal de fondo invocada, las mismas fueron incorporadas debidamente al Proceso dentro del término oportuno y no consta dentro del Proceso que hayan sido objetados en

cuanto a su autenticidad y veracidad, razón por la cual resulta procedente la valoración de su contenido de manera conjunta.

Ahora bien, de los hechos en que se fundamenta la Demanda Ordinaria interpuesta por las Sociedades **MURESA INTERTRADE, S.A.** y **TIRE GROUP OF FACTORIES LTD., INC.**, resulta claro para esta Sala que la Sociedad **MURESA INTERTRADE, S.A**. tiene un contrato de distribución, representación y distribución con la Sociedad **TIRE GROUP OF FACTORIES LTD, INC.,** desde el año 2001 y que a su vez, desde ese mismo año, ésta última Sociedad celebró contrato de representación y distribución con la Sociedad LV INTERNACIONAL INC., para todo lo relacionado a los neumáticos marca RIVERSTONE, lo cual fue debidamente acreditado y no objetado a lo largo del Proceso.

Como pretensión fundamental del presente Proceso Ordinario, se solicita la indemnización por parte de las demandadas **BRIDGESTONE LICENSING SERVICES, INC.** y **BRIGESTONE CORPORATION**, y a favor de las demandantes, a cubrir por los daños y perjuicios ocasionados en virtud de la merma en las ventas comerciales que sufrieron, específicamente ante la situación de haber sido sujeta la demandante **MURESA INTERTRADE, S.A.,** a un Proceso de Oposición al Registro de la marca de neumáticos RIVERSTONE, producto que representaba su mayor objeto de venta comercial y que además, al decir de las Recurrentes, tal Proceso de Oposición se apoyó en actitudes temerarias e intimidantes.

Denuncian las Recurrentes que luego de la valoración probatoria denunciada en los Motivos en que se fundamenta el concepto invocado de error de hecho en cuanto a la existencia de la prueba, lo cual ha sido plenamente comprobado por esta Sala, al indicarse previamente que las

pruebas denunciadas no merecieron pronunciamiento de valoración por el Ad quem dentro de la Resolución recurrida, se demuestran los daños y perjuicios ocasionados a las demandantes, cometiéndose así no solo con la infracción del artículo 780 del Código Judicial, sino que además se infringe lo preceptuado en el artículo 1644 del Código Civil, en concordancia con el artículo 217 del Código Judicial.

El contenido de las normas citadas como infringidas es del tenor siguiente:

> "**Artículo 1644.** (Código Civil) El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado.
>
> Si la acción u omisión fuere imputable a dos o más personas, cada una de ellas será solidariamente responsable por los perjuicios causados.
>
> **Artículo 217.** (Código Judicial) Las partes responderán por los daños y perjuicios que causen a la otra parte o a terceros con sus actuaciones procesales temerarias o de mala fe. Cuando en el proceso haya prueba de tal conducta, el Juez impondrá la correspondiente condena en la sentencia o en el auto que lo decida, y si no fuere posible fija allí su monto, se liquidará en la forma prevista en el artículo 996; si el proceso ha concluido, dicho trámite se adelantará con independencia de aquél."

De las normas previamente trascritas, señala el Recurrente que su vulneración se ve acreditada por parte de las Demandadas, en el sentido del perjuicio que ellas le ocasionaron a las demandantes en virtud de un Proceso de Oposición al Registro de la marca de neumáticos RIVERSTONE, sobre el cual ellas tenían desde el año 2001, el derecho de su representación y distribución, acción judicial que señalan se da de forma temeraria e intimidante con el objetivo de causar perjuicio.

En cuanto al hecho que la iniciativa jurídica ejercida por las Demandadas **BRIDGESTONE LICENSING SERVICES, INC.** y **BRIDGESTONE CORPORATION** ocasionó un perjuicio a las demandantes **MURESA INTERTRADE, S.A.** y **THE GROUP OF FACTORIES LTD., INC.**, resulta para esta Sala un elemento plenamente comprobado del caudal probatorio que obra dentro del Proceso y sobre el cual se fundamenta el concepto probatorio invocado de error de hecho en cuanto a la existencia de la prueba; elementos de prueba estos sobre los cuales esta Sala ya especificó a detalle al verificarse los Motivos respectivos.

Los elementos de prueba como lo han sido los informes contables periciales, evidencian lo que la marca de neumáticos RIVERSTONE representaba a las sociedades demandantes, no solo en cuanto a su representación y distribución comercial, sino como objeto de venta, al ser una marca comercialmente posesionada y de reconocimiento en cuanto a su durabilidad y comercialidad, situaciones que la habían convertido este objeto en el elemento que generaba mayores ventas, por consiguiente, mayores ganancias, siendo entonces consecuente el hecho de que, al verse este objeto excluido como producto de venta, generó un impacto contable representativo en cuanto a los ingresos contables de tales sociedades.

Esta situación es igualmente evidenciada de las pruebas testimoniales practicadas por los empleados de las sociedades demandantes, quienes de forma contundente y coincidente reflejan la crisis de venta que aconteció contablemente en los ingresos de ganancias de las demandantes y que a pesar del uso de planes de contingencia comerciales, no se pudieron igualar las ventas comerciales

y colocación en el mercado de los neumáticos marca RIVERSTONE, producto del hecho que dicha marca comercial era objeto de litigio.

Ahora bien, pese al hecho que el impacto comercial tuvo al sacar del mercado la venta de los neumáticos RIVERSTONE, lo que generó daños y perjuicios en cuanto a las ventas anuales de las sociedades demandantes, situación que esta Sala considera perfectamente acreditada, el Ad quem consideró no acceder a la pretensión del presente Proceso Ordinario, toda vez que estimó que no se cumplía con la condición de acreditar la responsabilidad extracontractual contemplada en el artículo 1644 del Código Civil, por cuanto que consideró no probada la culpa o negligencia de que habla dicha norma como requisito indispensable para que se configurara la figura jurídica reclamada.

Si bien esta Sala comparte el análisis doctrinal expuesto dentro de la Resolución recurrida por parte del Ad quem, de cómo y cuándo es considerada la responsabilidad civil extracontractual, no comparte esta Sala la valoración realizada por dicho Tribunal, al decir que de las pruebas que obran dentro del Proceso no se configuran los presupuestos de la negligencia por parte de las demandadas BRIDGESTONE LICENSING SERVICES, INC. y BRIDGESTONE CORPORATION, a la que hace alusión el artículo 1644 citado.

Esto es así, toda vez que tal como así lo han denunciado las Recurrentes en el presente Recurso de Casación, al observarse la nota que obran a fojas 2622 a 2628 y de fojas 2955 a 2958, en la cual los apoderados judiciales de las demandantes, de forma intimidante indicaron interponer en varios países, Procesos de oposición a los registro de la marca de neumáticos RIVERSTONE y añadiendo sin

fundamento jurídico, al menos dentro de la legislación panameña, que las demandantes deberían de abstenerse de la venta comercial de ese producto, representa una actitud evidentemente intimidante y temeraria.

En concordancia con la prueba documental indicada en párrafo precedente, no pasa desapercibido para esta Sala la conducta procesal de las demandantes en el presente Proceso Marcario, generando confusión en cuanto a considerar la existencia de una buena fe, cuando las Sociedades **BRIDGESTONE LICENSING SERVICES, INC** y **BRIGESTONE CORPORATION** llevan hasta las ultimas consecuencias procesales la iniciativa de oponerse al registro de una marca comercial sobre un producto que convenientemente les resultaba comercialmente competitivo, para luego de trascurrido un tiempo importante en litigio, desistir de un medio de impugnación como lo es un Recurso de Apelación interpuesto sobre una Resolución adversa a sus intereses.

Considera la Sala propicio citar al jurista panameño Jorge Fábrega Ponce, quien en su obra "Diccionario de Derecho Procesal Civil", se refiere a las conductas procesales temerarias y que causan perjuicio a las partes, de la siguiente manera:

> "**TEMERIDAD Y MALICIA PROCESAL. La temeridad procesal es la conducta de quien sabe o debe saber que no tiene motivo para litigar, no obstante, lo hace, abusando de la jurisdicción. Supone una conducta mañosa, la maniobra desleal, las articulaciones de mala fe y sin apoyo jurídico o fáctico alguno.** La malicia procesal consiste en la utilización de facultades procesales con el deliberado propósito de obstruir el adecuado desarrollo y decisión del proceso. **La temeridad procesal se configura con el conocimiento que tuvo o debió haber tenido el litigante de la falta de motivo legítimo para promover o resistir la pretensión**. La malicia procesal se configura

> en los propósitos obstruccionistas y dilatorios en las respectivas articulaciones...." (**lo resaltado es de la Sala**) (Jorge Fábrega Ponce, "Diccionario de Derecho Procesal Civil", primera edición, PLAZA & JANÉS, Editores Colombia, S.A., Colombia, 2004, pág. 1242)

Cabe aclarar en este punto, que esta Sala no pretende, bajo ninguna circunstancia, señalar que el hecho de ejercer una iniciativa judicial para la reclamación de algún derecho, pueda interpretarse como sinónimo de que los perjuicios que pueda ocasionar la misma a los demandantes, resultando esto un elemento de coerción para quien se considera con derecho a una reclamación y en aras de utilizar los medio que la ley le provea para hacerlo. Sin embargo, en cuanto a la situación específica del presente caso, en el que existían pruebas contundentes de que las demandantes recurrentes poseían con base jurídica el derecho de comercializar un producto que además constituía un artículo de gran importancia en las ganancias propias de la actividad comercial a la que se dedican y convenientemente un elemento de competitividad comercial para las opositoras, pueda representar una situación central para quien pretende mermar comercialmente esa condición de posesión de mercado, sin respaldo jurídico contundente y con intención de causar perjuicios por la competitividad comercial que esto representa.

Y es precisamente esta situación la que considera esta Sala que se desprende de la conducta de las demandadas **BRIDGESTONE LICENSING SERVICES INC.** y **BRIDGESTONE CORPORATION**, al no poder considerarse de buena fe y por ende considerarse un actuar negligente, el hecho de utilizar la iniciativa jurídica de interponer sin fundamento jurídico en contra de las ahora demandantes en el presente

Proceso Ordinario, cuando contra éstas presentaron una oposición al registro de la marca comercial de neumáticos RIVERSTONE, por lo que tal actuación causó perjuicios irreversibles en cuanto a lo central de la actividad comercial a la que se dedicaban esas sociedades.

En consecuencia, esta Sala no solo considera que se han configurados los cargos de ilegalidad expuestos en los Motivos en que se fundamenta el presente Recurso de Casación, al comprobarse que los elementos probatorios fueron ignorados por el Ad quem dentro de la Resolución recurrida, sino que además, de la valoración de los mismos se demuestran los hechos en que se fundamenta la pretensión del presente Proceso Ordinario, influyéndose así lo dispositivo del fallo impugnado en Casación, razón por la cual procede casar la sentencia.

Como quiera que al haberse encontrado fundado los cargos de ilegalidad expuestos en la Causal de fondo que corresponde al concepto de error de hecho en cuanto a la existencia de la prueba, esta Sala dispondrá a casar la resolución recurrida.

En mérito de lo antes expuesto, **LA CORTE SUPREMA**, **SALA PRIMERA DE LO CIVIL**, administrando justicia en nombre de la República y por autoridad de la Ley, **CASA** la Resolución de veintitrés (23) de mayo de dos mil trece (2013), proferida por el Primer Tribunal Superior del Primer Distrito Judicial y convertida esta Sala en Tribunal de instancia, **REVOCA** la Sentencia No. 70 de 17 de diciembre de 2010, emitida por el Juzgado Undécimo de Circuito de lo Civil del Primer Circuito Judicial de Panamá y **RESUELVE** lo siguiente:

- **CONDENA** a **BRIDGESTONE CORPORATION** y **BRIDGESTONE LICENSING SERVICES INC.** a pagar de forma solidaria a las sociedades **MURESA INTERTRADE, S.A.** y **TIRE GROUP OF**

FACTORIES LTD, INC., la suma de **CINCO MILLONES DE DÓLARES (US$5,000,000.00)**, moneda de curso legal de los Estados Unidos de América, en concepto de indemnización por responsabilidad extra-contractual.

- **Se CONDENA** a **BRIDGESTONE CORPORATION** y **BRIDGESTONE LICENSING SERVICES INC.** a pagar las costas del Proceso a favor de las Actoras, **TIRE GROUP OF FACTORIES LTD. INC.** y **MURESA INTERTRADE, S.A.**, por la suma de CUATROCIENTOS TREINTA Y UN MIL BALBOAS (B/.431,000.00) y los gastos del Proceso, los cuales serán calculados por la Secretaria del Tribunal.

NOTIFÍQUESE Y DEVUÉLVASE,

REPÚBLICA DE PANAMÁ CORTE SUPREMA DE JUSTICIA SALA CIVIL ÓRGANO JUDICIAL

MAG. OYDÉN ORTEGA DURÁN

MGDO. HERNÁN A. DE LEÓN BATISTA

MGDO. HARLEY J. MITCHELL D.
(CON SALVAMENTO DE VOTO)

LICDA. SONIA F. DE CASTROVERDE
SECRETARIA DE LA SALA CIVIL

/dmj.-

CORTE SUPREMA DE JUSTICIA
SALA PRIMERA DE LO CIVIL

Panamá, 28 de mayo de 2014
CERTIFICO QUE LO ANTERIOR ES FIEL COPIA DE SU ORIGINAL.

Secretario

PONENTE: MAG. OYDÉN ORTEGA DURÁN **ENTRADA N°313-13.**

MURESA INTERTRADE, S. A. Y TIRE GROUP OF FACTORIES LTD. INC. RECURREN EN CASACIÓN DENTRO DEL PROCESO ORDINARIO QUE LE SIGUEN A BRIDGESTONE CORPORATION Y BRIDGESTONE LICENSING SERVICIES, INC.

SALVAMENTO DE VOTO
DEL MAGISTRADO HARLEY J. MITCHELL D.

