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Before the  
**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES (ICSID)**

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

v.

**REPUBLIC OF PANAMA,**  
*Respondent.*

**ICSID CASE NO. ARB/16/34**

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**Panama's Rejoinder**

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17 June 2019

**Arnold & Porter**

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## I. INTRODUCTION

1. As the Tribunal rightly observed in its Decision on Expedited Objections, the present “arbitration arises in the context of a world-wide battle between two groups of companies that manufacture and sell tires.”<sup>1</sup> On the one side — flanked by Firestone, a competitor-*cum*-subsidiary — stood Bridgestone Corporation, the Japanese tire giant. On the other: a young rival, which at the turn of the millennium had begun selling tires under the brand name RIVERSTONE.<sup>2</sup>

2. The battle should have been a simple tale of market forces, with the outcome determined by quality, consumer preference, and price. But the Bridgestone group was in the thick of a product safety fiasco,<sup>3</sup> and at once, winning the marketplace became a greater challenge. Customers were losing faith,<sup>4</sup> and

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<sup>1</sup> **Decision on Expedited Objections** (13 December 2017) (“**Decision on Expedited Objections**”), ¶ 48.

<sup>2</sup> See **Ex. R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 17 (explaining that Riverstone tires began being marketed in 2000).

<sup>3</sup> See generally **Ex. R-0022**, *Engineering Analysis Report and Initial Decision regarding EA-00-023: Firestone Wilderness AT Tires*, U.S. Department of Transportation, National Highway Traffic Safety Administration, October 2001, pp. iii, 1 (explaining that, in the year 2000, a defect in certain Bridgestone group tires had been linked to “numerous crashes, injuries, and fatalities,” and that 14.4 million of the tires subsequently were recalled).

<sup>4</sup> **Ex. R-0023**, *What Cost Recalls for Bridgestone, Ford?*, ABC NEWS (5 September 2000), p. 2 (“‘It’s gotten to the point where people don’t trust the brand name anymore,” says Art Spinella, vice president and general manager of CNW Marketing/Research, a Brandon, Ore.-based firm that tracks the auto industry”).

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partner Ford had cut its ties;<sup>5</sup> as a result, as *Forbes* reported, the “Bridgestone [group wa]s hemorrhaging business.”<sup>6</sup> And so, as the Bridgestone group did battle with its young rival, it appears to have reembraced a mindset that previously had yielded spoils — *i.e.*, that business is war,<sup>7</sup> and “all is fair” in combat.

3. The Bridgestone group thus bombarded the young rival with legal actions and threats thereof.<sup>8</sup> The campaign succeeded to some extent, as the rival seems to have incrementally abandoned the RIVERSTONE brand, which at one point it had sold in at least 24 different countries.<sup>9</sup> Nevertheless, along the way,

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<sup>5</sup> See generally [Ex. R-0030, Top of the News: Bridgestone Rear-Ends Ford](#), FORBES (1 June 2001).

<sup>6</sup> [Ex. R-0030, Top of the News: Bridgestone Rear-Ends Ford](#), FORBES (1 June 2001), p. 2.

<sup>7</sup> See [Ex. R-0021, Bridgestone Races Hard to Dominate Tire Trade](#), CHICAGO TRIBUNE (26 November 1989), p. 1 (explaining that, in 1988, Bridgestone Corporation had acquired Firestone Tire & Rubber Co. as part of a “vision” of “dominance of the world tire market,” and explaining that “the move was necessary. In the words of Bridgestone director Katsuyoshi Shibata: ‘As in war, when you are facing one another with pistols you don’t take a lot of time to make a decision’”).

<sup>8</sup> See [Ex. C-0013, Letter from “Bridgestone/Firestone” to L.V. International](#) (3 November 2004), p. 1 (“L.V. International, Inc. is acting at its own peril if it chooses to use the mark RIVERSTONE in other countries”); [Hearing on Expedited Objections, Day 3 Tr. 403:02–05](#) (“[T]he Company did send a Reservation of Rights Letter, yeah. It’s a standard kind of ‘close-the-loo’ letter, we call it”).

<sup>9</sup> See [Ex. R-0040, Judgment No. 48, Eighth Civil Circuit Court](#) (21 July 2006), p. 16 (“The commercialization of the Chinese RIVERSTONE tires has been taken place in Panama, Colombia, Ecuador, Guatemala, El Salvador, Bolivia, Honduras, Venezuela, Peru, Dominican Republic, Haiti, Belize, Sudan, Chile, Dubai UAE, Costa Rica, Uruguay, Indonesia, Korea, Ghana, Nicaragua, USA, Samoa and Malta”); [Second Jacobson Report, ¶ 42](#) (“The fact that so many registrations for the RIVERSTONE mark were eventually cancelled for non-use, or were allowed to expire for lack of renewal, suggests that the Bridgestone Parties were successful in compelling a competitor with a duly

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certain victims cried foul, and in a May 2014 decision, the Panamanian Supreme Court concluded that tactics by Bridgestone Corporation and Claimant Bridgestone Licensing Services, Inc. (“**Bridgestone Licensing**”) had transcended the rules of engagement.<sup>10</sup>

4. As the Tribunal will recall, in November 2004, lawyers for the Bridgestone group had warned an entity on the RIVERSTONE side that “Bridgestone/Firestone object[ed]”<sup>11</sup> — irrespective of the law, it advised<sup>12</sup> — to “the use or registration anywhere in the world of the mark RIVERSTONE for tires.”<sup>13</sup> This warning undisputedly had been intended as a deterrent,<sup>14</sup> and thus the letter concluded as follows: “L.V. International is acting at

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registered mark either to scale back or abandon its use of the RIVERSTONE mark altogether in most jurisdictions, even though most tribunals that considered the issue had concluded that the parties’ respective marks were distinguishable.”).

<sup>10</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 16–17.

<sup>11</sup> [Ex. C-0013](#), Letter from “Bridgestone/Firestone” to L.V. International, 3 November 2004, p. 1.

<sup>12</sup> See [Ex. C-0013](#), Letter from “Bridgestone/Firestone” to L.V. International, 3 November 2004 (“*Without undertaking a country-by-country analysis . . . , 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*”) (emphasis added).

<sup>13</sup> [Ex. C-0013](#), Letter from “Bridgestone/Firestone” to L.V. International, 3 November 2004, p. 1.

<sup>14</sup> [Hearing Transcript \(Day 3\)](#), Tr. 404:1–5 (Kingsbury) (conceding that the purpose of the above-quoted letter had been “to deter the person who’s trying to register and use the mark from actually using it . . .”).

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its own peril if it chooses to use the mark RIVERSTONE in other countries.”<sup>15</sup>

5. Shortly thereafter, the “Bridgestone/Firestone” family followed through on its threat of legal action, in Panama. In early 2005, Bridgestone Corporation and Bridgestone Licensing initiated a trademark opposition proceeding against the RIVERSTONE side,<sup>16</sup> claiming without any evidence that the sale of RIVERSTONE-brand tires — which, at that point, had been occurring for years — would improperly confuse consumers.<sup>17</sup> In parallel, RIVERSTONE tires were seized in the Dominican Republic.<sup>18</sup> Having seen Bridgestone act upon its threats, the Panamanian court defendants temporarily cut back their sales.<sup>19</sup>

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<sup>15</sup> [Ex. C-0013](#), Letter from “Bridgestone/Firestone” to L.V. International, 3 November 2004 (“L.V. International is acting at its own peril if it chooses to use the mark RIVERSTONE . . .”).

<sup>16</sup> See [Ex. R-0040](#), Judgment No. 48, Eighth Civil Circuit Court, 21 July 2006, p. 1.

<sup>17</sup> See [Ex. R-0040](#), Judgment No. 48, Eighth Civil Circuit Court, 21 July 2006, p. 3.

<sup>18</sup> [Ex. C-0161](#), Testimony by Fernan Jesus Luque Gonzalez - part 2 (27 April 2010), p. 3 (“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”).

<sup>19</sup> See [Ex. C-0162](#), Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 2 (“The sales scheduled by the company MURESA INTERTRADE, S.A. did not occur because the Factory Brand RIVERSTONE, primary product sold by the company Muresa Intertrade, S.A. was subject to a complaint opposing the registry application 120823-01 of the Brand RIVERSTONE Y DISEÑO filed by Bridgestone Corp. and Bridgestone Licensing Services, Inc. [sic], filed April 5, 2005. Also, prior to the complaint, on November 3, 2004, Foley & Lardner LLP

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But when the court later reaffirmed their right to sell RIVERSTONE tires,<sup>20</sup> those defendants sought redress. Eventually, the Panamanian Supreme Court awarded those defendants USD 5.4 million in damages<sup>21</sup> — three one-thousandths of one percent of the Bridgestone group’s recorded assets for 2014.<sup>22</sup>

6. Notably, this was not the first (nor would it be the last) occasion on which a State had required a Bridgestone entity to make amends for unfair dealing. For example, it is uncontested that, before the Supreme Court decision, Bridgestone Corporation had paid a U.S. government fine of USD 28 million for “bribing Latin American officials and bid rigging.”<sup>23</sup> Further, the Bridgestone litigants (Bridgestone Corporation and Bridgestone

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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.”). (emphasis omitted).

<sup>20</sup> See [Ex. R-0040](#), Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 22.

<sup>21</sup> See generally [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014).

<sup>22</sup> See [Ex. R-0156](#), 2014 Bridgestone Group Annual Report (24 March 2015), p. 10 (valuing at approximately USD 15.6 billion the total assets of “Bridgestone Corporation and [its] subsidiaries” as of 31 December 2014).

<sup>23</sup> [Ex. R-0024](#), *Bridgestone pays \$28 mln for bribes, bid-rigging*, REUTERS (15 September 2011), p. 1. It also is uncontested that, the Chinese government has imposed a multimillion dollar penalty on Bridgestone (China) Investment Co., Ltd. for “commercial bribery in violation of Chinese law . . . .” [Ex. R-0025](#), *China Cracks Down on Commercial Bribery in the Private Sector*, MORGAN LEWIS (31 January 2017), p. 2.

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Licensing) understood that their Panamanian lawsuit could result in “counterclaims” for which they would be the “defendants;”<sup>24</sup> when authorizing a Panamanian firm to act on their behalf, they accounted precisely for that scenario.<sup>25</sup> Further, in 2010, Bridgestone Corporation and Bridgestone Licensing apparently entered into a written agreement *inter se* in which they recorded their recognition that their trademark opposition actions could lead to “counter-actions . . . by third parties,” and eventually, a “financial burden.”<sup>26</sup>

7. And yet, instead of paying the penalty — as, for example, in the U.S.<sup>27</sup> — the Bridgestone group rallied the troops and established a new target: the Latin American State that dared to push back. For months, the group engaged in a show of force; for example, calling in favors with “the U.S. and Japanese embassies,”<sup>28</sup> and convincing the former to make overtures to the

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<sup>24</sup> [Ex. R-0159, Power of Attorney for Bridgestone Licensing’s Panamanian Counsel](#), p. 1.

<sup>25</sup> [Ex. R-0159, Power of Attorney for Bridgestone Licensing’s Panamanian Counsel](#), p. 1.

<sup>26</sup> See [Ex. R-0095, Bridgestone Licensing Decision to Assume All Costs of Muresa Damages Award](#) (20 July 2016), p. 1.

<sup>27</sup> See [Ex. R-0024, Bridgestone pays \\$28 mln for bribes, bid-rigging, REUTERS](#) (15 September 2011), p. 1 (“Tire and rubber giant *Bridgestone Corp* (5108.T) *has agreed to plead guilty to bribing Latin American officials and bid rigging, and to pay a \$28 million fine*, the company and Justice Department said on Thursday”) (emphasis added).

<sup>28</sup> [Request for Arbitration](#) (7 October 2016), ¶ 48 (“**Request for Arbitration**”).

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Panamanian Chief Justice.<sup>29</sup> The group also activated Claimant Bridgestone Americas, Inc. (“**Bridgestone Americas**”), which had not been involved (at all) in the events in Panama, but did have helpful allies in high places in the United States. Bridgestone Americas, among other things, lobbied the United States government to “place Panama on [a] Priority Watch List for serious intellectual property rights deficiencies . . . .”<sup>30</sup>

8. In parallel, the group resorted to an old tactic — threatening legal action as a means to secure surrender. On 30 September 2015, Claimants Bridgestone Licensing and Bridgestone Americas (“**Claimants**”) formally advised Panama of their intent to assert claims under Chapter Ten of the Panama-U.S. Trade Promotion Agreement (“**TPA**”).<sup>31</sup> Claimants have since conceded that three of their four “merits” theories were meritless,<sup>32</sup> and that the fourth had not been ripe at the time when it was first threatened.<sup>33</sup> But this move was a power play, and the next phase

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<sup>29</sup> [Request for Arbitration](#), ¶ 48.

<sup>30</sup> [Ex. C-0032](#), Written Comments and Hearing Statement of Bridgestone Americas Inc., 2015 Special 301 Public Hearing (24 February 2015), p. 3–4.

<sup>31</sup> *See generally* [Notice of Arbitration](#) (30 September 2015) (“**Notice of Arbitration**”).

<sup>32</sup> *See* [Reply](#), ¶ 75 (“Claimants have decided to withdraw their claims under Article 10.3 and 10.4 of the TPA”). Claimants abandoned their expropriation claim earlier in the proceeding. *Compare* [Request for Arbitration](#), ¶ 67 (alleging a violation of Article 10.7) *with* [Memorial](#) (failing to articulate a claim under Article 10.7).

<sup>33</sup> *Compare* [Claimants’ Rejoinder on Expedited Objections](#) (14 August 2017), ¶ 15 (acknowledging that Bridgestone Licensing had not exhausted local remedies with

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was a campaign of attrition. Thus, on 7 October 2016, Claimants submitted their meritless claims to ICSID, launching a three-year wave of propaganda and public aspersions.

9. This behavior has been disappointing for three reasons. *First*, Claimants’ insults and attacks are undeserved. As demonstrated below, the Supreme Court decision at issue was the product of an ordinary court proceeding, in which the Bridgestone litigants had a full and fair opportunity to be heard. Although those litigants plainly disagree with the outcome, the TPA does not provide any avenue for appeal. *Second*, throughout this arbitration, both Panama and its counsel have endeavored at all stages to be diligent and respectful — including in the face of potential impropriety by Claimants’ representatives.<sup>34</sup> *Third*, over the

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respect to the Supreme Court Judgment until 2016) with [Notice of Arbitration \(30 September 2015\)](#) (filed before local remedies had been exhausted).

<sup>34</sup> For example, a few short months ago — as Claimants were in the midst of flooding the Tribunal with baseless accusations against Panama and its counsel — a lobbyist approached certain Panamanian officials, and floated a settlement offer, supposedly at the behest of his “friends” at Akin Gump. See [Ex. R-0152, Letter from Arnold & Porter to Akin Gump \(30 March 2019\)](#), p. 1. This contact with a party known to be represented by counsel was concerning. See [Ex. R-0152, Letter from Arnold & Porter to Akin Gump, \(30 March 2019\)](#), p. 1 (citing NY Bar Rule 4.2(a) (“In representing a client, *a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer* in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law”) (emphasis added); see also [Ex. R-0158, Akin Gump Profile of Katie Sara Hyman \(last accessed on 11 June 2019\)](#) and [Ex. R-0157, Akin Gump Profile of Johann Strauss \(last accessed on 11 June 2019\)](#). Nevertheless, instead of running immediately to the Tribunal with accusations, Panama’s counsel wrote to Akin Gump, posing questions and offering the latter some time to investigate. [Ex. R-0152](#),

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course of their war, Claimants have lost sight of the rules that govern the peaceful assessment of claims. Their arguments are legally and logically unsound, and betray an irresponsible indifference to evidentiary standards. Indeed, as discussed below, Claimants have been so committed to the manifestly improper idea of the TPA as an “insurance policy”<sup>35</sup> that they provided materially false information in their Reply.<sup>36</sup>

10. With the hearing fast approaching, Panama trusts that the Tribunal will be looking beyond mere rhetoric and digging into the record — and welcomes and encourages such scrutiny of this Rejoinder. At the end of its review, what the Tribunal will find is a State that unduly has been dragged through the mud, and Claimants who never could muster a single viable claim. Indeed,

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Letter from Arnold & Porter to Akin Gump (30 March 2019), p. 2. Akin Gump responded, but declined to directly answer certain of the questions, and — notably — did not deny its involvement in the episode. **Ex. R-0153**, Letter from Akin Gump to Arnold & Porter (9 April 2019), p. 1. Nevertheless, Panama’s counsel gave Akin Gump one more chance, and then another. See **Ex. R-0154**, Letter from Arnold & Porter to Akin Gump (10 April 2019), p. 2; **Ex. R-0155**, Email from Arnold & Porter to Akin Gump (6 May 2019), p. 1. At no point did Akin Gump ever squarely deny having facilitated the lobbyist’s outreach to Panama.