A pesar de haber presentado mis observaciones y que estas fueron acogidas parcialmente por mis compañeros, debo manifestar que no comulgo con la decisión consignada en la resolución prohijada.

Aunque el Tribunal Superior del Primer Distrito Judicial, no motivó correctamente las razones por las que a su juicio no hay daño, ya que no se observa la contraposición de las pruebas con los hechos. El acto considerado dañoso: presentación de "la carta temeraria" y la interposición de demanda de oposición no son actos temerarios *per sé*.

Primero, porque la demanda de oposición no implica la paralización del uso de la marca, ni mucho menos responde a una medida precautoria. Respecto a la carta, amén de las precisiones valorativas del propio documento, su contenido no corresponde una amenaza, pues era decisión de la empresa destinataria de la epístola, si emplear o no el uso de la marca, que según ella tenía derecho. No fue una imposición por parte de la sociedad demandada.

En ese sentido, es dable analizar el problema del documento relativo a la "carta" en el proyecto abalado. La decisión no justipreció su procedencia, cómo llegó al proceso o si fue reconocida o no por las partes. Tampoco se dijo sobre el tiempo en que fue creada y enviada, pues durante su confección se estaba ventilando el proceso de oposición de marca del cual las demandadas creían tener derecho.

A foja 2622 está la primera carta, este documento **es copia a color de un documento con sello de notario que explica que las firmas fueron cotejadas y que considera auténtica**. Este documento emana de tercero y ello no se dejó sentado en la resolución. Esta copia no reúne los requerimientos necesarios a fin de que sea evaluada como prueba, el sello del notario no es suficiente pues la considera auténtica, máxime cuando los documentos de carácter testimonial que vienen de terceros deben ser reconocidos por sus suscribientes. Mismo análisis recae para las fojas 2624 a 2628 y de la 2955 a la 2958 del expediente. Estas cartas por sí solas no demuestran la temeridad o mala fe de la otra parte.

La decisión, como está enfocada, crea un mal precedente en materia de resarcimiento de daños, toda vez que la posición de las demandadas fue presentar una demanda de oposición creyendo tener un derecho de mejor valía frente a las demandantes. La presentación de procesos entre las partes, obviamente crea molestias entre ellas, sin embargo, esto no es un símil de daño. La conducta temeraria debe probarse y los documentos no suplen a cabalidad la cuota probatoria que las demandantes debieron aportar.

El abuso del derecho que las demandantes pretendían fijar es por la interposición de una demanda de oposición (Hecho sexto de la demanda), durante el proceso se introdujo la premisa de la presentación de una carta amenazante; no obstante, según Jaime Javier Jované este concepto corresponde al "irrespeto de los límites impuestos al ejercicio de un derecho". ("Abuso del derecho", fs. 66)

Este irrespeto debe mantener el dolo, la intención de hacer daño, ya que involucra el concepto de mala fe y la temeridad, actos que conllevan una intención hacia un tercero. La naturaleza del abuso del derecho se cataloga como "un acto de comportamiento "excesivo", donde se lesionan intereses de otros sujetos". (op. Cit., fs. 72) Escenario que no aparece reflejado en el expediente.

En este tipo de temas: abuso del derecho, temeridad y aplicación del artículo 217 del Código Judicial, debemos hacer docencia con los casos, ya que nuestra legislación no tiene de forma taxativa qué es abuso de derecho y temeridad, pero sí lineamientos que describen conductas que lo conforman. Es a través de la jurisprudencia que debemos enumerar las conductas que reflejarían un abuso en el ejercicio de los derechos y apoyarnos con la doctrina. Esto último no se observa en la sindéresis que mis compañeros comulgan.

A modo de guisa, de acuerdo con este escritor, la presentación de un segundo proceso a pesar de que haya uno en curso generando la litispendencia o la presentación de procesos donde funge la cosa juzgada es una conducta abusiva en el ejercicio del derecho del acceso a la justicia. Matiza este suscrito, que si bien la conducta podría catalogarse como abusiva, esta debe ser evaluada después de que las resoluciones que las declaran están confirmadas. Agrega este autor, que la recusación de jueces sin la mayor explicación de los motivos, también es un caso de abuso en el ejercicio del derecho de litigio.

Asimismo, el Código Judicial sanciona actos abusivos del ejercicio del litigio pero no los tipifica como tal por ejemplo: el artículo 706 de nuestro libro de procedimiento civil, que sanciona con multas a las partes que han perdido varios incidentes dentro de un mismo proceso. El artículo 1071 que enumera los casos en los que no haya buena fe, elemento que va de la mano con el abuso del derecho, pues la mala fe responde a una conducta que revela que la parte se excedió en el ejercicio de sus derechos, sea en el caso de su defensa o su restablecimiento. El artículo 1075 que condena a la parte en costas cuando a pesar de que se le debía, su despliegue fue tan abrumante que el demandado tuvo que hacer frente a su exceso.

Igualmente, dentro del concepto abuso del derecho está el fraude a la ley y el fraude procesal, donde el primero "implica la intención de burlar la eficacia de una norma procesal dentro de un litigio" y el segundo, conlleva "vulnerar el

ordenamiento jurídico valiéndose del proceso" (Jaime Jované Burgos, op. Cit., fs. 179) En ninguno de los casos antes enunciados se contempla el hecho que les ocurrió a las demandantes, mucho menos cuando siquiera hubo secuestro de bienes.

Otro elemento, para no compartir el criterio que mis colegas han avalado consiste **en que en la demanda, las demandantes manifestaron que producto del proceso oposición, se dejaron de vender o comercializar el producto RIVERSTONE Y DISEÑO, en cambio, la decisión señala que los daños son por la disminución de las ventas; por consiguiente, nunca se dejó de vender el producto**. (Ver hecho sexto de la demanda y foja 15 de la resolución)

No se confrontó lo dicho por los testigos que no fueron valorados por el *Ad quem*, **con la documentación que obra en el expediente aportada por la propia actora** que revela que las marcas de menor calidad que presuntamente fueron introducidas por las demandantes para enderezar el negocio, eran ya comercializadas en conjunto con RIVERSTONE antes de la demanda de oposición (Véase factura de fecha 3/12/2003, fs. 456, factura de 20/7/2004, fs. 520 y siguientes hasta la foja 595).

Estas facturas detalladas comprueban que la actora compraba marcas como JINYU, DOUBLE STAR (Factura a foja 520) que supuestamente eran de menor calidad que RIVERSTONE, para balancear su negocio, lo cual no es cierto, dado que siempre se comercializaron y desvirtúa en parte, lo dicho por el testigo **ORESTES MEDINA** que es citado en el proyecto. **En síntesis, no se compararon las fechas de facturas de fojas 456 hasta la 495 con los modelos de llanta presuntamente introducidos como (DOUBLE START, JINYU, JAPPINES, CHAOYAN).**

Igualmente, la merma de las ventas fue por planes de contingencia por miedos de un secuestro que nunca aconteció y no propiamente por la formulación de un proceso de oposición.

El testigo JOSÉ ORESTES MEDINA citado en la resolución señaló:

> "PREGUNTA 3. Diga el testigo cual (sic) fue la causa para adoptar un plan de contingencia.
> CONTESTO. En realidad lo que ocurría era un temor de que existiese alguna instrucción que consiguiera BRIGSTONE CORPORATION que llevara a un decomiso o impedimento de la venta de las llantas marca RIVERSTONE y era muy delicado el hecho de tener inventario en bodega, mercancía en tránsito y mercancía en fábrica con la marca RIVERSTONE que no se pudieran vender por parte de alguna resolución en nuestra contra" (fs. 563)

Es decir, que este testigo en conjunto con Esteban Romero y Fernan Jesús González son cónsonos en señalar que la merma de ventas fue **por decisión de la propia empresa frente a una situación ficta,** ya que nunca hubo interposición de medidas cautelares, solo la existencia de un proceso. **Condenar pecuniariamente a las demandadas, debido a los miedos comerciales de la otra es inadecuado.**

Lo que se probó fue la disminución de las ventas de acuerdo con los peritos, cuyo nexo causal fue por decisiones comerciales de las demandantes, pero nunca hubo una paralización del uso de la marca que alegaron las demandantes en la demanda. (Tomo I)

Ello fue así, porque según los testigos, se tenía miedo de que hubiese un secuestro por parte de las demandantes, lo que demuestra que la disminución de las ventas terminó siendo una decisión unilateral de las propias actoras. (Declaración de Domingo Estaban Romero, fs. 565 -569 y Fernan Jesús Luque González, 608 a 616)

En consecuencia, el siguiente párrafo fue plasmado sin una debida ilación de argumentos que soporten su peso:

> "Como pretensión fundamental del presente proceso ordinario, se solicita la indemnización por parte de las demandadas BRIDGESTONE LICENSING SERVICES, INC. y BRIGESTONE CORPORATION, y a favor de las demandantes, a cubrir por los daños y perjuicios ocasionados

> en virtud de la merma en las ventas comerciales que sufrieron, específicamente ante la situación de haber sido sujeta la demandante... a un proceso de oposición de registro de la marca de neumáticos RIVERSTONE, producto que presentaba su mayor objeto de venta comercial y que además, al decir de las Recurrentes, tal Proceso de Oposición al Registro de la marca de neumáticos RIVERSTONE, producto que representaba su mayor objeto de venta comercial y que además, al decir de las Recurrentes, tal proceso ... se apoyó en actitudes temerarias e intimidantes.."

Continuando con el estudio de la sindéresis, encontramos la siguiente contradicción: **"Ahora bien, pese al hecho que el impacto comercial "tuvo al sacar del mercado la venta de los neumáticos RIVERSTONE, lo que generó daños y perjuicios..." (fs. 19 del proyecto)**. En la decisión y en el proceso, quedó demostrado que el producto nunca se dejó de vender y nunca se sacó del mercado, solo hubo una disminución de las ventas, por inferencias propias de las demandantes.

Por otro lado, el proyecto adoptado no analiza qué es una conducta temeraria. Señalarle a un comerciante que se interpondrá un proceso marcario ¿es una conducta temeraria?. La Sala contesta que este es un caso especial, porque había pruebas contundentes de que las recurrentes podían comercializar el producto. Esta respuesta, no es justificante, porque para que se hubiese podido arribar al tema de la evaluación de las pruebas, se tuvo que acceder a un tribunal y a un proceso, donde un juez consideró que a las demandadas, no le asistió su derecho.

Reitera el suscrito que la carta donde se desprende la presunta temeridad no pasó por la criba de la Sala en cuanto a su autenticidad. Así mismo, no se motivó si quiera **qué hacer frente a la decisión del tribunal especializado quien evaluó la conducta de las partes como no temeraria en una sentencia, la cual quedó en firme**. No se evaluó la prueba que había sido objeto de la causal, solo se reseñó su contenido pero no se razonó sobre su impacto en el proceso y mucho menos en contraposición con el resto de las pruebas.

Para una mejor comprensión transcribo el siguiente extracto:

> "BRIDGESTONE CORPORATION Y BRIDGESTONE LICENSING SERVICE, INC. serán exoneradas del pago de costas, habida cuenta que esta sede de administración de justicia estima que ha actuado con evidente buena fe; mantuvo y sostuvo su posición en proceso, aportó material probatorio idóneo para demostrar su legitimación en causo, **todo ello sin abusar del ejercicio del derecho de gestión.** Así, sólo estarán compelidas a cubrir los gastos del proceso." (El resalto es nuestro)

Calificar como temerario el desistimiento de un recurso de apelación, es incorrecto, porque no es símil de una conducta temeraria, al contrario no hay abuso de litigio. Las demandadas comprendieron que no podían seguir más en el proceso. **El proceso no arribó hasta las últimas consecuencias, como esgrime el proyecto.** Sancionar a las partes por decisiones procesales como esta, es una posición inadecuada en cuanto a la calificación de temeridad y abuso del derecho.

Finalmente, no se está de acuerdo con la forma en que se motivó la condena pecuniaria en este proceso. No hubo un análisis basado en argumentos de cómo era plausible la condena **por cinco millones de balboas,** los cuales se otorgan con poca fundamentación jurídica.

Decimos así, porque citar el peritaje omitido sin que se vislumbre un esfuerzo interpretativo de parte de la Corte y sin contrastarlo con el resto que obra en el proceso, no es suplir el deber de motivar las decisiones, máxime cuando hay una pregunta que habla de los daños de MURESA (daños con los que el suscrito no esta de acuerdo) y en el peritaje omitido se calculó en B/. 3,351,731.15 (fs. 2638), el perito del tribunal justificó que no se contaban con documentación de sustento, estudios específicos, proyecciones financieras (aspecto imprescindible para poder comparar un daño en ventas programadas),

y que solo contaban con las ventas proyectadas de fotocopias, actas e informes que se adjuntan. (fs. 1650)

El perito del Tribunal en cuanto a la determinación de los daños justificó lo siguiente:

> "No tenemos documentos que indiquen que hayan tenido que suspender las ventas y las proyecciones no fueron basadas en estudios y la empresa TIRE GROUP OF FACTORIES LTD, INC, no dejó de vender llantas de la marca RIVERSTONE.".

Estas son en su mayoría todas las apreciaciones que me llevan a **SALVAR EL VOTO** frente a mis colegas.

Fecha ut supra.

HARLEY J. MITCHELL D.
MAGISTRADO

SONIA F. DE CASTROVERDE
SECRETARIA DE LA SALA CIVIL

ENTRY N° 313-13

REPORTING JUDGE: OYDEN ORTEGA DURAN

MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD., INC. LODGE A CASSATION RELATED TO THE ORDINARY CLAIM FILED AGAINST BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC.

SUPREME COURT OF JUSTICE, CIVIL CHAMBER – 28 MAY 2014.

WHEREAS:

By Decision dated 4 December 2013, this Civil Chamber admitted the Cassation Recourse lodged by the firm of **BALLARD & BALLARD**, legal representatives of **MURESA INTERTRADE, S.A.**, against the 23 May 2013 Decision issued by the First Superior Court, First Judicial District, modifying Judgment No. 70 of 17 December 2010 issued by the Eleventh Civil Court, First Judicial Circuit of Panama, within the Ordinary Proceedings initiated by **MURESA INTERTRADE, S.A.** and TIRE GROUP OF FACTORIES LTD., INC. against **BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC.**

After the allegations in the merits phase (pp. 4736-4755 of the file,) the Chamber proceeded to rule on the Cassation Recourse, after the following considerations.

BACKGROUND

Through their legal counsel, **MURESA INTERTRADE, S.A.** and **TIRE GROUP OF FACTORIES LTD., INC.**, filed a greater claim against BRIDGESTONE CORPORATION and **BRIDGESTONE LICENSING SERVICES INC.**, seeking payment

of **FIVE MILLION DOLLARS (US$ 5,000,000.00)** for damages. The Ordinary Claim was based on the following:

1. That Respondents BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC., be ordered to pay our clients, MURESA INTERTRADE, SA and TIRE GROUP OF FACTORIES LTD, INC., the sum of Five Million Dollars of the United States of America (US$ 5,000,000.00) in compensation for non-contractual liability.
2. That Respondents **BRIDGESTONE CORPORATION** and **BRIDGESTONE LICENSING SERVICES INC.** be ordered to pay the costs and expenses resulting from the present proceeding.

The facts on which the claim filed by **MURESA INTERTRADE, S.A**. and **TIRE GROUP OF FACTORIES LTD, INC.** was based are the following:

> "**ONE**: On 5 April 2005 Respondents BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC. filed an application opposing Registration No. 120823-01 of the RIVERSTONE Y DISEÑO brand against MURESA INTERTRADE, S.A.
>
> **TWO**: On 27 December 2001, the Plaintiff, MURESA INTERTRADE, S.A., entered into a representation and distribution agreement with TIRE GROUP OF FACTORIES LTD, INC. for various countries in Europe, Asia, Africa and any other country in the area, to register and sell RIVERSTONE Y DISEÑO brand products (tires.)
>
> **THREE**: On 27 December 2001 Plaintiff MURESA INTERTRADE, S.A., entered into a representation and distribution agreement with LV INTERNACIONAL INC. for different countries in the American continent, among them the United States of America, the United Mexican States, Guatemala, El Salvador, Honduras, Belize, Costa Rica, Canada, Nicaragua, Venezuela, Ecuador, Uruguay, Paraguay, Haiti, Argentina, Bolivia, Peru, Dominican Republic and Colombia to register and sell RIVERSTONE Y DISEÑO brand products (tires.)

FOUR: MURESA INTERTRADE, S.A. is the exclusive owner of the RIVERSTONE Y DISEÑO brand, as established by Law 35 of 10 May 1996, approved in our country by Law 41 of 13 July 1995, the Paris Agreement and the agreement on TRIPS, approved by Law 23 of 15 July 1997.

FIVE: MURESA INTERTRADE, S.A. authorized LV INTERNATIONAL INC. and TIRE GROUP OF FACTORIES LTD, INC. to register the RIVERSTONE Y DISEÑO brand internationally; these products (tires) being sold in America, Europe, Asia and Africa.

SIX: Given the lawsuit filed by the now Respondents BRIDGESTONE CORPORATION and BRIDGESTON LICENSING SERVICES INC., damages were caused to our client because they stopped selling the RIVERSTONE Y DISEÑO as a result of the lawsuit."

The present proceeding was filed with the Eleventh Civil Circuit Court of the First Judicial Circuit of Panama. Through Official Doc. No. 1293-07 the Court admitted the lawsuit, and served notice to the Respondents, who in their reply denied the facts and the amount claimed.

After the relevant procedural stages were completed, the lower court judge ruled in the present proceeding through Judgment No. 70 of 17 December 2010, whose dispositive part states the following:

"The undersigned Judge of the ELEVENTH CIVIL CIRCUIT COURT, FIRST JUDICIAL CIRCUIT OF PANAMA, administering justice on behalf of the Republic and by authority of the Law, within the Ordinary process for civil liability initiated by MURESA INTERTRADE, SA and TIRE GROUP OF FACTORIES LTD., INC., against BRIDGESTONE CORPORATION and BRIDGESTONE, LICENSING SERVICES, INC., RESOLVES the following:

ONE: The Lack of Legal Standing objection regarding TIRE GROUP OF FACTORIES LTD, S.A., alleged by Respondents BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC. is admitted.

TWO: The Claim by MURESA INTERTRADE, S.A., is denied.

> The Court orders the Plaintiff to pay costs, assessed at THREE HUNDRED SEVENTY ONE THOUSAND SEVEN HUNDRED BALBOAS AND 00/100 (B/.371,700.00)."

Exercising its procedural rights, the Plaintiff timely filed an appeal against the Lower Court Judgment. The appeal was heard by the First Superior Court of the First Judicial District of Panama, which ruled through the 23 May 2013 Decision. The Operative Part of the ruling stated the following:

> "For the above reasons, the FIRST SUPERIOR COURT, administering justice in the name of the Republic and by authority of the Law, MODIFIES Judgment No. 70 of 17 December 2010, issued by the Eleventh Circuit Court of the First Judicial Circuit of Panama, Civil Branch, and declares that the Lack of Legal Standing Objection regarding TIRE GROUP OF FACTORIES LTD, S.A. company, alleged by the Respondent, IS UNPROVEN.
>
> The Court CONFIRMS everything else."

It is against this decision by the second level Court that the Appellant filed the present Cassation Recourse, that this Civil Chamber shall address.

CASSATION RECOURSE

The Cassation Recourse is on the merits. The Infringement of Substantive Legal Rules is invoked, a factual error with regard to the existence of evidence.

The invoked NOTION is based on Six reasons, below:

> **"ONE**: The First Superior Court of the First Judicial District of Panama, when issuing the judgment, totally ignored a document in English, duly translated into Spanish by an authorized public translator (pp. 2622-2628 and 2955-2958 of the file,) where counsel for Transnational BFS Brands, LLC, threatened and warned L.V. INTERNATIONAL, INC., Riverstone brand, representative of MURESA INTERTRADE, S.A., from refraining to register and use the Riverstone brand, both within the United States of America and in any other country; and if L.V.

INTERNATIONAL INC., did use the brand, it would do so at its own risk. By ignoring such an important piece of evidence, the First Superior Court, First Judicial District of Panama, committed a factual error on the existence of evidence. In turn, this substantially influenced the dispositive part of the Decision since the ignored evidence proves that there was malicious intent and recklessness by the Plaintiffs.

TWO: The First Superior Court, by ignoring the certifications issued by MIRMA R. MOREIRA, Authorized Public Accountant, CPA No. 307-2005, accountant to MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD, INC., did not take into account that said companies ceased to sell internationally the sum of Five million one hundred and sixty-eight thousand two hundred and seventy dollars and fifty six cents (US$ 5,168,270.56). The Court incurred in a factual error about the existence of evidence which substantially influenced the dispositive part of the challenged Decision. If the Court had not ignored this important evidence, it would have recognized that the Respondents' conduct caused our clients serious economic damages.

THREE: The First Superior Court completely ignored the 8 September 2006 Decision by the Third Superior Court of the First Judicial District of Panama (pp. 37-38) which denotes malicious conduct and bad faith by the Respondent. The latter, after opposing registration by our client of the Riverstone brand, and announcing they would appeal the ruling that denied the opposition action, then withdrew their appeal. By ignoring this documentary evidence, the upper court incurred in factual error on the existence of evidence, substantially influencing the dispositive of the challenged Decision. Had the court taken the documentary evidence into account, the damages caused to our client would have been proven.

FOUR: The First Superior Court of the First Judicial District of Panama ignored testimonial evidence in the file by Messrs. JOSE ORESTES MEDINA SAMANIEGO (pp. 553-564); DOMINGO ESTEBAN ROMERO CEVALLOS (pp. 565-569); GRICELDA PINEDA CASTILLO (pp. 575-585); AMINTA JULISA VEGA DE BARRERA (pp. 586-594); AIXA YADIRA RAMIREZ GONZALEZ (pp. 622-628); MIRNA RAQUEL MOREIRA MARTINEZ (pp. 634-643); LAURA ESTHER MURGAS DE BRACHO (pp. 647-655.) The aforementioned

were all our client's employees, who knew about tire sales volume. They all agreed, in time and place, that our clients were not able to sell Riverstone tires because of the opposition to registration of the brand and the threats by multinational BRIDGESTONE. Thus, the Upper Court incurred in a factual error about the existence of evidence. This affected the dispositive of the challenged provision, by not accepting that damages were caused by the Respondents.

FIVE: The First Superior Court also ignored a witness statement by FERNAN JESUS LUQUE GONZALEZ (pp. 603-616) and JORGE ALBERTO LUQUE GONZALEZ (pp. 657-661,) who stated in their deposition that they were aware of a threat made by BFS BRANDS, LLC (BRIDGESTONE) USA, in a letter, as well as an action of seizure and confiscation against the RIVERSTONE brand in the Dominican Republic, China and other countries. This led our clients to fear an action against them that would prevent them from selling RIVERSTONE tires during the opposition to registration. The Upper Court incurred in a factual error about the existence of evidence which, in turn, influenced the dispositive of the challenged Decision. By ignoring such evidence the Court did not acknowledge that there was malice and bad faith by the Respondents, and damages.

SIX: The First Superior Court ignored an accounting expert report by experts PSIQUIES DE LEON and JOSE ANTONIO AGUILAR - (pp. 2635-2642) and the deposition and interrogation by said experts (pp. 3639-3663,) who concluded that our client's sales suffered a considerable decrease during the 2005-2008 period due to damages caused by BRIDGESTONE worth Five million one hundred and sixty-eight thousand two hundred and fifty and fifty six cents (US$ 5,168,270.56) by opposing the registration of the RIVERSTONE brand, and by their threats. The Upper Court incurred in factual error on the existence of evidence, which influenced the dispositive part of the challenged decision. By ignoring the evidence, the Respondents malice and bad faith and the damages they caused were not acknowledged."

Articles 780 and 217 of the Judicial Code, as well as Article 1644 of the Code, and Article 1 of Law No. 57 of 1978, are rules of law that were infringed.

CHAMBER'S OPINION

As previously stated, the Cassation Recourse is about the merits. We invoke an infringement of substantive rules of law due to factual error regarding the existence of evidence.

The invoked probatory issue occurs when evidence in the proceeding was ignored by the Upper Court when issuing a decision; and when such evidence would have had an influence on the dispositive part of the decision.

Thus, a thorough review of the challenged Decision shows that the evidence referred to in the Six Reasons was ignored. The Upper Court only pointed out that a review of the body of evidence did not support the Plaintiffs' claim. The Upper Court did not conduct a thorough analysis of the evidence, and did not identify any evidentiary elements, referring to it in a general and global way.

The foregoing is proof that the Reasons do contain arguments of unlawfulness. It has been shown that the aforementioned evidence was not assessed by the Upper Court in the challenged decision. Now it is up to this Chamber to determine if an appropriate analysis of said evidence supports the Plaintiffs' claims, thus having an influence on the dispositive part of the challenged Decision.

The Plaintiff's claim is aimed at obtaining compensation from the Respondents for damages caused by a proceeding filed with reckless intentions by **BRIDGESTONE LICENSING SERVICES INC. and BRIDGESTONE CORPORATION** against **MURESA INTERTRADE, S.A.;** and **TIRE GROUP OF FACTORIES LTD. INC. and L.V.**

INTERNATIONAL INC. as interpleaders - which caused loss of RIVERSTONE tire sales.

It is clear from the Reason One herein that the Appellants gave documentary evidence (pp. 2622-2628 and pp. 2955-2958.) Both groups of pages contain the same documentary evidence, a Spanish translation of a letter from the Respondents' counsel to the Plaintiffs' attorneys. Below is the content of said letter:

> "Dear Mr. Sanchelima:
>
> As you are aware, the Trademark Appeals and Litigation Board issued a ruling against your client, supporting our opposition and denying the request submitted by your client regarding the registration of the RIVERSTONE tire brand.
>
> **Please note that Bridgestone/Firestone objects to any RIVERSTONE trademark registration, not only to be used for tires but for any other use given to the trademark.** While we are not aware of the use of the RIVERSTONE brand for tires in the United States, Bridgestone/Firestone **hereby sends its client our formal request to refrain from using the RIVERSTONE brand in the United States, whether as of the date hereof, or at any other time in future.**
>
> Regarding the use of the RIVERSTONE brand in other countries, also please note Bridgestone/Firestone's position, in the sense that our formal requirement addressed to L.V. International Inc. for the purpose of refraining from using the RIVERSTONE brand is not limited to the United States. Before carrying out a country-by-country analysis, and not wishing to file any claim at this time regarding the use of the RIVERSTONE brand in any other country, both you and your client should be aware that Bridgestone/Firestone object to, and in no way approve, the use or registration of the RIVERSTONE brand for tires anywhere in the world. Therefore, L.V. International Inc. is acting at its own risk if it decides to use the RIVERSTONE brand in other countries.
>
> Sincerely,
> Peter G. Mack
> Attachment (s)
> PGMA / ras
> (emphasis added by the Court)

Reason Three states that a copy of a Judicial Decision (pp.37-39) issued by the Third Superior Court, First Judicial District of Panama, was omitted. Said Legal Decision admits a withdrawal request submitted by the law firm of BENEDETTI & BENEDETTI, legal representatives of the opposing party, within the "Opposing Proceeding to Registration Application No.120823-01 of the RIVERSTONE Y DISEÑO brand, Class 12," filed by BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICE, SA, against MURESA INTERTRADE, SA, and Interpleaders LV INTERNATIONAL INC. and TIRE GROUP OF FACTORIES LTD., INC."

From the aforementioned Decision, and as stated in Reason Three, it is clear that the proceeding opposing brand registration was being heard by the Third Superior Court, First Judicial District of Panama, by virtue of the appeal filed by the firm of BENEDETTI & BENEDETTI, legal representatives of BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC. The withdrawal was filed at this stage of the proceedings.