<sup>35</sup> See **Reply**, ¶ 83 (“[T]he insurance policy itself (here, the TPA) . . . .”); but see **RLA-174**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 ¶ 64 (Vicuña, Buergethal, Wolf) (“*Maffezini*”), (“Investment Treaties are not insurance policies against bad business judgments”); **CLA-0074**, *Waste Management II*, ¶ 114 (“But NAFTA Chapter 11 is not a forum for the resolution of contractual disputes, and as investment tribunals have repeatedly said, ‘Investment Treaties are not insurance policies against bad business judgments’”).

<sup>36</sup> See **Section III.B.1**, below.

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despite conceding that, “under the TPA, the Claimants must show both breach by the Respondent and loss incurred by the claimant in order to submit a claim to arbitration,”<sup>37</sup> Claimants have been unable to demonstrate either point.

11. The remainder of this Rejoinder is organized as follows. In **Section II**, Panama reintroduces the *dramatis personae*, recalls certain basic principles of trademark law (and practice), and sets straight the factual record — which Claimants repeatedly misstate. **Section III** then demonstrates that Claimants have failed to present even a single viable claim. In **Section IV**, Panama sets forth its request for relief.

## II. RELEVANT BACKGROUND

12. In a seminal book based on his Nobel-prize winning research,<sup>38</sup> Dr. Daniel Kahneman explains that the human brain is programmed to take various cognitive shortcuts reflexively, and that — because of this wiring — a person can succeed in convincing an audience of truth simply by repeating a point and omitting any adverse details.<sup>39</sup> This tactic is in essence the “pound

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<sup>37</sup> **Rejoinder on Expedited Objections**, ¶ 62.

<sup>38</sup> See generally **RLA-0222**, D. Kahneman, *THINKING FAST AND SLOW* (Farrar, Straus, and Giroux, 2011).

<sup>39</sup> See **RLA-0222**, D. Kahneman, *THINKING FAST AND SLOW* (Farrar, Straus, and Giroux, 2011), pp. 20–30 (explaining that the human brain is programmed to make an array of complex assessments and conclusions without conscious thought), p. 80 (explaining that the system is primed to believe and confirm (rather than question), pp.

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the table” approach to advocacy,<sup>40</sup> and unfortunately, it has been a staple of Claimants’ pleadings herein. Indeed, in their Reply, Claimants continue to hammer their talking points, omitting to mention the fact that the evidence stands squarely against them. To give but one example: even though the decision explicitly dispels their thesis, Claimants persist in arguing that the Supreme Court had held in its 28 May 2014 judgment (the “**Supreme Court Judgment**”) that the mere act of opposing a trademark registration inherently was abusive.<sup>41</sup>

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11–12, 128–35 (explaining that the system is influenced by the “availability heuristic” — *i.e.*, the ease with which information is recalled from memory), p. 85 (explaining that “[i]nformation that is not retrieved (even unconsciously) from memory might as well not exist”), p. 62 (explaining that “familiarity is not easily distinguished from truth,” and that, accordingly, “[one] reliable way to make people believe in falsehoods is frequent repetition . . . .”), p. 87 (explaining that “[w]e often fail to allow for the possibility that evidence that should be critical to our judgment is missing — what we see is all there is”), p. 196 (explaining that, because of “th[e] powerful WYSIATI rule [*i.e.*, what you see is all that there is], [y]ou cannot help dealing with the limited information you have as if it were all there is to know. You build the best possible story from the information available to you, and if it is a good story, you believe it. Paradoxically, it is easier to construct a coherent story when you know little, when there are fewer pieces to fit into the puzzle. Our comforting conviction that the world makes sense rests on a secure foundation: our almost unlimited ability to ignore our own ignorance”).

<sup>40</sup> See generally Wiktionary, “Pound the table,”

[https://en.wiktionary.org/wiki/pound\\_the\\_table](https://en.wiktionary.org/wiki/pound_the_table) (last visited 14 June 2019) (explaining that “[t]here’s an old legal aphorism that goes, ‘If you have the facts on your side, pound the facts. If you have the law on your side, pound the law. If you have neither on your side, pound the table’”).

<sup>41</sup> See, *e.g.*, **Reply**, ¶ 115 (asserting that the Supreme Court “held that it is reckless to oppose a trademark application by an existing competitor”); see also **Memorial**, ¶ 94 (“according to the Supreme Court Judgment, simply exercising legal rights in bringing trademark opposition proceedings was reckless behaviour because the trademark applicant was a competitor; **Ex. C-0032**, 2015 Special 301 Public Hearing, Hearing Statement of Bridgestone Americas Inc. (24 February 2015) and Bridgestone Americas Inc. Written

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13. In the sections that follow, Panama sets the record straight — pausing repeatedly to recall evidence that Claimants ignore. The discussion begins with a brief (re)introduction to the *dramatis personae*, and then proceeds to the relevant aspects of trademark law, before turning to the chronology that led the parties here.

## A. *Dramatis Personae*<sup>42</sup>

### 1. The Republic of Panama

14. Panama is a sovereign country in Central America, sharing land borders with neighboring States, Colombia and Costa Rica. On two sides, it is bordered by water, and — since 1999 — the State has served as the operator of the Panama Canal, which has been designated by treaty to be neutral territory.<sup>43</sup> Near the

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Comments (6 February 2015) p. 3 (“the Supreme Court’s decision severely penalized Bridgestone simply for utilizing an ordinary opposition mechanism to protect its intellectual property as provided for under Panamanian law”); *but see* [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), p. 17 (“*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 . . .*”). 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”) (emphasis added),

<sup>42</sup> This Section is intended to introduce only the entities that are relevant to the initial part of the story; additional entities will be introduced below, as relevant.

<sup>43</sup> *See generally* [Ex. R-0202, Treaty Concerning The Permanent Neutrality And Operation Of The Panama Canal \(1 October 1979\)](#)

entrance to the Canal is an area known as the “**Colón Free Zone**,” which is a free port used by many multinational corporations for warehousing and distribution of their products throughout the Americas.

15. Like many States, Panama has three branches of government, and a system of checks and balances. For present purposes, the judicial branch is the most immediately relevant, and — for actions involving claims of more than USD 25,000 — it is characterized by three levels of courts.<sup>44</sup> In those cases, complaints are heard in the first instance by “circuit courts,” whose merits judgments can be appealed to “superior tribunals,”<sup>45</sup> and then on to the third level. The highest court in Panama is known as the “Supreme Court of Justice,” and collectively, this court’s four chambers<sup>46</sup> decide an average of 4,669 cases each year.<sup>47</sup> A sampling of these decisions are published in a monthly online register and made available on the Supreme Court website.<sup>48</sup>

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<sup>44</sup> See [Second Lee Report](#), ¶¶ 7–9.

<sup>45</sup> See [Second Lee Report](#), ¶¶ 7–8.

<sup>46</sup> The Supreme Court is divided into a Civil Chamber, a Criminal Chamber, an Administrative and Labor Chamber, and a General Business Chamber. See [Second Lee Report](#), ¶ 12.

<sup>47</sup> See [Second Lee Report](#), ¶ 31.

<sup>48</sup> See [Second Lee Report](#), ¶ 33.



16. The nine justices who serve on the Supreme Court are nominated by the executive branch<sup>49</sup> to the legislature (the “**National Assembly**”), which then decides whether to confirm the nominee.<sup>50</sup> If a nomination is confirmed, the justice serves for a 10-year term.<sup>51</sup> For example, Mr. Jorge Federico Lee — whose expert reports on Panamanian law have accompanied Panama’s submissions — was a justice of the Supreme Court from 1996 to 2005.<sup>52</sup> As Mr. Lee explains, when all nine justices of the Supreme Court sit together in plenary session, the Court becomes the Constitutional Court of Panama, and can rule on the constitutionality of the laws that National Assembly has promulgated.<sup>53</sup>

17. Likewise, the National Assembly serves as a check on the judiciary. Specifically, the Credentials, Regulations, Parliamentary Ethics and Judicial Affairs Committee (“**Credentials Committee**”) of the National Assembly issues decisions “with respect to the accusations and charges presented against . . . the Justices of the Supreme Court of Justice and other civil servants, as determined in the Political Constitution and the laws of the

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<sup>49</sup> See [Second Lee Report](#), ¶ 27.

<sup>50</sup> See [Second Lee Report](#), ¶ 27.

<sup>51</sup> See [Second Lee Report](#), ¶ 27.

<sup>52</sup> See [First Lee Report](#), ¶ 10.

<sup>53</sup> See [Second Lee Report](#), ¶ 12.

Republic at the Plenary Session of the National Assembly . . . .”<sup>54</sup>

The Credential Committee has the “authority with jurisdiction to investigate and prosecute” a complaint that a Supreme Court Justice committed a criminal offense.<sup>55</sup>

18. In Panama, as in many civil law countries, court proceedings are inquisitorial,<sup>56</sup> as opposed to adversarial — and judges are more like investigators than they are like referees.<sup>57</sup> Thus, in addition to deciding between the parties’ alternative arguments, judges actively investigate in an effort to discern the truth.<sup>58</sup> To that end, the Panamanian Judicial Code, which regulates judicial proceedings, provides the courts with the power to order the production of evidence *ex officio*.<sup>59</sup> Some of these powers also extend to experts, which are considered in Panama to be extensions of the court.<sup>60</sup> For example, experts (like judges) have broad powers to collect evidence from the parties and other entities.<sup>61</sup> Article 973 of the Judicial Code requires that, when

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<sup>54</sup> See [Second Lee Report](#), ¶ 144; [Ex. C-0309](#), Excerpt of Panamanian Legal Provisions, Law No. 49 of 1984, Article 50, Section 8, (approving the Organic Regulations of the Internal Rules of the National Assembly).

<sup>55</sup> [First Lee Report](#), ¶ 108 (citing Constitution of the Republic of Panama, Art. 160).

<sup>56</sup> See [Second Lee Report](#), ¶ 13.

<sup>57</sup> See [Second Lee Report](#), ¶ 13.

<sup>58</sup> See [Second Lee Report](#), ¶ 13.

<sup>59</sup> See [Second Lee Report](#), ¶¶ 16-17.

<sup>60</sup> See [Second Lee Report](#), ¶ 18.

submitting a report to the court, the expert include any information obtained from third parties that the expert considers “useful.”<sup>62</sup>

## 2. Bridgestone Corporation and Bridgestone Licensing

19. As the Tribunal will recall, Bridgestone Corporation (also referred to as “**BSJ**”) is “a Japanese incorporated company headquartered in Tokyo, Japan.”<sup>63</sup> It is the owner of the BRIDGESTONE trademark, both in Panama and other countries.<sup>64</sup> Bridgestone Licensing, for its part — also known as “**BSLS**” — is a “wholly-owned subsidiar[y] of Bridgestone Corporation”<sup>65</sup> which has no offices,<sup>66</sup> no employees,<sup>67</sup> no letterhead,<sup>68</sup> and a Japanese board of directors.<sup>69</sup> Bridgestone Licensing depends heavily on

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<sup>61</sup> See **Second Lee Report**, ¶ 19; see also **Ex. R-0138**, Judicial Code of the Republic of Panama, Art. 973.

<sup>62</sup> **Ex. R-0138**, Judicial Code of the Republic of Panama, Art. 973 (“When in the course of an investigation the experts receive information from third parties that they consider useful for the report, they shall include it in such report”).

<sup>63</sup> **Request for Arbitration**, ¶ 1.

<sup>64</sup> **Decision on Expedited Objections**, ¶ 50.

<sup>65</sup> **Request for Arbitration**, ¶ 1.

<sup>66</sup> See **Claimants’ Rejoinder on Expedited Objections**, ¶ 51 (“[O]ffice space is not formally leased by BSLS . . . .”); **Hearing on Expedited Objections (Day 2)**, Tr. 324:17 (Claimants’ counsel) (“[S]pace is not formally leased to BSLS”); **Panama’s Expedited Objections, Annex A: BSLS Corporate Directories: LexisNexis Comprehensive Business Report**, p. 1 (“Properties: None Found”).

<sup>67</sup> See **Hearing on Expedited Objections (Day 2)**, Tr. 323:019–20 (Claimants’ counsel).

<sup>68</sup> See **Hearing on Expedited Objections (Day 3)**, Tr. 439:13–440:8 (Kingsbury).

<sup>69</sup> **Claimants’ Response on Expedited Objections**, ¶ 155.

cash infusions from other Bridgestone group entities,<sup>70</sup> and as explained by Claimants’ witness, it “[does not] have a product[.]”<sup>71</sup>

20. Rather, it is a “[l]icensing corporation,”<sup>72</sup> which “owns the FIRESTONE trademark outside [of] the United States and licenses it to various entities for use in other countries.”<sup>73</sup> Nevertheless, Bridgestone Licensing does not hold itself out as having the FIRESTONE trademark available for general business,<sup>74</sup> and most of the trademark licenses are merely “product placement agreements [for which] no royalty is paid to BSLS . . . .”<sup>75</sup> Indeed, Claimants’ damages expert has testified that “[he is] not aware of any sources of income attributable to the [FIRESTONE] Trademark[] earned by BSLS . . . other than the royalties [that Claimant] BSAM pays . . . .”<sup>76</sup> (More on “BSAM” below.)

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<sup>70</sup> See [Hearing on Expedited Objections \(Day 3\)](#), Tr. 460:17–461:10 (Kingsbury) (conceding that Bridgestone Licensing purchased trademarks using a USD 31 million loan from Bridgestone Corporation) ; see also [Ex. C-0271, Loan Agreement Between Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc.](#) (20 July 2016) (agreement to issue a USD 6 million loan to BSLS).

<sup>71</sup> [Hearing on Expedited Objections \(Day 3\)](#), Tr. 478:7–478:9 (Kingsbury) (“Basically because [we] don’t have a product; right? We’re a Licensing corporation that licenses the mark, as we’ve discussed”).

<sup>72</sup> [Hearing on Expedited Objections \(Day 3\)](#), Tr. 478:8–478:9 (Kingsbury).

<sup>73</sup> [Hearing on Expedited Objections \(Day 3\)](#), Tr. 399:5–7 (Kingsbury).

<sup>74</sup> [Hearing on Expedited Objections \(Day 3\)](#), Tr. 473:07–474:06 (Kingsbury) (“Q: . . . [Y]ou’re not in the business of holding yourself out to third parties as having the FIRESTONE mark available for general business . . . ? A: We don’t advertise ourselves as that . . . .”).

<sup>75</sup> [Claimants’ Response on Expedited Objections](#), ¶ 156.

<sup>76</sup> [Second Daniel Report](#), note 15.

21. In their pleadings, Claimants have boasted that “Bridgestone . . . [has a] robust approach to maintaining and defending its intellectual property rights all over the world.”<sup>77</sup> Among other things, this approach includes claiming a global monopoly on the use of the suffix “-STONE”<sup>78</sup> — a questionable policy considering that BRIDGESTONE tires and FIRESTONE tires used to be sold by competitors.

### **B. Trademarks: Relevant Concepts**<sup>79</sup>

22. The phrase “trademark rights” appears *in passim* in Claimants’ pleadings,<sup>80</sup> and — aided by insults and claims to a monopoly on intellectual property wisdom<sup>81</sup> — has been employed by Claimants to cover all manner of substantive sin. For example, to gloss over differences between licensing agreements and

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<sup>77</sup> **Request for Arbitration**, ¶ 5.

<sup>78</sup> **Request for Arbitration**, ¶ 20; **Third Kingsbury Statement**, ¶ 6 (“Bridgestone has opposed the registration of the RIVESTONE trademark for tires in almost all jurisdictions in which the RIVERSTONE trademark has been the subject of a trademark registration application since 2005”).

<sup>79</sup> As above, this Section is intended to introduce only certain initial concepts; additional points will be introduced as relevant below.

<sup>80</sup> *See, e.g.*, **Reply**, ¶¶ 22-24, 29, 85, 87, 93, 95-100, 102, 105-06, 108, 114-16; **Memorial**, 11, 17, 25(m), 32, 150-51, 230, 233-35, 239(b).

<sup>81</sup> *See, e.g.*, **Reply**, ¶ 79 (“BSLS’s claim for the damages awarded by the Supreme Court is simple enough to understand, even for the Respondent”), ¶ 87 (“Naturally, the Respondent’s position, based on its incomplete understanding of the nature and value of trademarks and trademark licenses . . .”).

trademarks,<sup>82</sup> Claimants refer in general terms to “trademark rights.” This legerdemain paves the way for a request that the Tribunal award “lost royalty income” to an entity that does not earn royalties — more on this below.<sup>83</sup> Similarly, to try to explain how a court possibly could have denied “due process” to an entity to which no “process” had ever been “due,” Claimants refer in vague terms to the “special” nature of intellectual property rights.<sup>84</sup>

23. However, the words “trademark rights” do not carry any particular magic, and — as discussed below — Claimants’ case seems to conflate and ignore basic concepts. Accordingly, throughout this Rejoinder, Panama will set the record straight, beginning with the primer below on trademarks and trademark policing.

## 1. Trademarks and Trademark Policing

24. In their Memorial, Claimants had asserted that “a trademark is a negative right — it is the right to exclude others

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<sup>82</sup> See [Decision on Expedited Objections](#), ¶ 219 (“Where the owner of a trademark licenses its use to a licensee, *it is necessary to distinguish carefully between the interest of the owner and the interest of the licensee*, each of which may be capable of constituting an investment”) (emphasis added); see also *id.* (“If the owner does no more than grant a license of the trademark, in consideration of the payment of royalties by the licensee, the value of the trademark to the owner will reflect the amount of royalties received, while the value of the license to the licensee will reflect the fruits of the exploitation of the trademark, out of which the royalties are paid”).

<sup>83</sup> See [Section III.B.2](#), below.

<sup>84</sup> Reply, ¶ 24. See also *id.* at ¶¶ 27–29.

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from using it [*i.e.*, the trademark].”<sup>85</sup> This is close, but not precise. Properly speaking, a trademark “is an indicator of source,”<sup>86</sup> which (if validated by government authorities) confers certain tools that a trademark owner can use to shield itself from unfair competition within a given country. For example, a trademark owner has the right (1) “to exclude others”<sup>87</sup> from using its mark, and (2) in certain circumstances, to seek a government ruling that would preclude third parties from using *other* marks.<sup>88</sup>

25. These rights have the potential to “increase[] barriers to market entry”<sup>89</sup> and otherwise “reduce competition,”<sup>90</sup> and accordingly they are subject to various limitations.<sup>91</sup> For example, a trademark owner must use and police its mark,<sup>92</sup> and may only seek to preclude a third party’s use of *another* mark if the latter “is confusingly similar to the opponent’s prior mark.”<sup>93</sup> As

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<sup>85</sup> [Memorial](#), ¶ 233.

<sup>86</sup> [Second Jacobson Report](#), ¶ 7.

<sup>87</sup> [Decision on Expedited Objections](#), ¶ 170 (*quoting* [RLA-001](#), Douglas, ¶ 396); [Memorial](#), ¶ 233 (“[A] trademark is a negative right — it is the right to exclude others from using it”).

<sup>88</sup> *See, e.g.*, [Ex. R-0026](#), Law No. 35 (Enacting Provisions on Industrial Property), Legislative Assembly (10 May 1996), §§ 98–99.

<sup>89</sup> [First Daniel Report](#), ¶ 42; *see also* [Second Jacobson Report](#), fn. 65.

<sup>90</sup> [First Daniel Report](#), ¶ 42.

<sup>91</sup> *See generally* [First Jacobson Report](#), § IV; [First Lasso de la Vega Report](#), ¶¶ 113–21.

<sup>92</sup> *See* [First Jacobson Report](#), ¶ 60; [Second Jacobson Report](#), fn. 65.

<sup>93</sup> [First Jacobson Report](#), ¶ 60. *See also* [First De La Vega Report](#), ¶ 15 (“The owner of a trademark registered in Panama has the right to prevent third parties from

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Claimants concede, “the right of the trademark holder to protect its brand”<sup>94</sup> must be “balance[d] [against] . . . the right of other entities to conduct business and compete fairly.”<sup>95</sup>

26. A trademark owner is also permitted to enter into trademark licensing agreements (*i.e.*, contracts that afford a third party the right to use the trademark).<sup>96</sup> Nevertheless, as explained by trademark law expert Ms. Nadine Jacobson, a trademark owner that licenses its trademark out for use will continue to be responsible for exercising quality control over the trademarked products.<sup>97</sup> In addition, the owner/trademark licensor also will continue to “own[] the Mark[] and all the goodwill associated therewith,”<sup>98</sup> and be responsible for policing.<sup>99</sup> Indeed, as

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using or intending to register, without his authorization, an identical or similar mark that is confusing”).

<sup>94</sup> [Request for Arbitration](#), ¶ 18.

<sup>95</sup> [Request for Arbitration](#), ¶ 18; *see also* [Ex. R-0197](#), [Bridgestone Code of Conduct](#), p. 26 (“Third parties have intellectual property rights, too, and we must always be careful to respect them”).

<sup>96</sup> [Second Jacobson Report](#), ¶ 9.

<sup>97</sup> *See* [Second Jacobson Report](#), ¶¶ 7–8. *See also* [Ex. C-0048](#), § 5 (“LICENSEE may use Marks . . . only after LICENSOR has seen, inspected, and approved a sample of the use of each of the Marks as well as a sample of each of the Licensed Products . . .”).

<sup>98</sup> [Ex. C-0048](#), § 11; *see also* [Second Jacobson Report](#), ¶¶ 9 (“The trademark laws of Panama and its neighboring countries only recognize the registrant . . . as being the owner of a registered trademark”), 10 (“In order for the trademark to fulfill its purpose as the indicator of source, the goodwill in the trademark necessarily belongs to the trademark owner alone”).

<sup>99</sup> [Ex. C-0048](#), § 14 (requiring the licensee to cooperate “with the efforts taken by LICENSOR to police the Marks”); *see also* [First Jacobson Report](#), ¶ 36 (“[I]t is clear that trademark law requires trademark owners to police their marks in order to maintain

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Claimants accept<sup>100</sup> — and the Tribunal has already stated<sup>101</sup> — in Panama, a licensee cannot police a mark by itself. Thus, in many respects, the licensee is at the mercy of the trademark owner, which could stop policing the trademark, sell or lose it (*e.g.*, through bankruptcy), and/or take actions that could affect the goodwill in the trademark.

27. On the subject of goodwill, it also seems useful to note that “[t]he term ‘goodwill’ has a specific meaning in the trademark context.”<sup>102</sup> The goodwill in a trademark represents the consumers’ trust in that quality and the resulting attractiveness and strength of that trademark.<sup>103</sup> As stated by the Tribunal, the trademark owner can build goodwill by “designing, manufacturing and selling products that contain the desirable features”<sup>104</sup> and “promoting the brand by advertising and other means.”<sup>105</sup> As stated above, a trademark owner can delegate these tasks to another

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their rights . . . ”); **First De La Vega Report**, ¶ 15 (“The owner of a trademark registered in Panama has the right to prevent third parties from using or intending to register, without his authorization, an identical or similar mark that is confusing”).

<sup>100</sup> See **Rejoinder on Expedited Objections**, ¶ 38.

<sup>101</sup> See **Decision on Expedited Objections**, ¶ 195.

<sup>102</sup> **Second Jacobson Report**, ¶ 5.

<sup>103</sup> **Second Jacobson Report**, ¶ 5 (“Specifically, ‘goodwill’ is understood in trademark law to refer to the trademark’s strength, inherent distinctiveness, and the enhanced distinctiveness and attractiveness acquired through use”).

<sup>104</sup> **Decision on Expedited Objections**, ¶ 167.

<sup>105</sup> **Decision on Expedited Objections**, ¶ 168.

entity by licensing the trademark.<sup>106</sup> However, because the trademark owner ultimately controls the quality upon which consumers rely, the *goodwill* in the trademark belongs to the trademark owner alone.<sup>107</sup> Indeed, for this very reason, most trademark licenses<sup>108</sup> — including those submitted by Claimants in this case<sup>109</sup> — explicitly provide that the “LICENSOR owns the Marks and all the goodwill associated therewith.”<sup>110</sup>

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<sup>106</sup> See [Decision on Expedited Objections](#), ¶ 173.

<sup>107</sup> [Second Jacobson Report](#), ¶ 7 (“As an indicator of source, a trademark communicates to consumers a message about the nature of the goods such that when consumers see the goods in the marketplace, they expect the goods bearing that mark to have a consistent level of quality. For this reason, as trademark law developed in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the licensing of trademarks was initially not permitted; it was viewed as deceptive, as the entity applying the mark to the goods (the licensee) was not the trademark owner (the source indicated by the trademark). However, trademark law eventually evolved to permit trademark licensing on the basis of the understanding that the trademark owner would control the quality of the goods bearing the mark”).

<sup>108</sup> See [Second Jacobson Report](#), ¶ 11 (“Consistent with the principle that a trademark is an indicator of source, most trademark licenses typically provide: (1) the trademark owner with the ability to exercise quality control, (2) that the licensee’s use of the mark will inure to the benefit of the trademark owner, and (3) that the licensee shall acquire no ownership interest in the mark as a result of its licensed use”).

<sup>109</sup> See [C-0048, Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. \(1 December 2001\)](#), § 11; [C-0052, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC \(1 December 2001\)](#), § 6-1.

<sup>110</sup> [C-0048, Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. \(1 December 2001\)](#), § 11 (emphasis added). See also [C-0052, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC \(1 December 2001\)](#), § 6-1 (“BFNT acknowledges that BSJ Trademarks are part of the goodwill of BSJ’s respective business and that BFNT shall not at any time do or suffer to be done any act or thing which will in any way impair BSJ’s proprietary rights in and to BSJ Trademarks. It is understood that, except for the right to use BSJ Trademarks to identify Tire Products, BFNT shall not acquire and shall not claim, whether by reason of this Agreement, by use or otherwise, any right, title or interest, direct or indirect, in BSJ Trademarks”).

## 2. Improper Policing Tactics

28. As with any other rights, the injunctive rights that derive from trademark ownership can be abused,<sup>111</sup> and States accordingly police improper policing tactics.<sup>112</sup> Their authority to do so is widely acknowledged. For example, the TRIPS Agreement<sup>113</sup> — a World Trade Organization instrument that binds Panama and the United States<sup>114</sup> — expressly acknowledges the power of a State’s “judicial authorities” to award damages and costs in instances of abusive trademark enforcement actions:

*The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused*

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<sup>111</sup> See [RLA-0200](#), Hersch Lauterpacht, *DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 164 (1958), p. 164 (explaining that “[t]here is *no* right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused”) (emphasis added); [RLA-0196](#), *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 (Decision on Jurisdiction, 10 June 2010), ¶ 169 (Guillaume, El-Kosheri, Kaufmann-Kohler) (explaining that, “in *all* systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of law”) (emphasis added); See also [RLA-0128](#), *Law Commission: Consultation Paper No. 212, Patents, Trade Marks and Design Rights: Groundless Threats*, (2013), ¶ 1 (“Disputes relating to patents, trade marks and design rights are widely viewed as expensive, complicated and best avoided. A business can be severely disrupted until the issues at stake have been finally resolved. This gives threats of infringement proceedings their formidable force. When a threat is used appropriately, it provides important protection to the rights holders. When it is misused, however, it can do great damage.”).

<sup>112</sup> See generally [First Jacobson Report](#), § IV.

<sup>113</sup> Formally, the “Agreement on Trade-Related Aspects of Intellectual Property Rights.” See [RLA-0091](#), *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, World Trade Organization (1 January 1995).

<sup>114</sup> See [First Lasso de la Vega Report](#), ¶ 59.

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*enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse.* The judicial authorities shall also have the authority to order the applicant *to pay the defendant expenses, which may include appropriate attorney's fees.*<sup>115</sup>

The TPA does not in any way purport to depart from this norm. To the contrary, Article 15.1.5 of the TPA expressly states that “the Parties *affirm* their existing rights and obligations under the TRIPS Agreement . . . .”<sup>116</sup>

29. In that same provision (*viz.*, Article 15.1.5), Panama and the United States also “affirm their existing rights and obligations under . . . intellectual property agreements concluded or administered under the auspices of the World Intellectual Property Organization (WIPO),”<sup>117</sup> such as the 136-year old Paris Convention for the Protection of Industrial Property (“**Paris Convention**”). This is important because, through Article 10*bis* of the Paris Convention, member States are bound to protect entities

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<sup>115</sup> [RLA-0091](#), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), World Trade Organization (1 January 1995), Art. 481(1) (emphasis added); *see also* [RLA-0139](#), Kimberlee Weatherall, Safeguards for Defendant Rights and Interests in International Intellectual Property Enforcement Treaties, 32 AM. UNIV. INT’L L. REV. (13 October 2016), p. 265 (“TRIPS at least makes it clear that judicial authorities must have the power to act and compensate a wronged party”).

<sup>116</sup> [Ex. R-0001](#), TPA, Art. 15.1.5 (emphasis added).

<sup>117</sup> [Ex. R-0001](#), TPA, Art. 15.1.5.

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against “unfair competition”<sup>118</sup> — a term that every State has some flexibility to define,<sup>119</sup> and which many States have interpreted to include the practice of “trademark bullying.”<sup>120</sup>

30. As Ms. Jacobson has explained, “Trademark bullying is a prevalent and persistent problem, where large companies with immense financial resources at their disposal intimidate others in order to achieve arguably anticompetitive outcomes.”<sup>121</sup> Indeed, in 2011, the U.S. Department of Commerce produced a detailed study of “trademark litigation tactics,”

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<sup>118</sup> [RLA-0120](#), [Paris Convention for the Protection of Industrial Property, WIPO \(28 September 1979\)](#), [Art. 10bis](#) (“(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.”).

<sup>119</sup> [RLA-0122](#), [Guide to the Application of the Paris Convention for the Protection of Industrial Property, BIRPI \(1968\)](#), p. 144 (“In giving effective protection against unfair competition, each country may itself determine which acts come under this category, provided, however, that paragraphs (2) and (3) of [Article 10bis]...are complied with”). Paragraphs (2) and (3) of [RLA-0120](#), [Article 10bis](#) state as follows: “(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”

<sup>120</sup> See [First Jacobson Report](#), ¶ 36 & note 61.

<sup>121</sup> [First Jacobson Report](#), ¶ 36 (citing [RLA-0141](#), J. Thomas McCarthy, [MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION](#), Section 11:92 (5th ed. 2018) (“‘Trademark bullying’ can be defined as conduct by a trademark owner who: (1) asserts an unreasonably inflated view of the scope of exclusivity of the mark; (2) makes overly aggressive demands out of proportion to the conduct objected to; (3) is a large company with substantial assets; and (4) the accused infringer is a relatively smaller concern”).

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detailing the harm produced by “abusive trademark enforcement tactics.”<sup>122</sup> Similarly, in 2013, the Law Commission (an independent law commission established by Parliament to review the law of England and Wales), undertook a study of the use and impact of “threats of infringement proceedings” in the intellectual property context.<sup>123</sup> The Commission observed that when such a threat “is misused, . . . it can do great damage.”<sup>124</sup>

31. In responding to this problem, States have adopted a variety of solutions — the “common thread [of which] is that there must be safeguards in place to strike a balance between the proper enforcement of trademark rights on the one hand, and the prevention of abusive behavior on the other hand.”<sup>125</sup> For instance, the United Kingdom has created a mechanism by which the recipient of a groundless threat of infringement proceedings may assert a civil claim against the maker of the threat,<sup>126</sup> irrespective of whether the threat had been made within the United Kingdom.<sup>127</sup>

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<sup>122</sup> [RLA-0092](#), Report to Congress: Trademark Litigation Tactics and Federal Government Services to Protect Trademarks and Prevent Counterfeiting (April 2011), p. 5.

<sup>123</sup> [RLA-0128](#), Law Commission: 012 Consultation Paper No. 212, “Patents, Trade Marks and Design Rights: Groundless Threats,” (2013), p. 15.

<sup>124</sup> [RLA-0128](#), Law Commission: 012 Consultation Paper No. 212, “Patents, Trade Marks and Design Rights: Groundless Threats,” (2013), p. 15.

<sup>125</sup> [First Jacobson Report](#), ¶ 38.

<sup>126</sup> [First Jacobson Report](#), ¶ 25–26.