Reason Four addressed the failure to evaluate certain testimonial evidence. The first testimonial evidence was provided by witness JOSE ORESTES MEDINA SAMANIEGO (pp. 553-564), who identified himself as an employee of Plaintiff MURESA INTERTRADE, S.A. Below is an excerpt of his deposition:

> "QUESTION # 3: The Declarant please state if he knows, regarding the registration of the RIVERSONTE tire brand that there was any opposition in Panama or other countries.
>
> ANSWER: In the year 2005, **I had just joined MURESA INTERTRADE as Sales Manager. I was informed that there was an objection to the registration of the RIVERSTONE brand proposed by BRIGSTONE**

CORPORATION, that said process was being addressed in Panama courts . At that time, we spoke with the law firm to verify if there was any opposition in any other country. Based on that, we were told that registration processes in China and the United States were being stopped.

QUESTION # 4: The Declarant please state, in your capacity as Sales Manager for MURESA INTERTRADE, S.A., where the RIVERSTONE brand tires were distributed before the opposition to their registration in the Republic of Panama.

ANSWER: **RIVERSTONE TIRE was a brand already positioned in countries like Colombia, Costa Rica, Nicaragua, Honduras, Salvador, Guatemala, Dominican Republic, Haiti; very well positioned in Cuba, Venezuel**a. In Asia and Europe it was sold in Singapore, Korea, Africa, Portugal and China.

QUESTION # 5 The Declarant please state, in his capacity as Manager for MURESA INTERTRADE, SA, and given that in your previous reply you said that the RIVERSTONE tire brand was very well positioned internationally, if you know, what happened after the company became aware of the opposition to the registration of the trademark in Panama. Please explain.

ANSWER: When we found out about the opposition to the trademark registration, **we had to create contingency plans to try to maintain the same volume of sales; as a result, we had to choose to enter the market with other brands to meet the needs of our customers; such brands as DOUBLE ESTART, JINYU, JAPPINES, brands like CHAOYAN. When entering the market with these brands, unknown at the time, we had to offer them at lower prices, to the detriment of the company's profit margin.** In addition, there was denial by many customers about a product that they did not know; they canceled orders for fear of a product of inferior quality. MURESA INTERTRADE took it upon itself to offer the same RIVERSTONE warranty to the other brands, assuming the risk involved in selling a product of an unknown quality" (emphasis by the Chamber.)

Similarly, witness statements by DOMINGO ESTEBAN ROMERO CEVALLOS (pp. 565-569), GRICELDA PINEDA CASTILLO (pp. 575-585), AMINTA JULISA VEGA

DE BARRERA (pp. 586-594), AIXA YADIRA RAMIREZ GONZALEZ (pp. 622-628), MIRNA RAQUEL MOREIRA MARTINEZ (pp. 634-643 9 and LAURA ESTHER MURGAS DE BRACO (pp. 647-655.) The Court noticed from all witness statements that, coincidentally, due to the process opposing the registration of the RIVERSTONE brand, filed against MURESA INTERTRADE, SA, by BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE CORPORATION, the Plaintiff suffered recurrent damages because they found themselves in a situation of having to improvise with other brands, even lower quality brands, to meet sales demand in the market.

Reason Six mentions an expert report (pp. 2635-2642), which states the following about Plaintiff MURESA INTERTRADE, S.A.:

> "Question 7: What were the damages caused to MURESA INTERTRADE, S.A., due to the company's inability to sell their products, the RIVERSTONE tires, and what was the result?
> Answer 7: Sales of RIVERSTONE tires by MURESA INTERTRADE, SA, during the year 2004 increased by 32% in relation to 2003 sales; and in 2005 sales increased by 18% in relation to 2004, despite the fact that 2005 was the year when the Opposing Request to Registration 120823-01 of the RIVERSTONE Y DISEÑO trademark was filed by BRIDGESTONE CORP. AND BRIGESTONE LICENSING SERVICES, INC. on 5 April 2005.
> In the years 2006, 2007 and 2008 sales decreased in relation to 2005, as follows:

	SALES (Balboas)	DECREASE (Balboas)
2005	5,364,132.54	
2006	3,971,353.40	1,392,779.14
2007	4,717,299.89	646,832.65
2008	4,563,294.20	800,838.34
Decrease in 3 years		2,840,450.13
Plus 18% increase		511,281.02
Total decrease		3,351,731.15

Question 8: What were the sales forecast by MURESA INTERTRADE, S.A. for the years 2007 and 2008?
Answer 8: The sales forecast by MURESA INTERTRADE, S.A. for 2007 and 2008, according to the Minutes of the Board of Directors submitted in the proceeding were:

2007	B/ .23,000,000.00
2008	B/ .23,000,000.00

According to the documentation submitted by the company, sales of RIVERSTONE tires were 35% of the sales forecast.

Question 9: What were MURESA INTERTRADE, S.A.'s sales in 2007 and 2008?
Answer 9: Sales in 2007 and 2008 by MURESA INTERTRADE, S.A. were the following:

	TOTAL SALES (Balboas)	RIVERSTONE SALES (Balboas)	%
2007	17,186,091.25	4,717,299.89	32
2008	20,197,735.61	4,563,294.20	23

Question 10: Why was MURESA INTERTRADE, S.A. unable to meet its sales forecast in 2007 and 2008?
Answer 10: MURESA INTERTRADE, S.A. was unable to meet the sales forecast for the RIVERSTONE Brand, its main product, because of a request opposing Registration 120823-01 of the RIVERSTONE Y DISEÑO trademark filed by BRIGESTONE CORP. And BRIGESTONE LICENSING SERVICES INC., on 5 April 2005. And, despite the fact that the sale of RIVERSTONE tires increased in 2007 and 2008, sales levels have not recovered to what they used to be before the lawsuit. "

Such accounting expert report also shows a decrease in the sales of **TIRE GROUP OF FACTORIES LTD., INC.,** the other Plaintiff. For the year 2005, sales of the RIVERSTONE brand were 56% of total sales, in 2006 they went down to 33%, in 2007 to 35% and in 2008 to 25%. The report states that decreases were caused by the Opposition Request against the Trademark Registration.

The Chamber notes that the aforementioned evidence, on whose grounds the merits are based, was duly and timely submitted to the Court, and does not appear to

have been challenged as to its authenticity and truthfulness. Thus, such evidence may be assessed jointly.

Now, from the facts of the Ordinary Claim filed by the MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD., INC., it is clear that MURESA INTERTRADE, S.A. has had a distribution, representation and distribution agreement with TIRE GROUP OF FACTORIES LTD, INC., since 2001. In turn, since 2001 the latter entered into a representation and distribution agreement with LV INTERNATIONAL COMPANY INC., for everything related to RIVERSTONE tires. The foregoing was accepted, and not objected to, throughout the proceeding.

A fundamental claim in the present Ordinary Proceeding is compensation requested from Respondents **BRIDGESTONE LICENSING SERVICES, INC.** and **BRIGESTONE CORPORATION**, by the Plaintiffs, to cover damages and losses caused by a decrease in sales. Specifically, Plaintiff M**URESA INTERTRADE, S.A.,** was subject to a Request to Oppose the Registration of the RIVERSTONE tire brand. Said product was the Plaintiff's best-selling product. In addition, according to the Appellants, the Opposing Proceeding was reckless and intimidating.

Plaintiffs claim that the damages they suffered were proven when initially they reported that the evidence they submitted had been ignored by the Upper Court. Thus, there was a violation of Article 780, Judicial Code, and a violation of the provisions of Article 1644, Civil Code, in accordance with Article 217, Judicial Code.

The content of the aforementioned violated rules are the following:

> "**Article 1644.** (Civil Code). An individual who by action or omission causes harm to another individual through fault or negligence, is obliged to repair the damages caused.
>
> If the action or omission is attributable to two or more individuals, each of them shall be jointly and severally liable for the damages caused.
>
> **Article 217.** (Judicial Code) A party shall be liable for damages caused to another party, or to a third party, through a reckless, or bad faith, procedural action. When there is proof of such conduct, a Judge shall issue a relevant penalty in a judgment or order. If the amount were not established in the judgment or order, the penalty shall be paid in the manner provided by Article 996. If the proceeding has concluded, this formality shall nevertheless be carried out."

The Appellants point out that violation of the above rules was carried out by the Respondents, in the sense of damages caused to the Plaintiffs by virtue of an Opposing Proceedings against the registration of the RIVERSTONE tire brand. Since 2001 Plaintiffs had had the right of representation and distribution of the brand. The legal action was reckless and intimidating in order to cause harm.

With regard to the fact that legal action by Respondents **BRIDGESTONE LICENSING SERVICES, INC.** and **BRIDGESTONE CORPORATION** caused damages to Plaintiffs **MURESA INTERTRADE, S.A.** and **THE GROUP OF FACTORIES LTD., INC.** 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.

Evidence such as expert accounting reports show what the RIVERSTONE brand meant for the Plaintiffs, not only in terms of representation and commercial distribution, but also in terms of sales because it was a well-positioned brand, well-known for

durability and quality. Thus, the brand generated higher sales and, therefore, greater profits. Consequently, losing this product had a substantial impact in terms of the companies' revenue.

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.

However, despite the commercial impact of removing the RIVERSTONE brand from the market, and the damages caused to the Plaintiffs in terms of annual sales, the Upper Court decided not to grant the claim in the present Ordinary Process, holding that the requirement to prove non-contractual liability in Article 1644, Civil Code had not been met - i.e., guilt or negligence as a fundamental requirement had not been proven.

This Chamber shares the doctrinal analysis set forth in the Upper Court' Decision t, about how and when there is non-contractual civil liability. However, we do not share the Upper Court's assessment, that the evidence submitted does not show any negligence by Respondents BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE CORPORATION, as provided in Article 1644.

The Appellants complained in the present Cassation Recourse, and the contents of pp. 2622-2628 and pp. 2955-2958 show it, that the plaintiffs' legal representatives stated, in an intimidating manner, that opposition proceedings were going to be filed in various countries against the registration of the RIVERSTONE tire brand. They also added, without any legal basis, at least under Panamanian law, that the Plaintiffs should abstain from selling the product. This is obviously intimidating and reckless conduct.

Together with the documentary evidence in the preceding paragraph, the plaintiffs' conduct in the Opposition Proceeding did not go unnoticed by this Chamber. There were doubts about there being any good faith when **BRIDGESTONE LICENSING SERVICES, INC. and BRIGESTONE CORPORATION** went to extremes to oppose the registration of a product brand that was conveniently commercially competitive. Then, after spending a significant amount of time in litigation, they withdrew the appeal they had filed against an adverse Decision.

The Chamber considers it appropriate to cite Jorge Fábrega Ponce, a Panamanian legal expert who, in his "Dictionary of Civil Procedural Law", refers to reckless procedural conduct causing harm to a party as follows:

> "**RECKLESSNESS AND PROCEDURAL MALICE. Procedural recklessness is a behavior adopted by someone who knows, or should know, that he has no reason to litigate and yet does it, abusing jurisdiction." It implies crafty behavior, unfair maneuvering, bad faith representations, and no legal or factual support.** Procedural malice consists of the use of procedural powers with the deliberate purpose of obstructing a proceeding's proper development and decision of the proceeding. **Procedural recklessness is present when the litigant knows, or should have known, that there was no legal reason to file or challenge a claim.** There is procedural malice in the obstructionist and delaying tactics employed .... "(emphasis added by the Chamber) (Jorge Fábrega Ponce, "Dictionary of Civil Procedural Law", 1st. Ed., PLAZA & JANES, Editores Colombia, SA, Colombia, 2004, page 1242)

It is not this Chamber's intention to say that initiating a legal action to claim a right may be interpreted as a synonym for the damages that may be caused to a plaintiff - thus creating a coercion element for anyone who feels entitled to a claim and to use

the means provided by the law to do so. However, in the present case, where there is strong evidence that the Plaintiffs/Appellants had a legal right to market a product, that such product was also substantially important to generate income and, conveniently, a commercially competitive item, such a situation may be key for anyone who, with no strong legal grounds and the will to cause damages to such commercial competitiveness, wishes to jeopardize that party's dominant market presence.

This Chamber considers that the conduct by Respondents **BRIDGESTONE LICENSING SERVICES INC. and BRIDGESTONE CORPORATION** is precisely a reflection of such a situation. The Respondents behavior cannot be held as good faith behavior; indeed, it is negligent behavior. The Respondents filed an action lacking in legal grounds against the current Plaintiffs in the present Ordinary Process by opposing the registration of the RIVERSTONE tire brand. Such action caused irreversible damages to the key part of the Plaintiffs' business activities.

Consequently, this Chamber admits the illegality claim set out in the Reasons of the present Cause of Action, since it was determined that the evidence in the challenged Decision was ignored by the Upper Court. In addition, an analysis of the evidence proves the facts on which the present Ordinary Process is based, thus having an effect on the dispositive part of the judgment challenged. This is why the judgment must be overturned.

Given that the illegality claim has been admitted with regard to the notion of factual error regarding the existence of evidence, this Chamber shall overturn the challenged Decision.

By virtue of the foregoing, **THE SUPREME COURT, FIRST CIVIL CHAMBER**, administering justice on behalf of the Republic and by authority of the Law, **OVERTURNS** the 23 May 2013 Decision issued by the First Superior Court of the First Judicial District; converting this Chamber into a Court of Instance, **REVOKES** Judgment No. 70 dated 17 December 2010, issued by the Eleventh Court, First Judicial Circuit of Panama; and **DECIDES** as follows:

- **BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC.** are ordered to jointly pay **MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD, INC.**, the sum of **FIVE MILLION DOLLARS (US$ 5,000,000.00)**, legal currency of the United States of America, as compensation for non-contractual liability.
- **BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC.** are ordered to jointly pay all Proceedings costs to Plaintiffs **TIRE GROUP OF FACTORIES LTD. INC. and MURESA INTERTRADE, S.A.**, for the sum of FOUR HUNDRED AND THIRTY ONE THOUSAND BALBOAS (B/ .431,000.00) as well as expenses, which shall be calculated by the Court's Clerk.

NOTIFY AND RETURN,

OYDEN ORTEGA DURAN, Judge

HERNAN A. DE LEON BATISTA, Judge **HARLEY 1. MITCHELL D., Judge**
(DISSENTING OPINION)

SONIA F. DE CASTROVERDE, Clerk

SUPREME COURT OF JUSTICE, FIRST CIVIL CHAMBER
Panamá, 28 May 2014

I CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL
[*Signed*] CLERK

REPORTING JUDGE: OYDEN ORTEGA DURAN ENTRY N° 313-13.

MURESA INTERTRADE, S. A. and TIRE GROUP OF FACTORIES LTD. INC. LODGE A CASSATION RECOURSE IN THE LAWSUIT AGAINST BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICIES, INC.

DISSENTING OPINION
JUDGE: HARLEY J MITCHELL D

Despite having submitted my remarks, which were partially accepted by my colleagues, I must state that I do not agree with the decision issued in the Judgment.

Although the Superior Court, First Judicial District, did not correctly state why, in its opinion, there were no damages - because there is no comparison between evidence and facts - the alleged harmful act, submitting a “reckless letter“ and filing an opposing petition, is not a reckless act per se.

First, because the opposing request does not imply that use of the brand should be stopped, and it is not an injunction. Regarding the letter, apart from specific clarifications, its content does not constitute a threat since it was the addressee’s decision whether or not to use the brand - which the addressee thought it was entitled to.. It was not an imposition on the part of the Respondent.

In that sense, one can examine the issue of the document related to the "letter." The decision did not verify the letter’s origin, how it reached the proceedings, or whether it was recognized by the parties. Nothing was said about the date when the letter was drafted or sent, because when the letter was being drafted, the opposition to the trademark registration was being heard.

Page 2622 contains the first letter. This document **is a color copy of a document bearing a notary's seal that explains that the signatures were compared and are authentic.** The document emanates from a third party, and this was not stated in the Decision. The copy does not meet the necessary requirements to be considered evidence, a notary's seal is not sufficient because it considers the copy as authentic, particularly when a document of a testimonial nature, from a third party, must be recognized by the individual who signed it. The same analysis applies to pages 2624-2628 and 2955-2958 of the file. These letters alone do not prove the other party's recklessness or bad faith.

The decision's approach, in this case, creates a bad precedent in the matter of compensation for damages given that the Respondents' position was to file an opposing claim in the belief that it was their right to do so. Filing a claim between parties obviously creates inconvenience, but it is not tantamount to causing damages. A reckless conduct must be proven. The documents in this case do not fully meet the evidentiary quota that Plaintiffs needed to provide.

The abuse of a right that the Plaintiffs intended to establish was related to the filing of an opposing claim (Fact number Six,) and during the proceeding, the introduction of a premise about the submission of a threatening letter. However, according to Jaime Javier Jované, the notion is "disrespect of the limits imposed on the exercise of a right." ("Abuse of rights", page 66.)

In such disrespect there must be maliciousness and an intention to do harm, and involve the notion of bad faith and recklessness. These are acts that entail intention towards a third party. The nature of abuse of a right is classified as "an act of excessive

behavior'', where the interests of another individual are harmed." (op.cit., pp. 72.) Such a scenario is not reflected in the file.

In this type of issue: abuse of right, recklessness, and application of Article 217 of the Judicial Code, we must educate ourselves because our legislation does not have a restrictive notion on what is abuse of a right or recklessness. However, we do have guidelines that describe related forms of behavior. Through jurisprudence, supported by doctrine, we must list the types of behavior involving abuse in the exercise of a right. The latter, however, is not present in the judgment that my colleagues share.

By way of illustration, and in my opinion, initiating a second proceeding, despite the fact that there is one proceeding in progress, or filing a proceeding that is *res judicata,* is abusive conduct in the exercise of the right of access to Justice. Further, although it could be classified as abusive, a behavior must be evaluated after a Decision confirms it. I should add that challenging a judge without some explained reasons is also a case of abuse of the exercise of the right to litigation.

Likewise, the Judicial Code sanctions abusive acts in the exercise of litigation, but does not typify them as such, for example: Article 706, Civil Procedure Code, which imposes a fine to parties that have lost several incidents within the same process. Article 1071 lists cases where there is no good faith, which goes hand in hand with abuse of a right, since bad faith results from a conduct that reveals that the party abused the exercise of a right, whether in defending or reinstating said right. Article 1075 orders a party to pay costs when, despite being owed the costs, such party's expenditure was so overwhelming that the Respondent was forced to cover the excess.

Also, within the concept of abuse of a right, there is legal fraud, and procedural fraud. The former "implies the intention to circumvent the effectiveness of a procedural rule in a litigation" and the latter involves "violating the legal system through the proceeding" (Jaime Jovano Burgos, op.cit., p. 179.) None of the aforementioned cases relates to what happened to the Plaintiffs, particularly since there was no seizure of goods.

Another element, so as not to share a criterion that my colleagues have endorsed, is that **in the lawsuit, the Plaintiffs stated that owing to the opposition proceeding, they stopped selling the RIVERSTONE Y DISEÑO product. However, the decision states that the damages were caused by a decrease in sales. Therefore, the Plaintiffs never stopped selling the product.** (See Fact 6, Lawsuit, and page 15 of the Decision.)

Witness statements, ignored by the Upper Court, were not compared **with the documentation on file provided by the Plaintiff itself**, which reveals that the lower quality marks that were allegedly introduced by the Plaintiffs to improve the business were already being sold, together with RIVERSTONE, before the opposing lawsuit (see invoice dated 3/12/2003, page 456, invoice dated 20/7/2004, page 520 *et seq.* up to page 595.)

The detailed invoices prove that the Plaintiffs bought brands such as JINYU, DOUBLE STAR (invoice on p. 520) that supposedly were of lower quality than RIVERSTONE, to balance their business. This is not true, given that they were always sold, and partially undermines the statement by witness **ORESTES MEDINA**, mentioned in the project. **In short, the dates on invoices at pp. 456-495 were not**

compared with the models of tires allegedly introduced, (as DOUBLE START, JINYU, JAPPINES, CHAOYAN).

Likewise, lower sales were due to contingency plans implemented due to fears of a seizure that never happened, and not the opposition proceeding.

Witness JOSE ORESTES MEDINA, cited in the Decision, noted:

> "QUESTION 3. What was the cause of the contingency plan?
>
> ANSWER (Witness): Actually, there was a fear that BRIGSTONE CORPORATION would order a seizure of RIVERSTONE tires, or prevent the sale of said tires. It was a very delicate situation, having inventory in the warehouse, goods in transit, and goods being manufactured with the RIVERSTONE brand that we may not be able to sell owing to a Decision against us" (fs. 563.)

This witness, together with Esteban Romero and Fernán Jesús González, are in agreement when stating that a sales decrease was due to **the company's decision in the face of a fictional situation.** There never was an interim injunction, only a proceeding. **Sentencing the Respondents to pay for damages because of the other party's commercial fears is inappropriate**.

According to the experts, a decrease in sales was caused by the Plaintiffs business decisions. Use of the brand never ceased, contrary to the Plaintiffs' claim. (Volume I.)

According to the witnesses, the Plaintiffs feared that the goods would be seized. This means that the decrease in sales was caused by the Plaintiffs unilateral decision. (Witness Statement by Domingo Esteban Romero, pp. 565-569, and Fernán Jesús Luque González, pp. 608-616.)

Consequently, the following paragraph was drafted without a proper logical flow of supporting arguments:

> "As a fundamental claim in this ordinary proceeding, compensation is requested from Respondents BRIDGESTONE LICENSING SERVICES, INC. and BRIGESTONE CORPORATION, in favor of the Plaintiffs, to cover for damages and losses caused by a decrease in sales, specifically in view of the fact that the Plaintiff was subject to a proceeding to oppose the registration of the RIVERSTONE tire brand, a product that was their sales mainstay. In addition, and according to the Appellants, such opposition proceeding was based on reckless, intimidating conduct."

Continuing with our analysis of logical flow, we find the following contradiction: "**Now, despite the fact that the commercial impact 'involved removing RIVERSTONE tires from the market, which caused damages..." (p. 19 of the project.)** The decision and the proceeding showed that sales of the product never ceased, the product was never withdrawn from the market; there was only a decrease in sales caused by the Plaintiffs' own inference.

On the other hand, the adopted project does not analyze the meaning of reckless behavior. Is reckless behavior informing a businessman that a request opposing a brand registration will be filed? The Chamber replies that this is a special case, because there was strong evidence that the Appellants were able to sell the product. This response is no justification because in order to reach the subject of evidence evaluation, there had to be a court and a proceeding, where a judge ruled against the Respondents.

The undersigned reiterates that the authenticity of a letter stating an alleged recklessness was not screened by the Chamber. Likewise, no reason was given about

what to do with a final decision, by the specialized court, ruling that the party's conduct was not reckless. The evidence that gave rise to the event was not evaluated. The content was revealed, but no reasoning followed about an impact on the proceeding, much less in contrast with other evidence.

For better understanding, I transcribe the following excerpt:

> "BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICE, INC. shall be exempted from paying costs, given that this court considers that they acted in evident good faith, maintaining their position, and providing appropriate evidence to prove their legal standing - **all without abusing the exercise of their management right**. Thus, they shall only be compelled to cover the costs of the proceedings." (Emphasis added.)

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 proceeding. **The proceeding did not reach the end, the last consequences, as argued by the project**. Punishing a party for a procedural decisions such as this, qualifying it as recklessness and abuse of a right, is inappropriate.

Finally, I do not agree with the reasons behind the monetary sanction in this proceeding. No analysis was offered, based on arguments, and scarce legal grounds, as to how the **Five million Balboas** figure was reached.

Citing an ignored expert opinion, without even a glimpse of an interpretative effort by the Court, and without comparing it to the rest of the documents, is failure to comply with the duty to motivate a decision, especially when there is an issue about MURESA's damages (that I do not agree with,) and an ignored expert report, calculated at

B/.3,351,731.15 (p. 2638.) The Court expert argued that there were no supporting documents, specific studies, or financial projections (essential items to evaluate damages to sales forecasts), and that there were only projected sales on photocopies, minutes and reports, (attached) (p. 1650.)

The Court's expert regarding the assessment of damages stated as follows:

> "We have no documents showing that they had to stop sales; projections were not based on any study; and TIRE GROUP OF FACTORIES LTD, INC, did not stop selling RIVERSTONE brand tires."

The foregoing are, in the main, the reasons that lead me to issue a **DISSENTING OPINION.**

Dated *ut supra.*

[*Seal:* Republic of Panama
Judicial Body
Supreme Court of Justice
Civil Chamber

HARLEY J. MITCHELL D.
JUDGE

SONIA F. DE CASTROVERDE
CLERK

"TRANSLATION"

ENTRY: No. 313-13
DRAFTING JUSTICE: OYDEN ORTEGA DURAN

MURESA INTERTRADE, S.A. AND TIRE GROUP OF FACTORIES LTD., INC. RESORT TO AN APPEAL WITHIN THE ORDINARY ACTION BEING FOLLOWED AGAINST BRIDGESTONE CORPORATION AND BRIDGESTONE LICENSING SERVICES, INC.

SUPREME COURT OF JUSTICE – CIVIL BRANCH – PANAMA
MAY TWENTY EIGHTH (28TH) OF TWO THOUSAND FOURTEEN.

WHEREAS:

By Resolution of December fourth (4th) of two thousand thirteen (2013), this Civil Branch admitted the Appeal filed by the law firm **BALLARD & BALLARD**, in its capacity of legal representative of the corporation **MURESA INTERTRADE, S.A.,** filed against Resolution of May twenty third (23rd) of two thousand thirteen (2013), given by the First Superior Court of the First Judicial District, modifying Sentence No. 70 of December 17, 2010, issued by the Eleventh Circuit Court of the First Judicial Circuit of Panama, Civil Branch, within the Ordinary Action that **MURESA INTERTRADE, S.A.** and **TIRE GROUP OF FACTORIES LTD., INC.,** followed against **BRIDGESTONE CORPORATION** and **BRIDGESTONE LICENSING SERVICES, INC.**

Upon completing the phase of arguments on the merits, which was used by both parties to the Action, which is the visible result of the different briefs set forth on pages 4736 through 4755 of file, the Chamber proceeds to decide on the respective Appeal, considering the following points.

BACKGROUND

Through legal counsel, the Corporations **MURESA INTERTRADE, S.A.** and **TIRE GROUP OF FACTORIES LTD.,**

INC., initiated Ordinary Action of Greater Amount against **BRIDGESTONE CORPORATION** and **BRIDGESTONE LICENSING SERVICES INC.,** so that the same be condemned jointly and severally to pay the amount of **FIVE MILLION DOLLARS (US$5,000,000.00)** on account of money damages. The ordinary complaint was based on the following claims:

> 1. That the defendants, BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC. be sentenced to pay to our clients, MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD., INC. the amount of Five Million Dollars (US$5,000,000.00), legal currency of the United States of America, on account of indemnification for extra-contractual liability.
>
> 2. That the defendants, BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC. be condemned to pay attorney's fees and expenses originated during this process.

The facts on which the Action filed by **MURESA INTERTRADE, S.A.** and **TIRE GROUP FACTORIES LTD., INC.,** were based were the following:

> **"FIRST:** On April 5, 2005, the defendants, BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES INC., filed an opposition complaint against the application for registration No. 120823-01 for the RIVERSTONE and DESIGN trademark filed by MURESA INTERTRADE, S.A.
>
> **SECOND:** The plaintiff, MURESA INTERTRADE, S.A., entered into a representation and distribution agreement with TIRE GROUP OF FACTORIES LTD., INC. on the 27th day of December 2001, for different countries of Europe, Asia, Africa and any other country of the area (sic), for the registration and marketing of the Products

of the RIVERSTONE AND DESIGN trademark (tires or wheels)

THIRD: The plaintiff, MURESA INTERTRADE, S.A. entered into a representation and distribution agreement with LV INTERNATIONAL INC. on the 27th day of December 2001, for different countries of America, among them the United States of America, Mexican United States, Guatemala, El Salvador, Honduras, Belize, Costa Rica, Canada, Nicaragua, Venezuela, Ecuador, Uruguay, Paraguay, Haiti, Argentina, Bolivia, Peru, Dominican Republic and Colombia for the registration and marketing of the Products under the trademark RIVERSTONE AND DESIGN (tires or wheels).