<sup>127</sup> See [RLA-0128](#), ¶ 5.36 (“For example, in *Unilever Plc v Proctor & Gamble* the relevant threat was made in Germany and no suggestion was made that this made it non-

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Analogous mechanisms exist in other common law jurisdictions.<sup>128</sup> In civil law jurisdictions (*e.g.*, Germany,<sup>129</sup> the Netherlands,<sup>130</sup> France,<sup>131</sup> and Panama<sup>132</sup>), the courts have extended to abusive trademark enforcement measures the general protections under tort and unfair competition laws.

32. Similarly, in the United States, which is Claimants' purported home State, "the law has provided for recourse in the form of the 'abuse of process' tort. This cause of action addresses the 'misuse of [the] legal process primarily to accomplish a purpose for which it was not designed, usually to compel the victim to yield

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actionable. Similarly, in *Dimplex (UK) Ltd v De'Longhi Ltd* threats were made to both British and French businesses and it was held to be acceptable to consider the impact of the threats made in France").

<sup>128</sup> [First Jacobson Report](#), ¶¶ 26–27.

<sup>129</sup> See [First Jacobson Report](#), ¶ 28 (discussing a case in which a panel of the German Federal Civil Court held that an unfounded warning letter asserting a trademark right, just like any other IP right, can render the warning party liable for damages on the ground of an illegal and culpable interference with the right to operate a business, under Section 823(1) of the German Civil Code) (*citing* [RLA-0123](#), *Don't fret over threats*, *Global Practice Threats, ManagingIP.com* (February 2016)).

<sup>130</sup> See [First Jacobson Report](#), ¶ 29 ("In the Netherlands, the courts have expanded on the duty not to commit tortious acts found in the Dutch Civil Code to provide protection against threats of infringement proceedings when the claim is baseless and the claimant knew or should have known this, or even when the threat is well-founded but still deemed unlawful because it is unnecessarily offensive or public in nature") (*citing* [RLA-0128](#), *Law Commission Consultation Paper No. 212, "Patents, Trade Marks and Design Rights: Groundless Threats,"* (2013) chapter 6).

<sup>131</sup> See [First Jacobson Report](#), ¶ 29.

<sup>132</sup> See generally [Ex. R-0034](#), *Decision of the Supreme Court of Panama* (28 May 2014).

on some matter.”<sup>133</sup> As Ms. Jacobson observes, “A party can recover damages and attorneys’ fees for conduct which amounts to an abuse of process.”<sup>134</sup>

### C. Chronology of Events

33. At the turn of the millennium, a group of Chinese companies began marketing and selling RIVERSTONE tires,<sup>135</sup> and requesting registration of the RIVERSTONE mark in various jurisdictions. Eventually, on 13 August 2002, an entity named L.V. International, Inc. (“**L.V. International**”) filed an application with the United States Patent and Trademark Office (“**USPTO**”) to register the RIVERSTONE trademark in the United States.<sup>136</sup> In response, in December 2003, two U.S. members of the Bridgestone group formally opposed L.V. International’s application.<sup>137</sup> In their submission to the USPTO’s Trademark Trial and Appeal Board, the Bridgestone entities alleged that the RIVERSTONE trademark

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<sup>133</sup> **First Jacobson Report**, ¶ 36 (quoting **RLA-0144**, *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 963 (2010)).

<sup>134</sup> **First Jacobson Report**, ¶ 36 (citing **RLA-0145**, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); **RLA-0144**, *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 626 F.3d 958, 965, 966 (2010)).

<sup>135</sup> **Ex. C-0176**, Muresa Response (20 June 2005), p. 9 (“Today the RIVERSTONE & DESIGN trademark is a very well-known trademark among the consuming public to which it is offered, and it has been successfully marketed by our client since 1999”).

<sup>136</sup> See **Ex. C-0009**, Riverstone U.S. Trademark Application, USPTO (13 August 2002).

<sup>137</sup> See **Ex. C-0010**, Notice of Riverstone Trademark Opposition, BFS Brands LLC and Bridgestone/Firestone North American Tire, LLC v. L.V. International Inc., USPTO (3 December 2003).



was confusingly similar to the BRIDGESTONE and FIRESTONE marks.<sup>138</sup>

34. In the opposition proceeding that followed (the “**U.S. Opposition Proceeding**”), L.V. International responded by submitting two pleadings in which it (1) addressed and denied the merits of the Bridgestone group’s claim,<sup>139</sup> and (2) requested that the claim be dismissed on timeliness grounds.<sup>140</sup> Nevertheless, for reasons that the court filings do not explain, L.V. International thereafter proceeded to withdraw its request for registration of the RIVERSTONE mark.<sup>141</sup> On 13 August 2004, the entity submitted a one-sentence “Notice of Voluntary Withdrawal of Application with Prejudice,”<sup>142</sup> stating: “Applicant, through its undersigned attorney, hereby expressly withdraws the above mentioned

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<sup>138</sup> [Ex. C-0010](#), Notice of Riverstone Trademark Opposition, BFS Brands LLC and Bridgestone/Firestone North American Tire, LLC v. L.V. International Inc., USPTO (3 December 2003).

<sup>139</sup> Compare [Ex. C-0170](#), Opp. No. 91158815, LV's Answer to Notice of Opposition (26 January 2004), p. 13 (denying that the RIVERSTONE Trademark is confusingly similar to the FIRESTONE Trademark) with [Ex. C-0010](#), Notice of Riverstone Trademark Opposition, BFS Brands LLC and Bridgestone/Firestone North American Tire, LLC v. L.V. International Inc., USPTO (3 December 2003), p. 13 (alleging that the RIVERSTONE Trademark is confusingly similar to the FIRESTONE Trademark).

<sup>140</sup> See [Ex. C-0170](#), Opp. No. 91158815, LV's Answer to Notice of Opposition (26 January 2004); [Ex. C-0171](#), Opp. No. 91158815, Motion to Dismiss for Lack of Standing (26 January 2004).

<sup>141</sup> [Ex. C-0011](#), Notice of Voluntary Withdrawal of Application with Prejudice of Riverstone, USPTO (13 August 2004).

<sup>142</sup> [Ex. C-0011](#), Notice of Voluntary Withdrawal of Application with Prejudice of Riverstone, USPTO (13 August 2004).

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application.”<sup>143</sup> The U.S. Trademark Trial and Appeal Board then recorded this event in a three-sentence ruling dated 13 October 2004, which is quoted in full below:

On August 20, 2004 [sic], applicant [L.V. International] filed an abandonment of its application Serial No. 78/153,594 with prejudice. Opposer’s September 3, 2004 motion to suspend is noted.

Trademark Rule 2.135 provides that, if in an inter partes proceeding, the applicant files an abandonment without the written consent of every adverse party to the proceeding, judgment shall be entered against the applicant.

In view thereof, and because opposer’s written consent to the abandonment is not of record, judgment is hereby entered against applicant, the opposition is sustained and registration to applicant is refused.<sup>144</sup>

35. The following month, an attorney from Foley & Lardner — a global law firm, which at the time, had offices in 19 cities<sup>145</sup> — sent a letter to the attorney who had represented L.V.

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<sup>143</sup> [Ex. C-0011](#), Notice of Voluntary Withdrawal of Application with Prejudice of Riverstone, USPTO (20 August 2004).

<sup>144</sup> [See Ex. C-0175](#), Opp. No. 91158815, Judgment against L.V. International Inc. and Registration of the Riverstone, USPTO (13 October 2004).

<sup>145</sup> [See Ex. C-0013](#), Letter from Foley & Lardner LLP "Bridgestone/Firestone" to Sanchelina & Associates, P.A., "L.V. International" (indicating that, in 2004, Foley & Lardner had offices in Brussels, Chicago, Detroit, Jacksonville, Los Angeles, Madison,

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International in the U.S. Opposition Proceeding (a Mr. Jesus Sanchelima of Sanchelima & Associates, P.A.).<sup>146</sup> The letter warned: 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.”<sup>147</sup> And this “position”<sup>148</sup> — the letter explained — “[wa]s not limited to the United States.”<sup>149</sup> Rather, as the letter made clear, “Bridgestone/Firestone objects 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.”<sup>150</sup>

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Milwaukee, New York, Orlando, Sacramento, San Diego, San Diego/Del Mar, San Francisco, Silicon Valley, Tallahassee, Tampa, Tokyo, Washington DC, and West Palm Beach).

<sup>146</sup> **Ex. C-0013**, Letter from Foley & Lardner LLP "Bridgestone/Firestone" to Sanchelina & Associates, P.A., "L.V. International" ("Reservation of Rights Letter") (3 November 2004).

<sup>147</sup> **Ex. C-0013**, Letter from Foley & Lardner LLP "Bridgestone/Firestone" to Sanchelina & Associates, P.A., "L.V. International" ("Reservation of Rights Letter") (3 November 2004) (original emphasis omitted; new emphasis added).

<sup>148</sup> **Ex. C-0013**, Letter from Foley & Lardner LLP "Bridgestone/Firestone" to Sanchelina & Associates, P.A., "L.V. International" ("Reservation of Rights Letter") (3 November 2004).

<sup>149</sup> **Ex. C-0013**, Letter from Foley & Lardner LLP "Bridgestone/Firestone" to Sanchelina & Associates, P.A., "L.V. International" ("Reservation of Rights Letter") (3 November 2004).

<sup>150</sup> **Ex. C-0013**, Letter from Foley & Lardner LLP "Bridgestone/Firestone" to Sanchelina & Associates, P.A., "L.V. International" ("Reservation of Rights Letter") (3 November 2004).

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36. In their pleadings, Claimants contend that this letter (“**Demand Letter**”) was routine — a standard “reservation of rights”<sup>151</sup> that no reasonable person might fear.<sup>152</sup> But as Ms. Jacobson has explained, the Demand Letter contains “language [that] goes far beyond what is typically asserted in a mere reservation of rights letter,”<sup>153</sup> could “quite reasonably [be] viewed . . . as a threat”<sup>154</sup> and as an “attempt to intimidate a smaller, weaker competitor into ceasing use of its mark.”<sup>155</sup> Indeed, Claimants’ witness Mr. Kingsbury has conceded that the purpose of the Demand Letter had been “to deter the person who’s trying to register and use the mark from actually using it.”<sup>156</sup>

### 1. The Panamanian Opposition Proceeding

37. In parallel with the events above, on 6 May 2002, one of L.V. International’s sister entities<sup>157</sup> — a company named Muresa Intertrade, S.A. (“**Muresa**”) — submitted an application to the Panamanian intellectual property office (“**DIGERPI**”), seeking registration of the RIVERSTONE mark in Panama. The

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<sup>151</sup> [Notice of Dispute](#), §§ 9, 11, 13.

<sup>152</sup> [See Reply](#), ¶ 71.

<sup>153</sup> [First Jacobson Report](#), ¶ 45.

<sup>154</sup> [First Jacobson Report](#), ¶ 58.

<sup>155</sup> [First Jacobson Report](#), ¶ 59.

<sup>156</sup> [Hearing on Expedited Objections \(Day 3\)](#), Tr. 404:1–5; *see also id.* at Tr. 402–03.

<sup>157</sup> [See Memorial](#), ¶ 22 (“Muresa and LV International are both companies within the same group, known as the Luque Group”).

application was then reviewed, and on 4 February 2005, DIGERPI published Muresa’s application in the Official Gazette.<sup>158</sup> In the words of the Panamanian Trademark Law, this meant that “the application for registration [had been] found to be in order . . . .”<sup>159</sup>

38. Nevertheless, there then was “a two-month period” during which third parties were permitted to “file opposition to the registration applied for.”<sup>160</sup> On 5 April 2005, Bridgestone Corporation and Bridgestone Licensing made use of this mechanism — bringing suit against Muresa in a Panamanian court. (Specifically, the Eighth Court of the Civil Circuit of the First Judicial District (the “**Opposition Court**”).) At the time, the Bridgestone entities (collectively, the “**Bridgestone Litigants**”) were fully aware of the possibility of “counterclaims,” and of situations in which they might act as the “defendants.”<sup>161</sup>

39. Witnesses from Muresa’s sister companies would later testify that, around this same time, RIVERSTONE tires were seized in the Dominican Republic.<sup>162</sup> In light of this, and based on warnings from “customs agents and[] some related persons that in

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<sup>158</sup> [Ex. C-0256](#), Official Gazette of Panama (4 February 2005).

<sup>159</sup> [Ex. R-0026](#), Law No. 35, Art. 106.

<sup>160</sup> [Ex. R-0026](#), Law No. 35, Art. 107.

<sup>161</sup> [Ex. R-0151](#), Bridgestone Corporation Power of Attorney (22 March 2005); [Ex. R-0159](#), Bridgestone Licensing Power of Attorney (28 March 2005).

<sup>162</sup> See e.g., [Ex. R-0161](#), Testimony by Fernan Jesus Luque Gonzalez - part 2 (27 April 2010), p. 3.

the case of a brand registration challenge[,] [they] could face seizures,”<sup>163</sup> the RIVERSTONE side grew fearful. “Consequently” — one witness testified — “we decided to halt production, [and] sent a letter to our agent in China instructing him to communicate this to the factory . . . .”<sup>164</sup>

40. In parallel, on 20 June 2005, Muresa filed an “answer” to the opposition petition, seeking “to answer and oppose the reckless lawsuit.”<sup>165</sup> The proceeding (“**Opposition Proceeding**”) then began in earnest.<sup>166</sup> Shortly thereafter, L.V. International requested permission to intervene in the Opposition Proceeding as a special type of third-party intervener known as a *coadyuvante*.<sup>167</sup> Another sister company, Tire Group of Factories Ltd., Inc. (“**Tire Group**”), also requested the same.<sup>168</sup> As Mr. Lee explains, a *coadyuvante* is a third party that intervenes in a litigation for the purpose of assisting one of the parties,<sup>169</sup> and is authorized by the Panamanian Judicial Code to introduce claims

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<sup>163</sup> [Ex. C-0161](#), Testimony by Fernan Jesus Luque Gonzalez - part 2 (27 April 2010), p. 3.

<sup>164</sup> See e.g., [Ex. C-0161](#), Testimony by Fernan Jesus Luque Gonzalez - part 2 (27 April 2010), p. 3.

<sup>165</sup> See [Ex. C-0176](#), Muresa Response (20 June 2015), p. 1.

<sup>166</sup> See [Ex. C-0176](#), Muresa Response (20 June 2015).

<sup>167</sup> See [Ex. C-0177](#), Third-party Intervention filed by Ballard & Ballard on behalf of LV International (25 August 2005).

<sup>168</sup> [Ex. C-0178](#), Third-party Intervention filed by Ballard & Ballard on behalf of TGFL (26 August 2005).

<sup>169</sup> See [Second Lee Report](#), ¶¶ 39, 112.

and evidence that the court must then consider.<sup>170</sup> The *coadyuvante* petitions were both approved by the Opposition Court, in a ruling that was upheld on appeal.<sup>171</sup> Both *coadyuvantes* assisted Muresa in the Opposition Proceeding, “incorporat[ing] into the procedural file copious evidence . . . .”<sup>172</sup>

41. In terms of merits arguments, as the Opposition Court later observed, the petition of the Bridgestone Litigants — “[a]s in any opposition proceedings”<sup>173</sup> — had been intended to secure the rejection of Muresa’s application for registration of the RIVERSTONE mark.<sup>174</sup> In support of this objective, the Bridgestone Litigants asserted that the RIVERSTONE mark at issue was “deceptively similar to the BRIDGESTONE and FIRESTONE trademarks . . . .”<sup>175</sup> This allegation is a staple in any opposition proceeding. Indeed, as Panamanian trademark law

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<sup>170</sup> [Ex. R-0138](#), [Judicial Code of the Republic of Panama, Art. 603](#) (“The request for intervention must contain the facts and the legal grounds on which it is based, and the relevant evidence will be attached to it. If the judge considers the intervention appropriate, he will accept it outright and will consider the petitions that the intervener made in the same brief”).

<sup>171</sup> [Ex. C-0183](#), [Order joining TGFL and LV International \(15 November 2005\)](#).

<sup>172</sup> [Ex. R-0040](#), [Judgment No. 48, Eight Circuit Court \(21 July 2006\)](#), p. 8 (“The counsels of record of either side (including third-party interveners) used the procedural opportunity provided by Article 186 of Law 35 of May 10th 1996, and incorporated into the procedural file copious evidence materials that they considered advantageous and in favor of the interests of their clients”).

<sup>173</sup> [Ex. R-0040](#), [Judgment No. 48, Eight Circuit Court \(21 July 2006\)](#), p. 1.

<sup>174</sup> [Ex. R-0040](#), [Judgment No. 48, Eight Circuit Court \(21 July 2006\)](#), p. 1.