FOURTH: That MURESA INTERTRADE, S.A. is the sole owner of the RIVERSTONE AND DESIGN trademark, as established by Law 35 of May 10, 1996, approved in our country by Law 41 of July 13, 1995, the Paris Convention and the TRIPS agreement, approved by Law 23 of July 15, 1997.

FIFTH: That MURESA INTERTRADE, S.A. authorized LV INTERNATIONAL INC. and TIRE GROUP OF FACTORIES LTD., INC. to register the RIVERSTONE AND DESIGN trademark, on an international level, being those products (tires) commercialized (sold) in America, Europe, Asia and Africa.

SIXTH: That the complaint filed by the defendants, BRIDGESTONE CORPORATION and BRIDGESTON LICENSING SERVICES INC., caused money damages to our clients since the commercialization (sale) of the product under the RIVERSTONE AND DESIGN trademark ceased, as a result of the of the complaint.

This Action was filed at the Eleventh Circuit Court of the First Judicial Circuit of Panama, Civil

Branch, which by means of Resolution No. 1293-07 admitted the respective Complaint,

notified the defendants, who denied the facts and the amounts claimed. After complying with the appropriate procedural stages, the first instance court resolved this Action through Judgment No. 70 of December 17, 2010, which in its decisive part stated the following:

"The undersigned, ELEVENTH CIRCUIT CIVIL JUDGE OF THE FIRST JUDICIAL CIRCUIT OF PANANA, administering justice on behalf of the Republic and by authority of law, within the Ordinary Action for Civil liability proposed by MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD., INC., against BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC., RESOLVES the following:

FIRST: Declares proved the Exception of Illegitimacy in the Case of the Corporation TIRE GROUP OF FACTORIES LTD., S. A., alleged by the defendants BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC.

SECOND: DENIES THE CLAIM requested by the corporation MURESA INTERTRADE, S.A. within this Action.

Orders the plaintiff to pay the attorney's fees which are valued in the amount of THREE HUNDRED SEVENTY ONE THOUSAND SEVEN HUNDRED DOLLARS WITH 00/100 ($371,700.00)."

In the exercise of its procedural rights, the Plaintiff timely brought an Appeal against the Judgment of first instance, being known such Appeal by the First Superior Court of the First Judicial District of Panama, who resolved the appeal through Resolution of May 23, 2013, by stating in the decisive part of such judgment the following:

"For the stated above, the FIRST SUPERIOR COURT, administering justice on behalf of

the Republic and by authority of the Law, MODIFIES the Judgment No. 70 of December 17, 2010, delivered by the Eleventh Circuit Court of the First Judicial Circuit of Panama, Civil Branch, to declare NOT PROVED the Exception of Illegitimacy in the Action of the corporation TIRE GROUP OF FACTORIES LTD., S. A., alleged by the defendants.
IT IS AFFIRMED for everything else."

The Appellant has brought this Appeal against this resolution of second instance, which this Civil Chamber proceeds to resolve.

APPEAL

The present Appeal is on the merits and a ground of violation of Substantive Rules of Law is invoked, which corresponds to an error of fact regarding the existence of evidence.
This invoked ground is based on six MOTIVES which are stated as follows:

"**FIRST**: The First Superior Court of the First Judicial District of Panama, when delivering the judgment ignored completely the document in the English language and duly translated into Spanish through an authorized public translator and which can be read from page 2622 to page 2828 and from page 2955 to page 2958 of the file, in which the attorneys of Transnational BFS Brands, LLC, threaten and warn L.V. INTERNATIONAL, INC, Riverstone trademark, representative of MURESA INTERTRADE, S.A., to refrain from any registration and use of the Riverstone trademark, both within the United States of America and any other country; and if L.V. INTERNATIONAL, INC. used the mark, it was under its own risk. By not considering this important evidence of the Action, the First Superior Court of the First Judicial District of Panama, made an error of fact in connection with the

existence of evidence, which substantially influenced the decision contested, since such evidence shows the bad faith and recklessness of the defendants.

SECOND: The First Superior Court of the First Judicial District of Panama also did not consider, when ignoring completely the certifications issued and subscribed by the Authorized Public Accountant MIRMA R. MOREIRA, with CPA number 307-2005, with her signature acknowledged before a Public Notary, accountant of the company MURESA INTERTRADE, S.A., and TIRE GROUP OF FACTORIES LTD., INC. stopped selling worldwide the amount of five millions one hundred sixty eight thousand two hundred seventy dollars with fifty six cents (USD$5,168,270.56), making the error of fact in connection with the existence of evidence which substantially influenced the contested decision, since if it had not ignored this important evidence of the Action, it had acknowledged that the defendant caused our clients severe economic damages with its behavior.

THIRD: The First Superior Court of the First Judicial District of Panama did not evaluate, but ignored completely, the content of the resolution of September 8, 2006 of the Third Superior Court of the First Judicial District of Panama available from page 37 to page 38 of the file, in which it appears the willful and bad faith act or behavior from the defendant, who after opposing the registration of the Riverstone trademark of our clients and announcing appeal against the decision that denied the opposition, desisted from such recourse. By not considering this documentary evidence which is a document, the ad quem (court of appeals) made an error of fact in connection with the existence of evidence, substantially influencing the contested decision and if it had considered it, it had proved the damages caused by the defendant to our clients.

FOURTH: The First Superior Court of the First Judicial District of Panama ignored the testimonial evidences of JOSE ORESTES MEDINA SAMANIEGO, available from page 553 to page 564; DOMINGO ESTEBAN ROMERO CEVALLOS, page 565 to page 569; GRICELDA

PINEDA CASTILLO, available from page 575 to 585; AMINTA JULISA VEGA BARRERA, available from page 586 to page 594; AIXA YADIRA RAMIREZ GONZALEZ , from page 622 to page 628, MIRNA RAQUEL MOREIRA MARTINEZ available from page 634 to page 643, LAURA ESTHER MURGAS DE BRACHO, from page 647 to page 655 of the file, all employees of our clients, who know the sales flow of tires and who agree in time and place, that our clients could not sell their Riverstone tires because of the opposition against the application for registration of the trademark and the threats of the Transnational BRIDGESTONE, so that the ad quem made an error of fact in connection with the existence of evidence, which substantially influenced the decision as it did not deem proven the damages caused by the defendants.

FIFTH: Neither did the First Superior Court of the First Judicial District of Panama consider the testimonial statement made by FERNAN JESUS LUQUE GONZALEZ, see from page 603 to page 616 and JORGE ALBERTO LUQUE GONZALEZ, available from page 657 to 661 of the file, who mentioned in their testimonies that they knew there was a threat made through a letter from BFS BRANDS, LLC (BRIDGESTONE) in the United States of America and the seizure and challenge action against the RIVERSTONE trademark in the Dominican Republic, China and other countries, which led our clients to be afraid of actions against them and which prevented the sales of the RIVERSTONE brand tires, during the opposition against the registration hereof, thus the ad quem made an error of fact in connection with the existence of the evidence which influenced the contested decision, because by ignoring such evidence the court did not deem proven the willful and bad faith acts of the defendants and the damages.

SIXTH: Neither did the First Superior Court of the First Judicial District of Panama consider in its judgment the accounting expert report rendered by the experts PSIQUIES DE LEON and JOSE ANTONIO AQUILAR, available from page 2635 to page 2642 of the file and the testimony of such experts upon examination, which are read from page

3639 to page 3663, who concluded that our clients had a marked reduction of sales during the period 2005-2008 for damages caused by BRIDGESTONE valued in five millions one hundred sixty eight thousand two hundred seventy dollars with fifty six cents (USD$5,168,270.56) because of the opposition against the registration of the RIVERSTONE trademark and the defendants´ threats, thereby making the ad quem an error of fact in connection with the existence of evidence which influenced the contested decision, because by ignoring such evidence it did not deem proven the willful and bad faith acts of the defendants and the damages.

As rules of law considered infringed, articles 780 and 217 of the Judicial Code are cited, as well as article 1644 of the Code and article 1 of the Law No. 57 of 1978.

CHAMBER'S CRITERION

As it was indicated above, the Appeal is on the merits and a ground of violation of substantive rules of law is invoked by error of fact regarding the existence of evidence.

The invoked evidentiary ground occurs when evidence that has been submitted during the Action has not been appreciated by the Ad quem within the Resolution, and it is binding that its appreciation had influenced the challenged decision.

Thus, a thorough review of the contested decision proves that the evidences to which the six Motives upon which the invoked evidentiary error is based, were not appreciated within such Resolution. That is so because the Ad quem only indicated that from the review of the evidence within the Action, the claim

of the defendants is not clear, without a thorough analysis thereof and without identifying the evidentiary elements specifically, referring to the evidence in a general and global manner.

The foregoing shows to this Chamber that the illegality charges stated in the Motives do exist, by showing that the evidences listed have not been appreciated by the Superior Court within the challenged Resolution, therefore this Chamber must determine now if from the analysis and appropriate evidentiary appreciation of such evidences, the defendants´ claim is shown, thereby influencing the contested decision.

In this regard, for this Chamber the claim of this Ordinary Action commenced by the plaintiffs, is to obtain from the defendants a compensation for damages caused by virtue of an Action that with reckless intentions, the Corporations **BRIDGESTONE LICENSING SERVICES INC.** and **BRIDGESTONE CORPORATION** brought against **MURESA INTERTRADE, S. A.,** where the Corporations **TIRE GROUP OF FACTORIES LTD. INC. and L.V. INTERNATIONAL INC.,** served as third party interveners, which caused them damages in connection with the marketing and sale of the product, which consists of tires identified with the RIVERSTONE trademark.

Thus, it stems from the first Motive in which this Appeal is based that the Appellants pointed out the documentary evidences from pages 2622 and 2628 and from 2955 to 2958, in both groups of pages the same documentary evidence is shown, which represents a translation into the Spanish language from a correspondence issued by the

the defendants´ counsel to the plaintiffs´ attorneys. The content of such note reads as follows:

"Dear Mr. Sanchelima:

As you know, the Board of Disputes and Appeals of Trademarks has delivered judgment against your client, supporting our opposition and denying the application filed by your client regarding the registration for tires of the RIVERSTONE trademark.

Please note that Bridgestone/Firestone object any registration of the RIVERSTONE trademark not only for its use for tires but also for any use that may be given to this trademark. Although we are not aware of the use of the RIVERSTONE trademark tires in the United States, Bridgestone/Firestone **hereby submit to your client our formal demand that your client refrains from using the RIVERSTONE trademark in the United States either at the date hereof or at any time thereafter.**

Regarding the use of the RIVERSTONE trademark in other countries, please also note the position of Bridgestone/Firestone in such a way that our formal demand directed to L.V. International Inc. asking them to refrain from using the RIVERSTONE trademark is not limited only to the United States. Before performing an analysis country by country and without any intention to make any demands at this time, concerning the use of the RIVERSTONE trademark in any other particular country, both you and your client must be aware that Bridgestone/Firestone object and in no any way approve the use or registration of the RIVERSTONE trademark for tires anywhere in the world. Therefore, L. V. International Inc. is acting at its own risk if it decides to use the RIVERSTONE trademark in other countries.

Sincerely

Peter G. Mack

Attachment(s)

PGMA/ras

(the underlined part belongs to the Chamber)

Within the third Motive, the omission in the appreciation of the copy of a legal Resolution (fs. 37 to 39) delivered by the Third Superior Court of Justice of the First Judicial District of Panama, in which it is resolved to admit the withdrawal filed by the law firm BENEDETTI & BENEDETTI, counselors for the opposing party, within the "Opposition Action against the application for registration No. 120823-01 for the RIVERSTONE AND DESIGN trademark, in Class 12, brought by the Corporations BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICE, S. A., against the company MURESA INTERTRADE, S. A., which has as third party interveners the corporations L. V. INTERNATIONAL INC. and TIRE GROUP OF FACTORIES LTD., INC. is reported".

It stems from the appreciation of the aforementioned Resolution, as the Appellants mention in the third Motive upon which the evidentiary ground of error of fact is based in connection with the existence of evidence, the Opposition Action against the registration of trademark was in the Third Superior Court of Justice of the First Judicial District of Panama by virtue of the Appeal brought by the firm BENEDETTI & BENEDETTI, in its capacity of counselor for the Corporations **BRIDGESTONE CORPORATION** and **BRIDGESTONE LICENSING SERVICES`, INC.,** being in this procedural stage where the withdrawal of the appeal was filed.

Regarding the fourth Motive, what is reported is the omission in the appreciation of certain testimonial evidences, being the first of these reported the one that corresponds to the witness JOSE ORESTES MEDINA SAMANIEGO (fs.553 to 564), who identified himself as employee of the

plaintiff MURESA INTERTRADE, S. A. and from whose testimony the following stems from:

"QUESTION #3: May the witness state if he is aware that against the registration of the RIVERSTONE trademark any type of opposition to its registration was filed in Panama and in other countries?

ANSWER: In 2005, **when I recently joined MURESA INTERTRADE as Sales Manager of the company, I was notified that there was an objection against the registration of the RIVERSTONE trademark, such objection proposed by BRIDGESTONE CORPORATION, that such Action was being tried in Panamanian courts. At that time, there was a conversation with the law firm to check if there was opposition in any other country. Based on that, it was determined that the proceedings of registration were being stopped in China and United States.**

"QUESTION #4: May the witness state, since he has declared to be the Sales Manager of MURESA INTERTRADE, S. A., where were distributed or in which countries were distributed the tires identified with the RIVERSTONE trademark before the opposition to its registration in the Republic of Panama?

ANSWER: **RIVERSTONE TIRE was already an established trademark in countries such as Colombia, Costa Rica, Nicaragua, Honduras, Salvador, Guatemala, Dominican Republic, Haiti, and very well established in Cuba, Venezuela.** As for Asia and Europe, it was sold a lot in Singapore, Korea, Africa, Portugal and internally in China.

QUESTION #5 May the witness testify in his capacity of Manager of MURESA INTERTRADE, S. A., and since he has declared in the preceding answer, that the RIVERSTONE trademark for tires was very well established worldwide, if he knows, what happens after they knew about the opposition to the registration of the trademark in Panama? Please explain.

ANSWER: When we learned about the opposition against the registration of the trademark, **we had to make contingency plans within the company to attempt to manage the same sales volume or the sales volume of the company; because of this, we had to choose entering with other trademarks to meet the needs of our customers; such trademarks as DOUBLE**

ESTART, JINYU, enter trademarks as JAPPINES, we entered with trademarks as CHAOYAN. When entering with these trademarks which at that time did not have the name or recognition in their market, that lead us to introduce them with lower prices at the expense of the profit margin of the company, in addition the refusal of many customers for being a product they did not know, because of which they canceled the orders for being afraid they were low quality products. MURESA INTERTRADE assumes the responsibility of granting the guarantee given for RIVERSTONE to these other trademarks, taking the risk of selling a product the quality of which was unknown." (**the underlined part belongs to the Chamber**)

Likewise, it is reported within the Fourth Motive the testimonial statements of DOMINGO ESTEBAN ROMERO CEVALLOS (fs. 565 -569), GRICELDA PINEDA CASTILLO (fs. 575 -585), AMINTA JULISA VEGA DE BARRERA (fs. 586 -594), AIXA YADIRA RAMIREZ GONZALEZ (fs. 622 -628), MIRNA RAQUEL MOREIRA MARTINEZ (fs. 634 -643 9 and LAURA ESTHER MURGAS DE BRACO (fs. 647 -655), this Chamber having been able to verify that from all the aforesaid testimonies it is coincidentally shown the fact that, because of the opposition Action to the registration of the RIVERSTONE trademark brought against the Corporation MURESA INTERTRADE, S. A. by BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE CORPORATION, a commercial damage was caused to the plaintiffs – appellants, since they had to improvise with other trademarks, including low quality trademarks, to meet the sales demand of the market.

It is seen from what is stated in the sixth Motive, that the appreciation of the expert report of pages 2635 to 2642 of the

file, shows regarding the plaintiff MURESA INTERTRADE, S. A., the following:

"Question 7: Which were the damages caused to the company MURESA INTERTRADE, S. A.? because of the impossibility to sell its products, the RIVERSTONE tires, and what was the result?

ANSWER 7; The sales of the RIVERSTONE tires made by the company MURESA INTERTRADE, S. A., during 2004 increased by 32% in relation to the sales of 2003 and in 2005 increased by 18% in relation to 2004, in spite of the fact that 2005 was the year in which it was the Opposition complaint against application for registration 120823-01 of the RIVERSTONE AND DESIGN trademark was brought by BRIDGESTONE CORP. AND BRIDGESTONE LICENSING SERVICES, INC., filed on April 5, 2005.

In 2006, 2007 and 2008 the sales decreased in relation to 2005 in the following way:

	SALES (In Dollars)	DECREASE (In Dollars)
2005	5,364,132.54	
2006	3,971,353.40	1,392,779.14
2007	4,717,299.89	646,832.65
2008	4,563,294.20	800,838.34
Decrease 3 years		2,840,450.13
Plus an increase of 18%		511,281.02
Total Decrease		3,351,731.15

Question 8: Which were the sales scheduled by the corporation MURESA INTERTRADE, S. A., for 2007 and 2008?

Answer 8: The sales scheduled by the corporation MURESA INTERTRADE, S. A. for 2007 and 2008 under the minutes of the board of directors credited in the Action were the following:

2007 US$23,000,000.00

2008 US$23,000,000.00

According to the documents submitted by the company, the sales of the RIVERSTONE tires represented 35% of the scheduled sales.

Question 9: Which were the sales made during 2007 and 2008 by the company MURESA INTERTRADE, S. A.,?

Answer 9: The sales made during 2007 and 2008 by the company MURESA INTERTRADE, S. A., were the following:

TOTAL SALES (In Dollars)	SALES OF RIVERSTONE TIRES (In Dollars)	%
2007 17,186,091.25	4,717,299.89	32
2008 20,197,735.61	4,563,294.20	23

Question 10: What was the reason for not accomplishing the sales scheduled by the company MURESA INTERTRADE, S. A., for 2007 and 2008?

Answer 10: The sales scheduled by the company MURESA INTERTRADE, S. A. were not accomplished because the RIVERSTONE trademark, main product sold by the company MURESA INTERTRADE, S. A., was subject to an Opposition complaint against the application for registration 120823-01 for the RIVERSTONE AND DESIGN trademark brought by BRIGESTONE CORP. AND BRIGESTONE LICENSING SERVICES INC., filed on April 5, 2005. And even though the sales of RIVERSTONE tires have been increasing during 2007 and 2008, they have not been able to recover the increase levels they had before the complaint."

It can also be proved from such accounting expert report, the sales decrease of the other plaintiff, the Corporation **TIRE GROUP OF FACTORIES LTD., INC.,** indicating the report that by 2005 the sales of the RIVERSTONE tires represented 56% of the total sales, it decreased to 33% in 2006, in 2007 to 35% and in 2008 to 25%, specifying that the cause of this decrease was the Opposition Complaint against the respective registration of trademark.

This Chamber observes in connection with the previous detailed evidences and upon which the invoked ground has been based, that the same were duly incorporated to the Action within the appropriate term and it does not appear within the Action that they have been objected regarding

its authenticity and veracity, therefore, the appreciation of its jointly content is appropriate.

Now, from the facts upon which the Ordinary Complaint is based, brought by the Corporations **MURESA INTERTRADE, S. A.** and **TIRE GROUP OF FACTORIES LTD., INC.**, it is evident for this Court that the Corporation **MURESA INTERTRADE, S. A.** has a distribution, representation and distribution agreement with the Corporation **TIRE GROUP OF FACTORIES LTD., INC.**, since 2001 and, in turn, since that year, the latter Corporation entered into a representation and distribution agreement with the Corporation LV INTERNATIONAL INC., for all matters related to the RIVERSTONE tires, which was duly credited and it was not objected throughout the Action.

As the main claim of this Ordinary Action, a compensation from the defendants **BRIDGESTONE LICENSING SERVICES, INC.** and **BRIGESTONE CORPORATION,** in favor of the plaintiffs is requested to cover for damages caused by virtue of the decrease in the commercial sales they experienced, specifically because of the situation of the plaintiff **MURESA INTERTRADE, S. A.**, being subjected to an Opposition Action against the Registration of the RIVERSTONE trademark for tires, product that represented its most important good in terms of commercial sales and besides, as the Appellants said, such Opposition Action was supported by reckless and intimidating attitudes.

The Appellants point out that after the evidentiary appreciation reported in the Motives upon which the invoked ground of error of fact in connection with the existence of evidence is based, which has been fully verified by this Chamber, by previously indicating that the

evidences in question did not deserve a valuation statement from the Ad quem within the contested decision, the damages caused to the plaintiffs are shown, committing not only the infringement of Article 780 of the Judicial Code, but also violating the provisions of Article 1644 of the Civil Code, in accordance with Article 217 of the Judicial Code.

The content of the provisions cited as violated is as follows:

Article 1644. (Civil Code) Whoever by act or omission causes damage to another by fault or negligence is bound to repair the damage.
If the act or omission is attributable to two or more persons, each shall be jointly and severally liable for the damages caused.

Article 217. (Judicial Code) The parties shall answer for damages caused to the other party or third parties by their reckless or bad faith procedural actions. When there is evidence of such behavior in the procedure, the judge shall impose the appropriate award in the judgment or in the order that decides the procedure and if it is not possible to determine an amount thereof, it shall be settled in the manner provided in Article 996, if the Action has been completed, such proceeding shall be advanced independently."

From the previously transcribed rules, the Appellant indicates that its harm caused by the Defendants is proven in terms of the damages they caused to the plaintiffs as a result of the Opposition Action against the Registration of the RIVERSTONE trademark for tires, in which they had since 2001, the right of its representation and distribution, judicial action that the plaintiffs say occurred in a reckless and intimidating manner with the aim of causing damage.

Regarding the fact the legal initiative exercised by the Defendants **BRIDGESTIONE LICENSING SERVICES, INC.** and **BRIDGESTONE CORPORATION** caused damage to the plaintiffs **MURESA INTERTRADE, S. A.** and **THE GROUP OF FACTORIES LTD, INC.,** it is for this Court a fully proven element from the mass of evidence submitted within the Action and upon which the invoked evidentiary ground of error of fact in connection with the existence of evidence is based; evidence materials this Chamber specified in detail when verifying the respective Motives.

The evidence materials, such as the accounting expert report prove what the RIVERSTONE trademark for tires represented to the plaintiffs corporations, not only in terms of their representation and commercial distribution, but also as a sale product by being a trademark commercially established and recognized by its durability and marketability, situations that had made this product the one that generated most of the sales, therefore, greater profits, being consistent with the fact that, when this product was excluded as a sales product, it created a significant financial impact in respect of the incomes of such corporations.

This situation is also proved by the testimonial evidences given by the employees of the plaintiffs, who concretely and coincidently reflect the sales crisis that occurred in the accounting of the incomes of the plaintiffs´ profits and despite of the use of contingency commercial plans, the commercial sales could not be leveled

and the placement in the market of the RIVERSTONE tires, resulting from the fact that such commercial trademark was subject to a dispute.

However, despite the commercial impact that was caused due to taking out from the market the sales of the RIVERSTONE tires, which created damages in terms of the annual sales of the plaintiffs corporations, situation that this Chamber considers perfectly demonstrated, the Ad quem considered not to grant the claim of this Ordinary Action, since it deemed that the condition of proving the extra-contractual liability contemplated in Article 1644 of the Civil Code, because it considered not proven the fault or negligence that such rule refers to as a necessary requirement for the legal responsibility claimed to be formed.

While this Chamber shares the doctrinal analysis presented in the contested decision by the Ad quem concerning how and when extra-contractual civil liability occurs, this Chamber does not share the appreciation made by such Court when saying that from the evidence submitted within the Action, the negligence elements on the defendants BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE CORPORATION to which the cited article 1644 refers to are not proven.

This is so, as the Appellants have stated in this Appeal, when observing the note that appears on pages 2622 to 2628 and on pages 2955 to 2958, in which the legal counsel of the plaintiffs, in an intimidating manner indicated to have brought in several countries Opposition Actions against the registration of the RIVERSTONE trademark for tires and adding without

legal basis, at least within Panamanian law, that the plaintiffs should refrain from commercially selling that product, it represents an obviously intimidating and reckless behavior.

According to the documentary evidence indicated in the preceding paragraph, it does not go unnoticed for this Chamber the procedural behavior of the plaintiffs in this Trademark Action, creating confusion in considering the existence of good faith, when the Corporations **BRIDGESTONE LICENSING SERVICES, INC.** and **BRIDGESTONE CORPORATION** take until the last procedural consequences the initiative to oppose the registration of a trademark of a product that conveniently was commercially competitive to them and after an important time in dispute elapsed, withdraw a remedy such as the Appeal brought on a Decision adverse to their interests.

The Chamber finds appropriate to cite the Panamanian lawyer Jorge Fabrega Ponce, who in his work "Dictionary of Civil Procedure Law", refers to reckless procedural behaviors and that cause damage to the parties, as follows:

"**RECKLESSNESS AND PROCEDURAL MALICE. The reckless procedural act is the behavior of one who knows or should know that he does not have grounds to litigate, notwithstanding, he does, abusing of the jurisdiction. It implies devious behavior, unfair maneuver, articulating in bad faith and without any factual or legal support.** The procedural malice is the use of procedural powers with the deliberate intent to obstruct the proper development and decision of the Action. **The procedural recklessness takes place with the knowledge that the litigant had or should have had about the lack of legitimate grounds to bring or maintain a claim**. The procedural malice occurs

in the obstructionist and dilatory purposes in the respective articulations .... "(**The underlined part belongs to the Chamber**) (Jorge Fabrega Ponce, Dictionary of Civil Procedural Law", first edition, Plaza & Janes Editores Colombia, S.A., Colombia, 2004, p. 1242)

It should be noted at this point that this Chamber does not intend, under any circumstances, to indicate that the fact of exercising a judicial initiative for claiming any right could be interpreted as synonym of the damages that may cause thereof to the plaintiffs, resulting this in an element of coercion to whom is considered entitled to a claim and to use the resources that the law provides it to do so. However, as to the specific situation of this case, in which there were strong evidences that showed that the appellants plaintiffs had with legal basis the right to market a product that also constituted an item of great importance for their own profits in connection with the commercial activity they are engaged in and conveniently an element of commercial competitiveness for the opposing parties, it may represent a key situation for one who intends to commercially decrease that condition of market possession, without strong legal support and with the intent to cause damages because of the commercial competitiveness that this represents.

And it is precisely this situation the one that this Chamber considers that stems from the defendants´ behavior, **BRIDGESTONE LICENSING SERVICES INC.** and **BRIDGESTONE CORPORATION**, by not considering in good faith and, therefore, considering a negligent action the fact of using the legal initiative to bring without legal basis against the current plaintiffs in this

Ordinary process, when they filed against them an opposition to the registration of the RIVERSTONE trademark for tires, therefore such action caused irreversible damages regarding the key the commercial activity those corporations were engaged in.

Consequently, this Chamber not only finds that the charges of illegality presented in the Motives upon which this appeal is based have been shown, when verifying that the evidentiary elements were ignored by the Ad quem in the contested decision, but also, from their appreciation, the facts upon which the claim of this Ordinary Action is based are proven, influencing the provisions of the contested decision in Appeal, whereby it proceeds to repeal that decision. Given that the charges of illegality presented in the Ground that corresponds to the concept of error of fact regarding the existence of evidence have been shown, this Chamber shall order the revocation of the contested decision.