<sup>175</sup> [Ex. R-0040](#), [Judgment No. 48, Eight Circuit Court \(21 July 2006\)](#), p. 1.

expert Marissa Lasso de la Vega explains, an opposition petition *must* include this allegation.<sup>176</sup> Remarkably, however, the Bridgestone Litigants did not make any real attempt to prove the point.

42. As Ms. Lasso de la Vega explains, Panamanian law does not prescribe any particular formula for demonstrating that one brand is deceptively similar to another.<sup>177</sup> Instead, the general rules of evidence established by the Judicial Code apply.<sup>178</sup> Nevertheless, there are certain categories of evidence that parties are expected to submit<sup>179</sup> — for example, witness testimony and expert evidence that establish a risk of confusion.<sup>180</sup> But as Ms. Lasso de la Vega confirms in her report, the Bridgestone Litigants did not submit any such evidence to the Opposition Court.<sup>181</sup>

43. The Bridgestone Litigants did, however, submit other documents — including the complete record of the U.S. Opposition Proceeding.<sup>182</sup> (This is important, as will be seen.) For

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<sup>176</sup> See [Second de la Vega Report](#), ¶ 19.

<sup>177</sup> See [Second de la Vega Report](#), ¶ 14.

<sup>178</sup> See [Second de la Vega Report](#), ¶¶ 14–16.

<sup>179</sup> See [Second de la Vega Report](#), ¶ 19.

<sup>180</sup> See [Second de la Vega Report](#), ¶ 19.

<sup>181</sup> See [Second de la Vega Report](#), ¶ 22.

<sup>182</sup> See [Ex. R-0123](#), Excerpt of Panamanian Opposition Proceeding Evidentiary Hearing (21 February 2006); see also [R-0124](#), Excerpt of Panamanian Opposition Proceeding Evidentiary Hearing (11 May 2006), p. 2.



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example, even though the Bridgestone Litigants had not been a party to the U.S. Opposition Proceeding,<sup>183</sup> they argued that such proceeding had pronounced upon their rights, and that Muresa (another non-party) should have been aware of the same.<sup>184</sup> In fact, the Bridgestone Litigants even went so far as to suggest that the “precedent” in the United States should have put Muresa on notice that it could not register the RIVERSTONE trademark in Panama:

Undoubtedly, *the aforementioned precedent shows 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. 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. *Despite this, they insist on seeking the*

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<sup>183</sup> See **Ex. C-0010**, Notice of Riverstone Trademark Opposition, BFS Brands LLC and Bridgestone/Firestone North American Tire, LLC v. L.V. International Inc., USPTO (3 December 2003) (identifying BFS Brands LLC, Bridgestone/Firestone North American Tire, and LLC and L.V. International Inc. as the parties to the U.S. Opposition Proceeding).

<sup>184</sup> **Ex. R-0124**, Excerpt of Panamanian Opposition Proceeding Evidentiary Hearing (11 May 2006), p. 2.

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*registration and obtaining rights over the  
RIVERSTONE Y DISEÑO trademark.*<sup>185</sup>

On 21 July 2006, the Opposition Court issued a decision (the “**Opposition Proceeding Decision**”), rejecting the Bridgestone Litigants’ challenge.<sup>186</sup> In practical terms, this meant — in the words of Claimants themselves — “that tires with the RIVERSTONE mark may be sold in Panama alongside BRIDGESTONE and FIRESTONE tires, and the Bridgestone group cannot prevent this.”<sup>187</sup>

44. As the Opposition Court explained, it could “not find reasons to deny access to [RIVERSTONE] to the Trademark Registry . . . .”<sup>188</sup> For example, even though the marks at issue had certain similarities (*e.g.*, “the names share the same vowels in the same order” and the “termination <<STONE>>”),<sup>189</sup> the Opposition Court stated that “the sole presence of these circumstances”<sup>190</sup> did not create a risk of confusion.<sup>191</sup> In the Court’s view, a contrary finding would cast too wide of a net.<sup>192</sup>

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<sup>185</sup> [Ex. R-0124](#), Excerpt of Panamanian Opposition Proceeding Evidentiary Hearing (11 May 2006), p. 2 (emphasis added).

<sup>186</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 22.

<sup>187</sup> Reply, ¶ 102.

<sup>188</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 22.

<sup>189</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 20.

<sup>190</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 20.

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45. The Opposition Court then considered the use of the various trademarks at issue, and observed that they had “already had occasion to coexist in the market.”<sup>193</sup> This was important because, as Ms. Jacobson explains, “[l]ongstanding co-existence of the respective marks in the marketplace is accepted by tribunals as a factor in support of the conclusion that there is no likelihood of confusion between the respective marks.”<sup>194</sup> Indeed, after examining the materials that had been presented, the Opposition Court concluded, that “there [wa]s *no* evidence that their coexistence ha[d] caused error, confusion, mistake, mislead [sic] or deception in the public or caused damage to BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICE[S], INC. or dilute[d] the distinctive force of the trademarks BRIDGESTONE and FIRESTONE.”<sup>195</sup> This reality was fatal to the Bridgestone entities’ claim, as “the manner in which opposing trademarks’ presence in the market has

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<sup>191</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 20 (“[I]t would be too wide [a] perception to consider that there is risk of confusion because of the sole presence of [the above-quoted] circumstances”); *id.* (“The orthographic and phonetic closeness between the signs does not cause provokable confusions, mistakes, or deceptions among the group of consumers of each product”).

<sup>192</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 20.

<sup>193</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 22.

<sup>194</sup> [First Jacobson Report](#), ¶ 40.

<sup>195</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 22 (emphasis added).

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materialized. . . is one of the determinant factors to eliminate any likelihood of confusion between signs.”<sup>196</sup>

46. The Opposition Court Decision concluded by addressing the issue of costs, and stated that the Court had chosen to release the Bridgestone Litigants from the payment of attorneys’ fees because they had acted with “apparent good faith.”<sup>197</sup>

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47. Following the issuance of the Opposition Proceeding Decision, Bridgestone Corporation and Bridgestone Licensing filed a notice of appeal.<sup>198</sup> Nevertheless, “after[] considering the likelihood of [their] success in such a proceeding,”<sup>199</sup> they ultimately withdrew their notice.<sup>200</sup> This decision was perhaps not surprising, given the failure of the Bridgestone entities to present material and probative evidence during the Opposition Proceeding.

## 2. The Civil Proceeding

48. According to subsequent witness testimony, the actions by the Bridgestone group discussed in the preceding

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<sup>196</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), p. 21.

<sup>197</sup> [Ex. R-0040](#), Judgment No. 48, Eight Circuit Court (21 July 2006), pp. 22–23.

<sup>198</sup> See [Ex. C-0151](#), Notice of Appeal filed by Bridgestone Corporation and Bridgestone Licensing Services, Inc. (3 August 2006).

<sup>199</sup> [Request for Arbitration](#), ¶ 27.

<sup>200</sup> See [Ex. C-0152](#), Bridgestone withdrawal of appeal (5 September 2006).

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sections severely impacted Muresa, Tire Group, and L.V. International. For example, commercial customers who previously had purchased RIVERSTONE tires refused to place new orders, concerned that they might get caught in the crossfire.<sup>201</sup> 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,”<sup>202</sup> and (2) could only be sold “at cost or at 50% of cost.”<sup>203</sup> In addition, Muresa, Tire Group, and L.V. International faced troubles with their shipping partners: the reduced sale of RIVERSTONE tires meant that Muresa, Tire Group, and L.V. International could not fill the amount of shipping space that they had reserved via contract.<sup>204</sup> Accounting experts retained by

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<sup>201</sup> [Ex. C-0161, Testimony by Fernan Jesus Luque Gonzalez - part 2 \(27 April 2010\), p. 2](#) (testifying that customers “did not want RIVERSTONE products to be shipped because they feared a seizure or acts or reprisal against them since they were aware that RIVERSTONE was being challenged in Panama by BRIDGESTONE”).

<sup>202</sup> [Ex. C-0161, Testimony by Fernan Jesus Luque Gonzalez - part 2 \(27 April 2010\), p. 4.](#)

<sup>203</sup> [Ex. C-0161, Testimony by Fernan Jesus Luque Gonzalez - part 2 \(27 April 2010\), p. 4.](#)

<sup>204</sup> *See* [Ex. C-0155, Testimony by Gricelda Pineda Castillo \(22 April 2010\) pp. 5–6](#) (“Of course it caused losses, because we were no longer selling the RIVERSTONE product, as we had previously, for example, many customers from various countries did not order the other brands from us, which had the result that if before we had sold for example a container or two containers per month, the customer did not order the purchases anymore, and also that we had agreements with shipping lines to move our cargos and at those times that we were not able to transport the importations of our cargo we were breaking our agreement with the shipping companies for the amount of containers that we had reserved the space for and we had to reach an agreement with the

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Muresa and Tire Group would later go on to calculate that the above events resulted in a combined total of USD 5,775,793.84 in damages to Muresa and Tire Group.<sup>205</sup>

49. Accordingly, once their right to sell RIVERSTONE tires had been vindicated, Muresa and Tire Group sought to recoup their losses. Specifically, on 11 September 2007, they filed suit against the Bridgestone Litigants,<sup>206</sup> claiming that the latter had improperly caused them harm. These claims were first addressed by the Eleventh Court of the Civil Circuit of the First Judicial District (the “**First Instance Court**”), and eventually were appealed all the way up to the Supreme Court.

50. Should the Tribunal wish to peruse it, the record from this lawsuit (the “**Civil Proceeding**”), which spans thousands of pages, and will be made available on the file sharing platform as Annex A. But the salient parts of the record are summarized below, and these points (and the broader record) lead inexorably to three conclusions. *First*, the Bridgestone Litigants were afforded — and exercised — the opportunity to be heard on admissibility,

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shipping companies, we had to reach an agreement with them about the spaces that we had not used for the cargo, and this resulted in the need to pay these costs”).

<sup>205</sup> [Ex. C-0162](#), Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 4, 7.

<sup>206</sup> *See* [Ex. 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).

substance, evidence, and law. *Second*, the ultimate outcome (*i.e.*, a finding of liability and a monetary award of damages and costs to Muresa and Tire Group) was understandable given the context, and Claimants have simply not shown “that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective . . . .”<sup>207</sup> *Third*, Claimants have significantly mischaracterized the events in question, and many of Claimants’ arguments about the 2014 Supreme Court decision are thinly disguised appeals.

**a. Proceedings Before the First Instance Court**

51. The proceeding before the First Instance Court began on 11 September 2007 (when Muresa and Tire Group submitted their complaint), and lasted until 17 December 2010 (when the First Instance Court issued its ruling on the merits).<sup>208</sup> Similar to trial proceedings conducted around the world, the proceeding before the First Instance Court consisted of written pleadings, witness and expert testimony, and documentary evidence.

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<sup>207</sup> [RLA-0081](#), *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial Award, 13 November 2000), ¶ 263 (Hunter, Schwartz, Chiasson).

<sup>208</sup> See [Ex. 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); [Ex. R-0036](#), Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 7–8.

52. The first exchange of pleadings consisted of a complaint (by Muresa and Tire Group), and a response by the Bridgestone Litigants. In their complaint, Muresa and Tire Group alleged that the initiation of the Opposition Proceeding had contravened Article 1644 of Panama’s Civil Code. In response, the Bridgestone Litigants submitted (1) separate answers, and (2) a joint motion seeking the dismissal of the suit.<sup>209</sup> Following this exchange, the proceeding entered the evidentiary stage, which in Panama involves two phases — a *proposal* of evidence phase and a *submission* of evidence phase.<sup>210</sup>

53. The *proposal* of evidence phase began on 28 September 2009,<sup>211</sup> and lasted until 26 January 2010. During this phase, the parties (1) proposed evidence and counter-evidence, and (2) advanced objections to the opposing party’s evidence.<sup>212</sup> The

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<sup>209</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008); **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009); **Ex. R-0062**, Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing (19 August 2009).

<sup>210</sup> See **Second Lee Report**, ¶ 55.

<sup>211</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009); See **Ex. R-0064**, Decision No. 114-10 of the Eleventh Court on admissibility of the counter-evidence submitted by Bridgestone Corporation and Bridgestone Licensing (26 January 2010); **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Muresa and Tire Group (9 October 2009).

<sup>212</sup> See **Second Lee Report**, ¶ 55; *see also* **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009); **Ex. R-0121**, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing (1 October 2009); **Ex. C-**

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First Instance Court then ruled on these proposals, admitting some of the documentary evidence proposed by the parties, and establishing dates for witness testimony and the submission of expert evidence.<sup>213</sup> The *submission* of evidence phase began on 21 April 2010 and lasted until 27 May 2010.<sup>214</sup> During this second phase:

- a. the parties examined and cross-examined witnesses (between 21 April 2010 and 14 May 2010);<sup>215</sup>
- b. the party- and court-appointed experts submitted reports (on 24 May 2010); and
- c. the parties examined and cross-examined the experts (between 25 and 27 May 2010).<sup>216</sup>

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**0191**, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing (6 October 2009).

<sup>213</sup> See **Ex. C-0193**, Decision Accepting Evidence Presented by Muresa (26 January 2010); **Ex. R-0106**, Excerpt of Decision No. 107-10 of the Eleventh Court on Admissibility of the Evidence Submitted by Muresa and Tire Group (26 January 2010); **Ex. R-0120**, Decision No. 108-10 of the Eleventh Circuit Court on the Admissibility of Evidence Submitted By Bridgestone Corporation and Bridgestone Licensing (26 January 2010).

<sup>214</sup> See **Ex. C-0153**, Testimony by Jose Orestes Medina Samaniego (21 April 2010); see also **Ex. C-0199**, Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon (27 May 2010).

<sup>215</sup> See, e.g., **Ex. C-0153**, Testimony by Jose Orestes Medina Samaniego dated 21 April 2010; **Ex. C-0147**, Testimony by Jorge Alberto Luque Gonzalez (14 May 2010).

<sup>216</sup> **Ex. C-0195**, Interrogatory of Manuel Ochoa Sanchez (25 May 2010); **Ex. C-0199**, Continuation Interrogatory of Muresa Intertrade S.A Experts Jose Antonio Aguilar and Psiquies de Leon (27 May 2010); **Ex. C-0197**, Interrogatory of Vera Luisa Lindo de

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In addition, L.V. International requested permission to intervene as a *coadyuvante*,<sup>217</sup> alleging that all three sister companies (L.V. International, Muresa, and Tire Group) had been harmed by the Bridgestone Litigants' pursuit of legal remedies and threats.<sup>218</sup> L.V. International appended documentary evidence to its petition, including the Demand Letter.<sup>219</sup>

54. At the conclusion of the evidentiary phase, the parties submitted their closing arguments to the First Instance Court, with Muresa and Tire Group filing theirs on 4 June 2010.<sup>220</sup> Eventually, on 17 December 2010, the First Instance Court ruled on Muresa and Tire Group's suit.<sup>221</sup>

55. Throughout the proceeding, Muresa, Tire Group, and L.V. International, and the Bridgestone Litigants submitted

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Gutierrez (26 May 2010); **Ex. C-0199**, Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon (27 May 2010).

<sup>217</sup> See **Ex. C-0018**, L.V. International Third-Party Intervener Application (11 May 2010); **Ex. R-0126**, Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010).

<sup>218</sup> See **Ex. C-0018**, L.V. International Third-Party Intervener Application (11 May 2010); **Ex. R-0126**, Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010), pp. 2–3.

<sup>219</sup> See **Ex. C-0018**, L.V. International Third-Party Intervener Application (11 May 2010); **Ex. R-0126**, Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010).

<sup>220</sup> See **Ex. C-0164**, Closing arguments of Muresa and Tire Group (4 June 2010); see also **Ex. C-0200**, Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010).

<sup>221</sup> **Ex. R-0036**, Judgment No. 70 of the Eleventh Circuit Court (17 December 2010).

arguments to the court (1) on threshold issues of law, (2) on merits issues, and (3) the subject of damages. Because some of these arguments are relevant for present purposes, Panama summarizes them below.

**(i) The Threshold Argument on the Applicable Law**

56. One of the hotly-debated issues before the First Instance Court was a threshold question of law. As noted above, at the outset of the proceeding, Muresa and Tire Group had filed a complaint on the basis of Article 1644 of the Panamanian Civil Code,<sup>222</sup> which is the general negligence tort provision of Panamanian law. It states: “Any[one] who causes damage to another by action or omission through fault or negligence is obliged to compensate the damage caused.”<sup>223</sup>

57. In response, each Bridgestone Litigant separately submitted an answer in which it argued that — instead of Article 1644 of the Civil Code — the First Instance Court should apply Article 217 of the Judicial Code.<sup>224</sup> The theory underlying this

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<sup>222</sup> See [Ex. 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. 9.