On merits of the foregoing, **THE SUPREME COURT, FIRST CIVIL CHAMBER**, administering justice on behalf of the Republic and by the authority of the Law, **REPEALS** the Decision of May twenty three (23) of two thousand thirteen (2013), issued by the First Superior Court of First Judicial District, and this Chamber converted into Court of Instance, **REVOKES** the Judgment No. 70 of December 17, 2010, issued by the Eleventh Circuit Court of the First Judicial Circuit of Panama, Civil Branch, and **RESOLVES** the following:

- **SENTENCES BRIDGESTONE CORPORATION AND BRIDGESTONE LICENSING SERVICES INC.,** to pay jointly and severally to the corporations **MURESA INTERTRADE, S.A.** and **TIRE GROUP OF**

FACTORIES LTD., INC., the amount of **FIVE MILLION DOLLARS OR (US$5, 000,000.00),** lawful currency of the United States of America, as compensation indemnity for extra-contractual liability.

- **BRIDGESTONE CORPORATION** and **BRIDGESTONE LICENSING SERVICES INC.** are sentenced to pay the attorney's fees of the Process in favor of the Plaintiffs, **TIRE GROUP OF FACTORIES LTD. INC.** and **MURESA INTERTRADE, S.A.** for the amount of FOUR HUNDRED THIRTY ONE THOUSAND DOLLARS ($431,000.00) and legal expenses which shall be calculated by the Secretary of the Court.

TO BE NOTIFIED AND ACCOMPLISHED,

MAG. OYDEN ORTEGA DURAN

Republic of Panama
Supreme Court of Justice
Civil Branch
Judiciary Body

MGDO. HERNAN A. DE LEON BATISTA

MGDO. HARLEY MITCHELL D.
(WITH DISSENTING OPINION)

LCDA. SONIA F. DE CASTROVERDE
SECRETARY TO THE CIVIL CHAMBER

SUPREME COURT OF JUSTICE
FIRST CIVIL CHAMBER
Panama, May 28, 2014
I CERTIFY THAT THE FOREGOING
IS TRUE COPY OF ITS ORIGINAL

Translator's note: It appears a signature
Secretary

ENTRY: No. 313-13
DRAFTING JUSTICE: OYDEN ORTEGA DURAN

MURESA INTERTRADE, S.A. AND TIRE GROUP OF FACTORIES LTD., INC. RESORT TO AN APPEAL WITHIN THE ORDINARY ACTION BEING FOLLOWED AGAINST BRIDGESTONE CORPORATION AND BRIDGESTONE LICENSING SERVICES, INC.

DISSENTING OPINION FROM JUSTICE HARLEY J. MITCHELL D.

Despite submitting my comments, which were partially accepted by my peers, I must say that I do not agree with the decision contained in the resolution that has been executed.

Although the Superior Court of the First Judicial District did not properly indicate the Motives why to its criterion there was no damage, as the evidence was not individually contrasted with the facts, the act considered to be damaging: the delivery of the "reckless letter" and the filing of the opposition action are not reckless acts per se.

First, because the opposition action does not entail a suspension of the use of the mark and it does not have the nature of a preliminary injunction. Regarding the letter, in addition to the valuation issues of the document itself, its content does not constitute a threat, as it was up to the company the letter was addressed to whether or not to use the mark, which, according to that company, it was entitled to. It was not an imposition from the defendant.

In that sense, we should proceed with the analysis of the problem of the document consisting of the "letter" in the executed ruling. The decision did not fairly review the letter's origin, how it was submitted to the case file, and whether it was recognized or not by the parties. Nothing was said either concerning the time during which the letter was issued and sent, even though during its issuance the trademark opposition action the defendants believed to be entitled to bring was being heard.

At page 2622 of the case file, appears the first copy of the letter; this document is a color copy of a document bearing a notary public stamp that says that the signatures were verified and he considers them to be authentic (the highlighted was made by the Justice). This document comes from a third party and that fact was not indicated (taken into account) in the ruling. This copy (document) does not meet the necessary requirements in order to be admitted as evidence; the notary stamp is not sufficient to deem the document authentic, especially, when documents of testimonial nature issued by third parties must be recognized by their signers. The same analysis applies to the pages 2624-2628 and 2955-2958 of the file (where there are other copies of the letter). This letter alone does not prove recklessness or bad faith on the defendants' part.

The ruling, as it is focused, creates a bad precedent for damages claims matters, given that the defendants' conduct was the filing of a trademark opposition action under the belief that they had a better right against the plaintiffs. The filing of legal actions obviously creates discomforts between the parties; however, that is not a synonym of damages. Reckless behavior must be proven and the documents do not comply with the burden of proof that the plaintiffs must have had met.

The abuse of the right to litigate alleged by the plaintiffs consists of the filing of the opposition action (Factual Ground Sixth of the complaint), during the course of the proceedings the existence of a threatening letter was introduced; however, according to the author Jaime Javier Jované, the concept of the abuse of the right to litigate corresponds to "the disregard of the limits imposed to the exercise of a right." ("Abuse of law", pg. 66).

This disregard must have the connotation of malice, the intent to harm, as it involves the concept of bad faith and recklessness, acts that entail an intention against a third party. The nature of the abuse of the rights to litigate is categorized as "an act of excessive behavior"

where interests of other persons are harmed". (Op. cit., pg. 72) Scenario not reflected in this case.

In this type of issues: abuse of the right to litigate, recklessness and the application of Article 217 of the Judicial Code, we must make teaching with these cases, as our law does not have a specific list of what constitutes abuse of the right to litigate and recklessness, but it does provide guidelines that describe behaviors of that nature. It is through case law that we should list the behaviors that would reflect an abuse in the exercise of rights and use legal doctrine as our support. The latter is not observed in the discernment shown by my fellow Justices.

As an example, according to the cited author, the filing of a second lawsuit in spite of the existence of one pending, which generates lis pendens, or the filing of lawsuits where res judicata operates are abusive conducts in the exercise of the right of access to justice. The undersigned points out that even if a judicial conduct might be categorized as abusive, it must be evaluated after the rulings that decide the respective case become final. The cited author adds that petitions for the disqualification of judges without further explanation of the Motives why is also a situation of abuse in the exercise of the right to litigate.

Likewise, the Judicial Code punishes acts of abusive exercise of the right to litigate, although it does not entitle them as such. For example, Article 706 of our code of Civil Procedure imposes fines on parties that have lost several motions within the same case. Article 1071 lists the cases where there is no good faith, situations that go hand in hand with the abuse of the right to litigate because the bad faith entails a behavior that reveals that the party was excessive in the exercise of its rights, either as a plaintiff or defendant. Article 1075 punishes a party to pay attorney's fees even after having proved its credit when its judicial actions were so overwhelming that the defendant had to deal with that excess.

Also, within the concept of abuse of the right to litigate there are substantive frauds and procedural frauds, where the first "implies an attempt to circumvent the effectiveness of a procedural rule in litigation" and, the second involves "breaking the law by means of litigation" (Jaime Jované Burgos, op. Cit., pg. 179). The legal action to which the plaintiffs were subjected does not fall within any of the aforementioned situations, even more when there was never a seizure of products.

Another element that leads the undersigned not to share my colleagues' criterion is that in the complaint the plaintiffs stated that as a result of the opposition action, the sales or commercialization of the RIVERSTONE AND DESIGN products ceased; however, the ruling establishes that the damages consisted of a decline in sales; therefore, the sales of the product never stopped. (See Factual Ground Sixth of the complaint and page 15 of the ruling) (the highlighted was made by the Justice).

The witnesses' testimonies were not confronted with the documentary evidence on the file submitted by the plaintiffs themselves, which reveals that brands of lower quality that were allegedly introduced by the plaintiffs to straighten up the business, were already being commercialized together with the RIVERSTONE tires before the opposition action (See invoice dated 12/3/2003, pg. 456, invoice dated 7/20/2004, pg. 520 and following invoices up to page 595) (the highlighted was made by the Justice).

The referred to invoices prove that the plaintiffs bought brands like JINYU, DOUBLE STAR (Invoice seen in page 520) that were supposedly of lesser quality than RIVERSTONE to balance their business, which is not true, as they were always commercialized and that also rebuts the testimony of the witness ORESTES MEDINA, which is cited in the ruling. In summary, the dates of the invoices in pages 456 to 495 were not reviewed to verify the tire

models allegedly introduced, such as DOUBLE START, JINYU, HAPPINES, CHAOYAN) (the highlighted was made by the Justice).

Similarly, the decline in sales was the result of contingency plans made due to fears of a seizure that never occurred and not because of the filing of an opposition action.

The witness, JOSE ORESTES MEDINA, quoted in the ruling testified:
"QUESTION 3: May the witness state what was the cause for adopting a contingency plan? ANSWER: Actually, what was happening was a fear that BRIDGESTONE CORPORATION could obtain an order directing the seizure or an injunction against the sales of RIVERSTONE brand tires and it was very sensitive to have inventory in the warehouse, in transit goods and goods in the factory with the RIVERSTONE brand that could not be sold as a result of a ruling against us " (pg. 563)

In other words, this witness together with the witnesses Esteban Romero and Fernando Jesús González coincided in stating that the decline in sales was caused by a decision of the company itself in view of a fictitious situation, inasmuch as preliminary injunctions/seizures were never requested; there was only an opposition action. Ordering the defendants to pay a monetary compensation due to commercial fears of the other party is inadequate. (the highlighted was made by the Justice).

What was shown was a decrease in sales according to the experts, the cause of which was the plaintiffs' own commercial decisions, but the cessation of the use of the RIVERSTONE mark alleged by the plaintiffs in the complaint never happened. (Volume I).

That was so because according to the witnesses, there was a fear of a seizure by the plaintiffs, which shows that the sales decrease ended up being a unilateral decision of the plaintiffs

themselves. (Testimony of Domingo Esteban Romero, pgs. 565 -569, and of Fernan Jesus Luque González, 608-616).

Consequently, the following paragraph was included without proper arguments that can support it:

"As the main claim of this Ordinary Action, a compensation from the defendants **BRIDGESTONE LICENSING SERVICES, INC.** and **BRIGESTONE CORPORATION,** in favor of the plaintiffs is requested to cover for damages caused by virtue of the decrease in the commercial sales they experienced, specifically because of the situation of the plaintiff **MURESA INTERTRADE, S. A.,** being subjected to an Opposition Action against the Registration of the RIVERSTONE trademark for tires, product that represented its most important good in terms of commercial sales and besides, as the Appellants said, such Opposition Action was supported by reckless and intimidating attitudes."

Continuing with the study of the discernment (of the two other Justices), we found the following contradiction: " However, despite the commercial impact that was caused due to taking out from the market the sales of the RIVERSTONE tires, which created damages ... " (pg.19 of the ruling). In the decision and in the proceedings, it was shown that the product sales never stopped and that it was never removed from the market, there was only a decrease in sales because of the plaintiffs' own inferences. (the highlighted was made by the Justice).

On the other hand, the adopted ruling does not analyze what a reckless conduct is. Telling a businessman that a trademark opposition action will be initiated is a reckless conduct? The Chamber replies that this is a special case because there was strong evidence that the appellants could commercialize the product. This response is not well supported because to have the opportunity to evaluate evidence, it was necessary to go to a court and bring an action where a judge ruled that the defendants' claim (in the opposition action) could not be granted.

The undersigned reiterates that the letter where the alleged recklessness emerges did not pass through the Board's analysis as to its authenticity. Also, what was done with respect to the ruling of the specialized court that assessed the conduct of the parties as not reckless and established that in the ruling, which became final, was not grounded. (the highlighted was made by the Justice). The evidence that was the subject of one of the grounds of this appeal was not assessed, only its content was reproduced, but its impact in the case was not analyzed, and much less in contrast with the rest of the evidence.

For a better understanding, I transcribe the following extract:

"BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC. shall be exonerated from payment of attorney's fees, given that the this administration of justice office deems that it acted in evident good faith; maintained and upheld its position in the proceedings, submitted adequate evidence to show its standing and legitimacy in the case, all without abusing of the right to litigate. Thus, they will only be compelled to cover the legal expenses of the Action. " (The highlighted is ours)."

To categorize as reckless the withdrawal of an appeal is wrong because that is not a synonym of bad faith conduct; to the contrary, there is no abuse of litigation. The defendants realized that they could not go on with the action. The case was not challenged up to the last resort, as the ruling states. Punishing parties for procedural or litigation decisions like this one is an inappropriate position as to the determination of bad faith and abuse of rights.

Finally, I do not agree with the way the monetary award was motivated in this case. There was no analysis as to how a judgment for five million dollars was feasible; that amount in damages was awarded with little legal basis.

We say so because citing the experts' report without an interpretative effort from the Court and without assessing it together with the rest of the evidence on the file does not comply with the duty of motivating the court's decisions, especially, when there is a question that deals with MURESA's damages (damages with which the undersigned disagrees) and in the plaintiffs' experts' report the damages were calculated in $3,351,731.15 (page 2638); the court's accountant expert testified that there was no supporting documentation, specific studies, financial projections (an essential aspect to assess damages in connection with projected sales) and that they only had copies of charts of projected sales, reports and minutes (prepared by the plaintiffs) (Pg. 1650)

The court's accountant expert as to the determination of damages stated as follows:

"We have no documents showing they had to suspend sales and the projections were not based on studies, and TIRE GROUP OF FACTORIES LTD, INC. never stopped selling RIVERSTONE brand tires."

These are mostly all the assessments that lead me to express my DISSENTING OPINION.

Date Mentioned Above

HARLEY J. MITCHELL D.
JUSTICE

Republic of Panama
Supreme Court of Justice
Civil Branch
Judiciary Body

LCDA. SONIA F. DE CASTROVERDE
SECRETARY TO THE CIVIL CHAMBER

THE FOREGOING IS A TRUE TRANSLATION FROM THE SPANISH LANGUAGE INTO THE ENGLISH LANGUAGE. PANAMA, JULY 9, 2014.