<sup>223</sup> [Ex. C-0205](#), Extracts from the Civil Code of the Republic of Panama, Art. 1644.

<sup>224</sup> See [Ex. R-0045](#), Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008); [Ex. C-0019](#), Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009).

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argument was that if Muresa and Tire Group wished to pursue relief for procedural misconduct, the applicable standard would be the one set out in Article 217,<sup>225</sup> which describes a cause of action for “reckless or bad faith procedural conduct.”<sup>226</sup> In addition, the Bridgestone Litigants also filed a motion to dismiss (the “**Motion to Dismiss**”),<sup>227</sup> jointly arguing that the claims under Article 1644 should be rejected on the bases that (1) the proper avenue for seeking relief was under Article 217, and (2) any claims under that Article would need to be submitted to the same court that had decided the Panamanian Opposition Proceeding.<sup>228</sup>

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<sup>225</sup> See [Ex. R-0045, Answer of Bridgestone Licensing to the Civil Torts Claim \(13 October 2008\)](#), p. 2. (“In order for a plaintiff to be liable for damages and consequences of a proceedings, by express and clear mandate of Article 217, Judicial Code, it is imperative for such plaintiffs to have acted recklessly or in bad faith.”); see also [Ex. C-0019, Answer of Bridgestone Corporation to the Civil Torts Claim \(19 August 2009\)](#), p. 4 (“Our legislation is clear in terms of the possible damages that could be caused as the consequence of legal or litigious proceedings and in this regard it establishes a strict liability, which is found in Article 217 of the Judicial Code”).

<sup>226</sup> See [Ex. R-0138, Judicial Code of the Republic of Panama, Art. 218](#) (“The parties shall be liable for damages caused to another party or to a third party by their reckless or bad faith procedural conduct”).

<sup>227</sup> See [Ex. R-0062, Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing \(19 August 2009\)](#).

<sup>228</sup> See [Ex. R-0062, Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing \(19 August 2009\)](#), p. 3 (“The basis in law, Article 1644 of the Civil Code, in no way bears on the facts set forth in the complaint; the law which does bear on them is article 217 of the Judicial Code, derived from an Industrial Property conflict . . . . In addition to the foregoing, for purposes of procedural economy and in conformity with Article 217 of the Judicial Code, the injuries alleged by the plaintiffs today should have been claimed before the Eighth Commercial Court during the opposition to the application for Registration No. 120823-01 for the RIVERSTONE & DESIGN trademark, which was not done”). The Plaintiffs opposed the Bridgestone Litigants’ Motion to Dismiss. See [Ex.](#)

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58. On 6 December 2010, the First Instance Court rejected the Motion to Dismiss, confirming that the claims by Muresa and Tire Group could, in fact, be asserted under the Article 1644 of the Civil Code. As the Court explained, this was so, among other reasons, because Article 1644 does not impose any limits on the types of behavior that may give rise to liability.<sup>229</sup> The First Instance Court also rejected the Bridgestone Litigants' argument that the complaint should have been filed with the Opposition Proceeding Court.<sup>230</sup>

**(ii) The Parties' Arguments on the Substance**

59. While the debate regarding the above legal questions raged on, the parties also presented arguments on the substance of the claims. For example, even though the Bridgestone Litigants had argued that the claims should be rejected for threshold reasons, they also proceeded to defend themselves against the merits. Thus, in its "answer," Bridgestone Licensing argued that "[its] actions [could not] be considered reckless or in

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**C-0187**, Response of Muresa and Tire Group of Factories to the Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing (14 September 2009).

<sup>229</sup> See **Ex. R-0065**, Decision No. 1859 of the Eleventh Circuit Court (6 December 2010), pp. 2–3.

<sup>230</sup> See **Ex. R-0065**, Decision No. 1859 of the Eleventh Circuit Court (6 December 2010), p. 4.

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bad faith.”<sup>231</sup> For its part, Bridgestone Corporation argued that the “requirements of reckless or bad faith actions . . . are not found to be present in [our] actions.”<sup>232</sup>

60. As the parties debated the substance, two evidentiary questions emerged, which were discussed by the parties at length and now feature in Claimants’ pleadings. The first was about the relevance (*vel non*) of Bridgestone group conduct outside of Panama; the second was about the admissibility of the Demand Letter into evidence.

### **(a) Bridgestone Group Conduct Outside of Panama**

61. As noted, in their complaint, Muresa and Tire Group had alleged that they had suffered injury due to the Bridgestone Litigants’ initiation of the Panamanian Opposition Proceeding.<sup>233</sup> In their pleadings, Claimants latch onto this point, claiming that it necessarily rendered improper any court ruling based on any other

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<sup>231</sup> See [Ex. R-0045](#), Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2.

<sup>232</sup> See [Ex. C-0019](#), Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 5.

<sup>233</sup> See [Ex. 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. 2 (seeking “damages and losses caused to the plaintiff companies due to its opposition to the Registry of the brand RIVESTONE y DISEÑO [sic] that culminated with ruling No. 48 of July 21, 2006”).

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event.<sup>234</sup> But under Article 991 of the Judicial Code — which Claimants themselves repeatedly reference — there are certain instances in which a court may take into account an allegation that had not been advanced in the complaint. As Article 991 of the Judicial Code states: “A judgment must be in accordance with the petitions made in the claim, *or subsequently alleged in cases specifically foreseen . . . if so required by Law.*”<sup>235</sup> A successful *coadyuvante* petition is one such case.<sup>236</sup> Further, as explained below, over the course of the proceeding before the First Instance Court, the Bridgestone Litigants themselves adverted to foreign Bridgestone group actions, and these became the subject of debate before the First Instance Court.

**(I) The Parties’ Arguments on the Bridgestone Group Conduct Outside of Panama**

62. As noted above, the first reference in the Civil Proceeding record to foreign Bridgestone group actions appeared in Bridgestone Licensing’s answer. Specifically, Bridgestone Licensing — which had not been a named party to the U.S. Opposition Proceeding — asserted that it had prevailed in that

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<sup>234</sup> See [Reply](#), ¶ 39(c).

<sup>235</sup> [Ex. R-0138](#), [Judicial Code of the Republic of Panama, Art. 991](#) (emphasis added).

<sup>236</sup> See [Second Lee Report](#), ¶¶ 112–114.

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proceeding,<sup>237</sup> and that that L.V. International had “accepted the [opposition] claims.”<sup>238</sup> According to Bridgestone Licensing, this undermined any claims of recklessness.<sup>239</sup>

63. This assertion opened the floodgates, and as the proceeding went on, Muresa, Tire Group, *and the Bridgestone Litigants* each submitted evidence — documentary, witness, and expert — regarding events outside of Panama. For example, during the “proposal of evidence” phase, the Bridgestone Litigants submitted a list of evidence for admission,<sup>240</sup> which Claimants’ Memorial had omitted to mention,<sup>241</sup> and included the following items:

- a. the record of the U.S. Opposition Proceeding (including L.V. International’s request for registration of the RIVERSTONE mark and the

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<sup>237</sup> Reply, ¶ 69 (“In its submission of 13 October 2008, *BSLS referred to the trademark opposition action it had brought in the United States in order to make the point that it had not acted recklessly* in bringing similar proceedings in Panama, as LV International had not opposed this action in the United States.”) (emphasis added).

<sup>238</sup> See Ex. R-0045, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), pp. 3–4.

<sup>239</sup> Reply, ¶ 69 (“In its submission of 13 October 2008, *BSLS referred to the trademark opposition action it had brought in the United States in order to make the point that it had not acted recklessly* in bringing similar proceedings in Panama, as LV International had not opposed this action in the United States”) (emphasis added).

<sup>240</sup> Ex. R-0121, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing (1 October 2009).

<sup>241</sup> In the Memorial, Claimants had discussed the list of *counter-evidence* that the Bridgestone Litigants had submitted (see Memorial, ¶ 54), but omitted to mention the list of affirmative evidence that the Bridgestone Litigants had proposed.



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USPTO's ruling denying the application on the basis of its withdrawal);<sup>242</sup>

- b. trademark registrations that the Bridgestone Litigants had secured in Austria, Canada, Costa Rica, Japan, the United States, and the United Kingdom;<sup>243</sup> and
- c. invoices from sales of RIVERSTONE-branded tires in Chile, Cuba, the United Arab Emirates, and Venezuela during the time period for which Muresa and Tire Group claimed damages.<sup>244</sup>

The First Instance Court admitted all of the items on the Bridgestone Litigants' list.<sup>245</sup>

64. For their part, Muresa and Tire Group were attempting to develop the narrative that they had been the victims of a global trademark war. Accordingly, they submitted a list of evidence for admission that included the record of the Panamanian

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<sup>242</sup> See [Ex. R-0121, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing \(1 October 2009\)](#), pp. 11–12.

<sup>243</sup> See [Ex. R-0121, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing \(1 October 2009\)](#), pp. 6–9.

<sup>244</sup> See [Ex. R-0121, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing \(1 October 2009\)](#), pp. 15–18.

<sup>245</sup> [Ex. R-0120, Decision No. 108-10 of the Eleventh Circuit Court on the Admissibility of Evidence Submitted By Bridgestone Corporation and Bridgestone Licensing \(26 January 2010\)](#).

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Opposition Proceeding.<sup>246</sup> (*nb*: The documents often describe this as “Report No. 1.”)<sup>247</sup> As explained above, such record in turn included various documents and discussions of foreign events — *e.g.*, the record of the U.S. Opposition Proceeding and the Bridgestone Litigants’ foreign trademark registrations. The Bridgestone Litigants did not object to the admission of Report No. 1, and it subsequently was admitted into evidence by the First Instance Court.<sup>248</sup>

65. The Bridgestone group’s conduct outside of Panama was also the subject of witness testimony. For example, during oral examination, Muresa and Tire Group asked the manager of the importing department within Muresa to “state if she knows whether in addition to the challenge that occurred in Panama, where there also challenges in other countries? [And] [i]f this is the case, please state the countries if you know.”<sup>249</sup> The Bridgestone

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<sup>246</sup> See [Ex. C-0189, List of evidence submitted by Muresa and Tire Group \(28 September 2009\)](#), p. 5 (“B. REPORT . . . 1. That Note to the Court Eighth of Circuit of the First Judicial Circuit of Panama is celebrated, civil branch, so that i sent properly authenticated copy of the process [initiated] by societies Bridgestone Corporation and Bridgestone Licensing Services Inc. against Muresa intertrade, S.A.”).

<sup>247</sup> See [Ex. C-0189, List of evidence submitted by Muresa and Tire Group \(28 September 2009\)](#), p. 5 (“B. REPORT . . . 1. That Note to the Court Eighth of Circuit of the First judicial Circuit of Panama is celebrated, civil branch, so that i sent properly authenticated copy of the process [initiated] by societies Bridgestone Corporation and Bridgestone Licensing Services Inc. against Muresa intertrade, S.A.”).

<sup>248</sup> See [Ex. R-0063, Decision No. 107-10 of the Eleventh Court on admissibility of the evidence submitted by Muresa and Tire Group \(26 January 2010\)](#), p. 1.

<sup>249</sup> See [Ex. C-0155, Testimony by Gricelda Pineda Castillo dated 22 April 2010](#), p. 3.

Litigants did not object to this question.<sup>250</sup> Accordingly, the witness responded, and observed that the RIVERSTONE Trademark had been challenged by Bridgestone entities in the United States, China, Dominican Republic, Haiti, Colombia, Venezuela, Nicaragua, Costa Rica, and Honduras.<sup>251</sup>

66. In some instances, the Bridgestone Litigants objected to certain questions posed by Muresa and Tire Group about trademark opposition proceedings in other countries. In those instances, the Bridgestone Litigants' objections were heard and decided by the First Instance Court, which sustained some objections,<sup>252</sup> but overruled others.<sup>253</sup> For example, the First Instance Court overruled the Bridgestone Litigants' objection that evidence related to opposition actions outside of Panama was irrelevant.<sup>254</sup> In other words, even the First Instance Court —

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<sup>250</sup> See [Ex. C-0155](#), Testimony by Gricelda Pineda Castillo dated 22 April 2010, p. 3.

<sup>251</sup> See [Ex. C-0155](#), Testimony by Gricelda Pineda Castillo dated 22 April 2010, p. 3.

<sup>252</sup> See [Ex. C-0158](#), Testimony by Mirna Raquel Moreira Martinez dated 3 May 2010, pp. 2–3 (sustaining an objection to a question related to opposition proceedings in other countries).

<sup>253</sup> See e.g. [Ex. C-0159](#), Testimony by Laura Esther Murgas de Bracho dated 5 May 2010, pp. 2–3; see also [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), pp. 1–2.

<sup>254</sup> See e.g. [Ex. C-0159](#), Testimony by Laura Esther Murgas de Bracho dated 5 May 2010, pp. 2–3 (overruling an objection based on relevance to a question related to opposition proceedings in other countries); see also [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), pp. 1–2 (overruling an objection that “[t]he information relating to objection proceedings in the United States is irrelevant and immaterial to the proceedings for damages and losses caused by the objection to a registration in Panama”).

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whose conduct has not drawn any challenge by Claimants herein — admitted evidence of the Bridgestone group’s legal actions outside of Panama.

67. By the time that witness testimony concluded on 14 May 2010,<sup>255</sup> both sides had adduced evidence of the Bridgestone group’s actions abroad. The Bridgestone Litigants had adduced such evidence in an effort to demonstrate that they had not acted recklessly, and Muresa and Tire Group — for their part — had adduced the evidence to try to establish the contrary. Nevertheless, the bounds of the claim technically remained limited to the Panamanian Opposition Proceeding. This framework changed with the request for and eventual admission of L.V. International as a *coadyuvante*.

## (II) L.V. International’s *Coadyuvante* Petition

68. On 11 May 2010 and 3 June 2010, respectively, L.V. International filed an initial and corrected petition to intervene in the Civil Proceeding as a third-party *coadyuvante* (“***Coadyuvante* Petition**”).<sup>256</sup> As explained above, under

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<sup>255</sup> [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2).

<sup>256</sup> See [Ex. C-0018](#), L.V. International Third-Party Coadyuvante Petition (11 May 2010); [Ex. R-0126](#), Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010)

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Panamanian law, *coadyuvantes* are third parties who are granted permission by a court to intervene in a litigation to assist one of the parties. To give effect to this right, Article 603 of the Panamanian Judicial Code confers certain procedural powers upon *coadyuvantes*. For example, a *coadyuvante* has the ability “perform the procedural acts allowed to the party that he or she wants to help”<sup>257</sup> — e.g., advancing claims against the adverse party<sup>258</sup> — “as long as such acts are not in opposition to those of the aforementioned party.”<sup>259</sup> To ensure that claims raised by *coadyuvantes* are not ignored, Article 603 requires courts to “consider the petitions that the intervener made . . . if the judge considers the intervention appropriate.”<sup>260</sup>

69. In the Civil Proceeding, L.V. International exercised its procedural right to expand the factual scope of the complaint. For example, it asserted that the group of sister companies — *i.e.*, L.V. International, Muresa, and Tire Group — had all been damaged by the Bridgestone group’s opposition actions abroad:

Like the Plaintiffs, L.V. INTERNATIONAL, INC. **has been affected**, like the Plaintiffs, by the action opposing the registration of the

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<sup>257</sup> [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 603.

<sup>258</sup> [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 464 (permitting persons to “enforce any right or claim” in court).

<sup>259</sup> [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 603.

<sup>260</sup> [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 603.

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**RIVERSTONE Y DISEÑO trademark in the Republic of Panama and worldwide**, filed by the Defendants, which ended in Panama with Judgment No. 48 of July 21, 2006.<sup>261</sup>

In addition, L.V. International also expanded the factual basis of the complaint by asserting that the Bridgestone group had made threats, including the Demand Letter, “against the whole group of related companies, that is, **MURESA INTERTRADE. S.A., TIRE GROUP OF FACTORIES LTD, INC, and L.V. INTERNATIONAL INC.**”<sup>262</sup>

70. At the time, the first instance proceeding was nearing its end, and on 5 May 2011 — after ruling on the merits — the First Instance Court denied the *Coadyuvante* Petition on the basis that it had been untimely.<sup>263</sup> However, this ruling was later overturned on appeal, in a decision by the First Superior Court (the “**Appellate Court**”)<sup>264</sup> which explained that *coadyuvante* petitions even could be submitted during an appeal.<sup>265</sup> Accordingly, the

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<sup>261</sup> [Ex. R-0126](#), Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010) (emphasis in original).

<sup>262</sup> [Ex. R-0126](#), Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010).

<sup>263</sup> See [Ex. R-0104](#), Judgment No. 629, Eleventh Civil Circuit Court (5 May 2011), pp. 1–2.

<sup>264</sup> See generally [Ex. R-0101](#), Excerpt of Decision on L.V. International Inc.'s Third-Party Coadyuvante Petition, First Superior Court (19 June 2012).

<sup>265</sup> [Ex. R-0101](#), Excerpt of Decision on L.V. International Inc.'s Third-Party Coadyuvante Petition, First Superior Court (19 June 2012), p. 1.

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*Coadyuvante* Petition and the evidence appended thereto became a part of the record in the Civil Proceeding.<sup>266</sup>

71. In the meantime, Muresa, Tire Group, and the Bridgestone Litigants presented their closing arguments, and in that context continued to make arguments about Bridgestone group conduct abroad. For example, Muresa and Tire Group argued that the Bridgestone group had “made a series of threats which culminated in a formal note in November 2004 [*i.e.*, the Demand Letter], which clearly expressed opposition both to the registration, use and sale of the RIVERSTONE brand in the United States, in all of Latin America and in any part of the world.”<sup>267</sup> According to Muresa and Tire Group, the Panamanian Opposition Proceeding had been part of a broader pattern of behavior that reflected “a deliberate attempt to commercially harm [Muresa and Tire Group] . . . .”<sup>268</sup>

72. In response, the Bridgestone Litigants asserted three arguments. The *first* was that, because the original complaint had been about the Panamanian Opposition Proceeding (only), the First Instance Court could not consider Bridgestone group actions

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<sup>266</sup> See [Second Lee Report](#), ¶¶ 37–44.

<sup>267</sup> [Ex. C-0164](#), Closing arguments of Muresa and Tire Group (4 June 2010), p. 3.

<sup>268</sup> See generally [Ex. C-0164](#), Closing arguments of Muresa and Tire Group (4 June 2010), p. 8.

abroad.<sup>269</sup> In support of this argument, the Bridgestone Litigants cited the “principle of consistency,” which as Mr. Lee explains, is a principle of civil law that requires judicial decisions to be “consistent” with the scope of the complaint (in the sense of addressing only — but every — cause of action alleged in the complaint).<sup>270</sup> In Panama, the principle of consistency is enshrined in Article 991, which as noted above, provides: “A judgment must be in accordance with the petitions made in the claim, or subsequently alleged in cases specifically foreseen . . . if so required by Law.”<sup>271</sup>

73. The *second* argument was that a finding of recklessness was precluded by virtue of the statement in the costs section of the Opposition Court Decision to the effect that the Bridgestone Litigants had acted in good faith; the Bridgestone Litigants argued that this ruling was *res judicata*.<sup>272</sup> The *third* argument was that, in any event, the evidence was not sufficient to establish a pattern of misconduct. According to the Bridgestone Litigants, the documents pertaining to the U.S. Opposition Proceeding were the only evidence in the record of foreign

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<sup>269</sup> See [Ex. C-0200](#), Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), p. 19.

<sup>270</sup> See [First Lee Report](#), ¶ 138.

<sup>271</sup> [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 991.

<sup>272</sup> See [Ex. C-0200](#), Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), p. 25.



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opposition actions.<sup>273</sup> As noted, however, the First Instance Court had also heard witness testimony on the existence of opposition proceedings elsewhere.

### (b) The Admission And Relevance of the Demand Letter

74. As mentioned further above, as the parties debated the merits during the first instance proceeding, two side issues arose which are relevant for the Tribunal’s purposes. The first, discussed above, was the relevance (*vel non*) of the Bridgestone group’s conduct abroad. The second, summarized below, pertained to the admissibility (*vel non*) of the Demand Letter.

75. In their Reply, Claimants contend that such Letter “was produced *only* as an attachment to the report of Muresa’s quantum expert”<sup>274</sup> and was not properly admitted — and that, “[t]herefore, BSLs and BSJ had no opportunity to respond to and deal with [such] Letter.”<sup>275</sup> However, the reality, as discussed below, is that the Demand Letter was *also* submitted as evidence on other occasions, and admitted by the First Instance Court. (This is

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<sup>273</sup> See [Ex. C-0200, Closing arguments of Bridgestone Corporation and Bridgestone Licensing \(11 June 2010\)](#), p. 7 (“[N]ot a single documented piece of evidence appears in the file which demonstrates that there were oppositions to the registration of the RIVERSTONE brand by the respondents in any other country, except the United States of America”).

<sup>274</sup> Reply, ¶ 2(b) (emphasis added).

<sup>275</sup> Reply, ¶ 2(b).

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important, given that Claimants have not asserted a single claim of impropriety by that Court.) Specifically, the Demand Letter also was appended as an exhibit to the report submitted by the court-appointed accounting expert,<sup>276</sup> and was submitted with L.V. International's *Coadyuvante* Petition.<sup>277</sup> On both occasions, the Demand Letter was admitted into evidence. Further, a review of the procedural history confirms that the Bridgestone Litigants had ample opportunity to discuss the Demand Letter.

### (I) The Admission of the Demand Letter Via The Expert Reports

76. During the “submission of evidence” phase, the parties presented expert testimony on the issue of damages, and the First Instance Court appointed an expert to do the same.<sup>278</sup> The Demand Letter was submitted as evidence in this context.

77. By way of background, in their complaint, Muresa and Tire Group had asserted a claim pursuant to Article 1644 of the

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<sup>276</sup> See **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010); see also **Ex. R-0111**, Demand Letter Included as an Exhibit with Tribunal Appointed Expert Exhibits (dated submitted 24 May 2010).

<sup>277</sup> See **Ex. R-0126**, Corrected L.V. International Inc. Third-Party *Coadyuvante* Petition (3 June 2010); see also **Ex. R-0110**, Demand Letter Included as an Exhibit with L.V. International's Third-Party *Coadyuvante* Petition (date submitted 11 May 2010).

<sup>278</sup> See generally **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010); **Ex. C-0020**, Accounting Expert Report of Manuel Ochoa (24 May 2010).

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Civil Code, seeking USD 5 million in damages.<sup>279</sup> To prove causation and damages, during the “proposal of evidence” phase, Muresa and Tire Group requested that the First Instance Court admit expert evidence.<sup>280</sup> The First Instance Court agreed,<sup>281</sup> and also appointed its own expert. The Bridgestone Litigants likewise received permission to adduce expert testimony.<sup>282</sup> The experts began their work during the “submission of evidence” phase, which took place between 21 April 2010 and 27 May 2010. All of the experts submitted reports on 24 May 2010, and gave oral testimony (and sat for questioning) over the next three days.<sup>283</sup> As Claimants observe, the Demand Letter appeared “as an attachment to the

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<sup>279</sup> See **Ex. 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. 2.

<sup>280</sup> See generally **Ex. R-0122**, Excerpt of List of Evidence Submitted by Muresa and Tire Group (28 September 2009).

<sup>281</sup> See generally **Ex. R-0106**, Excerpt of Decision No. 107-10 of the Eleventh Court on Admissibility of the Evidence Submitted by Muresa and Tire Group (26 January 2010).

<sup>282</sup> See e.g., **Ex. C-0020**, Accounting Expert Report of Manuel Ochoa (24 May 2010).

<sup>283</sup> **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010); **Ex. C-0020**, Accounting Expert Report of Manuel Ochoa (24 May 2010); **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010); **Ex. C-0195**, Interrogatory of Manuel Ochoa Sanchez (25 May 2010); **Ex C-0199** Interrogatory of Vera Luisa Lindo de Gutierrez (26 May 2010); **Ex. C-0197**, Continuation of Interrogatory of BJS Expert Vera Luisa Lindo de Gutierrez (26 May 2010).

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report of Muresa’s quantum expert.”<sup>284</sup> In addition, the Letter was appended to the report of the court-appointed expert.<sup>285</sup>

78. During the proposal of evidence phase, Muresa and Tire Group had requested permission to present expert evidence regarding the damages that they claimed to have suffered.<sup>286</sup> The First Instance Court approved this request, asking the experts to test the plaintiffs’ allegations of injury by examining their accounting books, financial records, income statement, and other documents.<sup>287</sup> When undertaking this task, the experts who had been appointed by Muresa and Tire Group concluded that the Demand Letter was relevant,<sup>288</sup> and attached the Letter to their expert report (the “**Muresa/TG Expert Report**”). For her part, the

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<sup>284</sup> Reply, ¶ 2(b).

<sup>285</sup> See **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010); see also **Ex. R-0111**, Demand Letter Included as an Exhibit with Tribunal Appointed Expert Exhibits (dated submitted 24 May 2010).

<sup>286</sup> See **Ex. R-0122**, Excerpt of List of Evidence Submitted by Muresa and Tire Group (28 September 2009), pp. 1–4.

<sup>287</sup> See **Ex. R-0106**, Excerpt of Decision No. 107-10 of the Eleventh Court on Admissibility of the Evidence Submitted by Muresa and Tire Group (26 January 2010) p. 2.

<sup>288</sup> **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 2 (“The sales scheduled by the company Muresa Intertrade, S.A. did not occur because the Factory Brand RIVERSTONE, primary product sold by the company Muresa Intertrade, S.A. was subject to a complaint opposing the registry application 120823-01 of the Brand RIVERSTONE Y DISEÑO filed by Bridgestone Corp. and Bridgestone Licensing Services, Inc. [sic], filed April 5, 2005. 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.”).

court-appointed expert appended the Demand Letter to her report because, during the course of her interviews with Muresa employees, Muresa's sales manager had cited the Demand Letter as the basis for Muresa's fear of selling RIVERSTONE tires.<sup>289</sup> The Demand Letter was admitted into the record with both expert reports.<sup>290</sup>

79. Following the submission of the expert reports, the experts testified orally in a session during which the parties could pose questions. During that session, the Demand Letter was discussed. For example, in response to a question from Muresa and Tire Group about the reason behind their failure to meet projected sales, the court-appointed expert mentioned that Muresa's sales manager had identified the Demand Letter as the basis for Muresa's

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<sup>289</sup> See [Ex. C-0196, Interrogatory of Vera Luisa Lindo de Gutierrez \(25 May 2010\)](#), p. 7 ("I insisted and I asked them to provide us with some documentation from that time which stated that they could not sell those tires or that they were afraid of selling them, I also asked him for a document or letter that referred to the reduction of production or something similar and the only thing that we were provided with was the letter that I included in my report and which I already explained").

<sup>290</sup> [Ex. R-0111, Demand Letter Included as an Exhibit with Tribunal Appointed Expert Exhibits \(dated submitted 24 May 2010\)](#); [Ex. C-0196, Interrogatory of Vera Luisa Lindo de Gutierrez \(25 May 2010\)](#), p. 7 ("I insisted and I asked them to provide us with some documentation from that time which stated that they could not sell those tires or that they were afraid of selling them, I also asked him for a document or letter that referred to the reduction of production or something similar and the only thing that we were provided with was the letter that I included in my report and which I already explained"). Additionally, the Demand Letter was deemed submitted by operation of law when the First Instance Court did not sustain the Bridgestone Litigants' objections to the Demand Letter's admission. See [Second Lee Report](#), ¶ 66.

[REDACTED]

fear of selling RIVERSTONE-branded tires.<sup>291</sup> In addition, the Bridgestone Litigants also asked the plaintiffs' experts about the reliability of the Demand Letter — *e.g.*, inquiring as to the accuracy of the translation on into Spanish.<sup>292</sup> During the exchange, the Bridgestone Litigants advanced certain arguments that Claimants now repurpose as TPA claims (*e.g.*, that the Letter had been sent in the United States, was a copy, and had not been authenticated in the Civil Proceeding by the attorney who had signed it).<sup>293</sup>

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<sup>291</sup> See [Ex. C-0196, Interrogatory of Vera Luisa Lindo de Gutierrez \(25 May 2010\)](#), p. 7 (“I insisted and I asked them to provide us with some documentation from that time which stated that they could not sell those tires or that they were afraid of selling them, I also asked him for a document or letter that referred to the reduction of production or something similar and the only thing that we were provided with was the letter that I included in my report and which I already explained”).

<sup>292</sup> See *e.g.*, [Ex. C-0199, Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon \(27 May 2010\)](#), p. 2 (“Will the experts state how reliable or accurate in accounting terms for your expert report is the translation from English to Spanish of the copy of the letter from the FOLEY legal firm which is a translation that is not acknowledged by its signatory nor has the basis of the translation been acknowledged?”).

<sup>293</sup> See [Ex. C-0198, Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon \(26 May 2010\)](#), p. 11 (“Will the experts state how reliable or accurate in accounting terms for your expert report is the copy of a letter from the year 2004 from the Foley and Lardner legal firm from November 3rd of 2004 referred to by you throughout your report, a letter that lacks signature and basis, that is a document that has not been legalized as it comes from abroad, that has not been recognized by the signatory, that is a judgment of an attorney and that this is a copy of the letter has only been compared with another copy by a notary in 2010, is a reliable and accurate basis in order for you to conclude that this letter is the cause of damages suffered by Muresa Intertrade and Tire Group Of Factories Ltd., Inc.?”).

[REDACTED]

[REDACTED]

(II) **The Admission of the Demand Letter  
Via L.V. International’s *Coadyuvante*  
Petition**

80. As noted above, on 3 June 2010, L.V. International filed its (corrected) *Coadyuvante* Petition. As contemplated in Article 603 of the Judicial Code,<sup>294</sup> this Petition was accompanied by documentary evidence — including the Demand Letter.<sup>295</sup> The First Instance Court took approximately one year to rule upon the Petition, eventually denying it on 5 May 2011.<sup>296</sup> L.V. International then appealed.<sup>297</sup>

81. The Bridgestone Litigants filed an opposition to the appeal, requesting that the appeal be rejected and that the Petition — and every item of evidence submitted therewith — be excluded from the record of the Civil Proceeding.<sup>298</sup> In their submission, the Bridgestone Litigants mentioned the Demand Letter specifically,

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<sup>294</sup> [Ex. R-0138](#), [Judicial Code of the Republic of Panama, Art. 603](#) (“The request for intervention must contain the facts and the legal grounds on which it is based, and the relevant evidence will be attached to it”).

<sup>295</sup> See [Ex. R-0126](#), [Corrected L.V. International Inc. Third-Party \*Coadyuvante\* Petition \(3 June 2010\)](#), pp. 3, 6; see also [Ex. R-0110](#), [Demand Letter Included as an Exhibit with L.V. International’s Third-Party \*Coadyuvante\* Petition \(date submitted 11 May 2010\)](#).

<sup>296</sup> See generally, [Ex. R-0104](#), [Judgment No. 629, Eleventh Civil Circuit Court \(5 May 2011\)](#).

<sup>297</sup> See generally, [Ex. R-0105](#), [L.V. International Appeal of Judgment No. 629 \(26 May 2011\)](#).

<sup>298</sup> See [Ex. R-0103](#), [BSJ and BSLs Opposition to L.V. International Appeal of Judgment No. 629 \(2 June 2011\)](#), p. 1 (“[W]e object to the form and substance of each piece of evidence submitted with the third-party assistant application”).

[REDACTED]

[REDACTED]

and advanced various arguments as to why the document should be excluded. (As the table below illustrates, Claimants advance the exact same arguments in their pleadings, framing them as bases for finding that a denial of justice occurred.) Yet the Appellate Court rejected the Bridgestone Litigants' arguments and overturned the lower court ruling that had denied the *Coadyuvante* Petition.<sup>299</sup> In its decision, the Appellate Court affirmed that the Demand Letter was relevant to the *Coadyuvante* Petition.<sup>300</sup>

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<sup>299</sup> See generally, [Ex. R-0101](#), Decision on L.V. International's Third-Party *Coadyuvante* Petition, First Superior Court of the Judicial District (19 June 2012).

<sup>300</sup> See generally, [Ex. R-0101](#), Decision on L.V. International's Third-Party *Coadyuvante* Petition, First Superior Court of the Judicial District (19 June 2012), p. 11 (“[T]he request for intervention includes the factual and legal grounds on which it is based *and is accompanied by the relevant evidence*”) (emphasis added).

[REDACTED]



**Table 1: Claimants’ Appeal of the Bridgestone Litigants’ Unsuccessful Arguments**

The Bridgestone Litigants’ Arguments To The Appellate Court	Claimants’ Arguments To The Tribunal
The Demand Letter does “not refer to any of the parties to this proceeding, so [it is] not related to this proceeding and [is], therefore, irrelevant.” <sup>301</sup>	The Demand Letter “was sent by and addressed to parties not involved in the Panamanian proceedings, and relating to a proceeding in the United States which is not relevant to the proceedings in Panama.” <sup>302</sup>
The Demand Letter does not meet the “requirements established by our Judicial Code in articles 856 and 857 for a private document to be considered authentic . . . [and] directly violate[s] Article 871 of the Judicial Code.” <sup>303</sup>	The Demand Letter violates Articles “856, 857, 871 . . . of the Panamanian Judicial Code.” <sup>304</sup>

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<sup>301</sup> Ex. R-0103, Excerpt of Bridgestone Corporation and Bridgestone Licensing Services, Inc.’s Opposition to L.V. International Inc.’s Appeal of Judgment No. 629 (2 June 2011), p. 2.

<sup>302</sup> Memorial, ¶ 193.

<sup>303</sup> Ex. R-0103, Excerpt of Bridgestone Corporation and Bridgestone Licensing Services, Inc.’s Opposition to L.V. International Inc.’s Appeal of Judgment No. 629 (2 June 2011), p. 2.

<sup>304</sup> Reply, ¶ 39(b).

The Bridgestone Litigants' Arguments To The Appellate Court	Claimants' Arguments To The Tribunal
The Demand Letter "directly violate[s] articles 877 and 878 of the Judicial Code." <sup>305</sup>	The Demand Letter violates Articles "877 and 878 of the Panamanian Judicial Code." <sup>306</sup>
The Demand Letter, "by not having been submitted during the evidentiary period, [has] not been subject to [contradiction] and, consequently, violate[s] our clients' right to defend themselves." <sup>307</sup>	The admission of the Demand Letter "violated BSLS and BSJ's right to due process because they were not able to respond to the evidence against them on an equal level." <sup>308</sup>

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<sup>305</sup> Ex. R-0103, Excerpt of Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to L.V. International Inc.'s Appeal of Judgment No. 629 (2 June 2011), p. 3.

<sup>306</sup> Reply, ¶ 39(b).

<sup>307</sup> Ex. R-0103, Excerpt of Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to L.V. International Inc.'s Appeal of Judgment No. 629 (2 June 2011), p. 3.

<sup>308</sup> Reply, ¶ 39(b).

The Bridgestone Litigants' Arguments To The Appellate Court	Claimants' Arguments To The Tribunal
The Demand Letter is "addressed to an American lawyer by another North American lawyer and [is] related to a proceeding in the United States of America, so [is] irrelevant in this proceeding." <sup>309</sup>	The Demand Letter "the letter was not sent by or on behalf of BSLs or BSJ (but rather was sent by lawyers acting for two U.S. Bridgestone entities), (b) was not sent to Muresa, (c) was sent and received in the U.S., (d) related only to U.S. court proceedings." <sup>310</sup>

82. The Bridgestone Litigants chose not to file a cassation recourse against the Appellate Court's decision. Accordingly, the First Instance Court recognized L.V. International as a *coadyuvante* and placed the *Coadyuvante* Petition and supporting documentation on the record in the Civil Proceeding, thereby officially admitting the Demand Letter as evidence.<sup>311</sup>

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<sup>309</sup> Ex. R-0103, Excerpt of Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to L.V. International Inc.'s Appeal of Judgment No. 629 (2 June 2011), p. 3.

<sup>310</sup> Memorial, ¶ 3.

<sup>311</sup> See Ex. R-0102, Edict No. 1230, Eleventh Civil Circuit Court (26 July 2012).

[REDACTED]

(III) **Witness Testimony Concerning the Demand Letter**

83. The first instance proceeding also featured witness testimony in connection with the Demand Letter. For example, when the manager of L.V. International (Mr. Jorge Luque) appeared for oral testimony, Muresa and Tire Group posed a question about the Letter.<sup>312</sup> Specifically, they asked Mr. Luque whether he had advised Muresa’s legal representative of the U.S. Opposition Proceeding. The Bridgestone Litigants objected to the question on relevance grounds,<sup>313</sup> but the First Instance Court overruled the objection.<sup>314</sup> Mr. Luque then responded by confirming that he had informed various Muresa employees of the U.S. Opposition Proceeding as well as “the letter that [L.V. International’s counsel] 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

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<sup>312</sup> See [Ex. C-0147, Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 \(part 2\), p. 1](#) (“Will the witness state if you informed Ms. LUCINDA BATISTA DE LUQUE the legal representative of MURESA INTERTRADE of the objection that had been made to the RIVERSTONE brand in the United States of North America?”).

<sup>313</sup> See [Ex. C-0147, Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 \(part 2\), pp. 1–2](#).

<sup>314</sup> See [Ex. C-0147, Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 \(part 2\), p. 2](#) (“The Objection presented by the legal representative of the defendants is dismissed and the witness is asked to answer the question”).

[REDACTED]

[REDACTED]

in any part of the world[.]”<sup>315</sup> The Bridgestone Litigants did not object to subsequent questions about the Demand Letter.<sup>316</sup>

84. In fact, the Bridgestone Litigants even proceeded to pose a series of questions to Mr. Luque about the Demand Letter, including the following:

- a. “Will the witness state in relation to the threat that you claim you received in the United States, why did you continue to register RIVERSTONE brands in various countries of the world?”<sup>317</sup>
- b. “Will the witness state, if the letter that you refer to was directed to Muresa Intertrade or to Tire Group of Factories?”<sup>318</sup>
- c. “Will the witness state, in relation to what you have indicated about the danger of a possible seizure,

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<sup>315</sup> [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), p. 2.

<sup>316</sup> *See generally*, [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), p. 5.

<sup>317</sup> [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), p. 5.

<sup>318</sup> *See* [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), p. 5.

[REDACTED]

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is this an express warning in the referred to document or is that your own conclusion?”<sup>319</sup>

There accordingly can be no question that the Bridgestone Litigants had the right to be heard as to the probative value and relevance of the Demand Letter.

#### **(IV) The Parties’ Debate Regarding the Demand Letter During Closing Arguments**

85. The parties also discussed the Demand Letter during their respective closing arguments, which — as noted above — consisted of written pleadings that the parties filed sequentially. For their part, Muresa and Tire Group continued to assert that the Demand Letter served as evidence of “the malicious acts of intimidation and threats” against them.<sup>320</sup> In response, the Bridgestone Litigants alleged that the inclusion of the Demand Letter in the expert report of Muresa’s and Tire Group’s accounting experts somehow demonstrated Muresa and Tire Group’s “bad faith and recklessness” during the Civil Proceeding.<sup>321</sup> The

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<sup>319</sup> See [Ex. C-0147](#), Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2), pp. 5–6.

<sup>320</sup> See [Ex. C-0164](#), Concluding Remarks Filed by Muresa Intertrade S.A in Civil Action (4 June 2010), p. 4 (emphasis added).

<sup>321</sup> See [Ex. C-0200](#), Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), pp. 35, 34 (identifying as proof of bad faith and recklessness the “[i]nclusion in the evidence filing stage by the claimant of private documents flawed in form and content in the expert reports of the accounting experts for the claimant”).

[REDACTED]

[REDACTED]

Bridgestone Litigants further objected to the Demand Letter on the alleged basis that Letter was irrelevant, incorrectly translated, admitted in violation of Articles 871, 877, and 878 of the Judicial Code, and submitted extemporaneously.<sup>322</sup> Nevertheless, the Bridgestone Litigants never objected to the admission of the Demand Letter as an exhibit to the court-appointed expert's report.

**(iii) The Parties' Arguments on Damages**

86. Finally, for the sake of completeness, it bears noting that, in the proceeding before the First Instance Court, Muresa, Tire Group, and the Bridgestone Litigants also presented arguments, documentary, witness and expert evidence on the subject of damages.

87. In their pleadings, Claimants now challenge the Supreme Court Judgment on the alleged basis that the Supreme Court "did not base its determination of the damages on any evidence or assessment whatsoever."<sup>323</sup> But as Claimants must be aware, Muresa, Tire Group, and the Bridgestone Litigants submitted considerable documentary and expert evidence on the subject of damages during the proceeding before the First Instance Court. Thus, by the time that the Civil Proceeding reached the

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<sup>322</sup> See **Ex. C-0200**, Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), pp. 12–15, 19–21.

<sup>323</sup> See **Reply**, ¶ 39(e).

[REDACTED]

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Supreme Court, there was substantial evidence in the record that could support a conclusion that that Muresa and Tire Group had suffered a sizable amount of damages — including expert reports from Muresa and Tire Group’s experts and the court-appointed expert, both of which showed decreases in sales for RIVERSTONE tires.<sup>324</sup>

88. In their complaint, Muresa and Tire Group had asked that the First Instance Court order the Bridgestone Litigants to pay USD 5 million in damages (plus attorney’s fees and expenses) as compensation for the injury that they had suffered as a result of the Bridgestone Litigants’ conduct.<sup>325</sup> Then, throughout the proceeding, Muresa and Tire Group submitted evidence in support of their claim, including (1) affidavits by Ms. Mirna Moreira, a certified public accountant, which demonstrated that actual sales of RIVERSTONE tires were lower than projected sales

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<sup>324</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 4, 7; see also **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010), pp. 6, 12.

<sup>325</sup> See **Ex. 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), pp. 2, 7.

[REDACTED]



[REDACTED]

from 2005 through 2008;<sup>326</sup> and (2) copies of Muresa's and Tire Group's tax returns for fiscal years 2005 through 2008.<sup>327</sup>

89. Muresa and Tire Group also appointed two certified public accountants to serve as accounting experts (*i.e.*, the authors of the Muresa/TG Expert Report).<sup>328</sup> Those experts were asked to review "accounting books, documents, accounting records, financial statements, income statements, and other documents relevant to the case,"<sup>329</sup> and analyze ten issues, including (1) the decrease in sales from 2005 through 2008; (2) the reduction or restriction of RIVERSTONE-branded tire imports into the Colon Free Trade Zone; (3) the cause of decreased sales of RIVERSTONE-branded tires to countries in Central and South America; and (4) the quantum of Muresa's and Tire Group's damages.<sup>330</sup>

90. Based on the evidence, these experts determined that Muresa and Tire Group had not met their sales projections, because

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<sup>326</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), pp. 1–5.

<sup>327</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), pp. 5–6.

<sup>328</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), p. 20.

<sup>329</sup> **Ex. R-0122**, Excerpt of List of Evidence Submitted by Muresa and Tire Group (28 September 2009), p. 1.

<sup>330</sup> See **Ex. R-0122**, Excerpt of List of Evidence Submitted by Muresa and Tire Group (28 September 2009), pp. 2–4.

[REDACTED]

their main product, RIVERSTONE-branded tires, had been the subject of the Panamanian Opposition Proceeding and the Demand Letter.<sup>331</sup> As to quantum, the experts determined that the decrease in sales had caused damages in the amount of USD 3,351,731.15 to Muresa and USD 2,424,062.69 to Tire Group.<sup>332</sup> Thus, the experts concluded that Muresa and Tire Group had suffered a combined total of USD 5,775,793.84 in damages.

91. The court-appointed expert stated that she could not determine the cause of the decrease in RIVERSTONE tire sales or confirm the accuracy of Muresa and Tire Group's sales projections.<sup>333</sup> However, she was generally able to determine the figures of actual sales of RIVERSTONE tires on a yearly basis. As can be seen in the following tables, the court-appointed expert either (1) agreed with the figures of the plaintiffs' experts, or (2) concluded that actual RIVERSTONE tire sales had been *lower*:

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<sup>331</sup> **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 1, 2, 4.

<sup>332</sup> **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 4, 7.

<sup>333</sup> *See generally* **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010).

**Table 2: Yearly Sales of RIVERSTONE Tires for Muresa (USD)**

Year	Muresa/TG Experts <sup>334</sup>	Court-Appointed Expert <sup>335</sup>
2005	5,364,132.54	5,364,132.54
2006	3,971,353.40	3,971,353.40
2007	4,717,299.89	4,717,299.89
2008	4,563,294.20	3,777,637.53

**Table 3: Yearly Sales of RIVERSTONE Tires for Tire Group (USD)**

Year	Muresa/TG Experts <sup>336</sup>	Court-Appointed Expert <sup>337</sup>
2005	3,031,663.71	No Determination
2006	1,762,683.16	No Determination
2007	2,785,416.37	2,699,851.19
2008	2,122,828.91	2,053,195.70

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<sup>334</sup> See Ex. C-0162, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 4.

<sup>335</sup> See Ex. C-0163, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010), p. 6.

<sup>336</sup> See Ex. C-0162, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 7.

<sup>337</sup> See Ex. C-0163, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010), p. 12.

92. Muresa and Tire Group also submitted witness testimony that corroborated the injury claimed. For example, Mr. Fernan Luque, manager of Muresa, testified that sales of RIVERSTONE-branded tires had decreased dramatically after the Bridgestone Litigants had initiated the Panamanian Opposition Proceeding.<sup>338</sup>

93. Importantly, the Bridgestone Litigants had an opportunity to respond to these submissions,<sup>339</sup> including by offering their own documentary evidence on projected and actual sales by Muresa and Tire Group.<sup>340</sup> The Bridgestone Litigants also cross-examined the plaintiffs' experts on the subject of damages<sup>341</sup> and again addressed the subject of damages in their closing arguments.<sup>342</sup>

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<sup>338</sup> [Ex. C-0161, Testimony by Fernan Jesus Luque Gonzalez - part 2 \(27 April 2010\)](#), p. 4 (“The sales were at cost or at 50% of cost of the product that we were selling because of its low quality, in attempting to replace the RIVERSTONE brand. Muresa and Tire Group were deprived from receiving approximately B/. 350,000.00 to B/. 400,000.00 per month during 2005-2006. In 2007 we reactivated the brand but up to the present we have not been able to reach the projections established for it before the registration challenge”).

<sup>339</sup> See, e.g., [Ex.-0121, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing \(1 October 2009\)](#); [Ex. C-0191, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing \(6 October 2009\)](#).

<sup>340</sup> See [Ex. C-0191, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing \(6 October 2009\)](#) pp. 2–3; [Ex.-0121, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing \(1 October 2009\)](#), pp. 15–18.

<sup>341</sup> See [Ex. C-0198, Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon \(26 May 2010\)](#); see also, [Ex. C-0199, Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon \(27 May 2010\)](#).

<sup>342</sup> See [Ex. C-0200, Closing arguments of Bridgestone Corporation and Bridgestone Licensing \(11 June 2010\)](#), p. 12 (“The [Plaintiffs’] experts . . . with all of the foregoing,

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(iv) **The First Instance Court’s Ruling on the Merits**

94. On 17 December 2010, the First Instance Court issued its judgment on the merits (“**First Instance Decision**”), finding that Muresa and Tire Group had not suffered any injury.<sup>343</sup> In their pleadings, Claimants focus mainly on this outcome. In doing so, they ignore or minimize points that are important for present purposes.

95. *First*, the First Instance Court did not rule on the Bridgestone Litigants’ objections to the admission of the Demand Letter included with the Muresa/TG Expert Report. This is important because, as Mr. Lee explains, pursuant to Article 1297 of the Judicial Code, when a Panamanian court does not rule on objections to the admission of evidence presented by a party, the evidence is admitted by operation of law.<sup>344</sup>

96. *Second*, the First Instance Court rejected the Bridgestone Litigants’ assertion that the reference to “good faith” in the Opposition Court Decision precluded a finding of

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must objectively conclude that there was no damage suffered by the claimants.”); *see also id.* at pp. 26–27.

<sup>343</sup> [Ex. R-0036](#), Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 4–15.

<sup>344</sup> *See* [Second Lee Report](#), ¶ 66.

recklessness and/or bad faith in the Civil Proceeding.<sup>345</sup> As the Court explained, because the parties in the Opposition Proceeding “[we]re not, totally, the same parties involved in the present proceeding, neither is there identity of property or object, or claim . . . under no assumption can a *res judicata* objection operate in this proceeding because it does not conform to any of the assumptions enshrined in the standard.”<sup>346</sup> Nevertheless, in their Reply, Claimants continue to insist (mistakenly) that the “good faith” finding in the Opposition Court Decision “*was* final and binding, and *was res judicata*,”<sup>347</sup> and that “[i]t was not open to the parties to re-litigate this issue, in any court.”<sup>348</sup>

97. **Third**, the First Instance Court did not apply Article 217, as had been requested by the Bridgestone Litigants. Instead, it assessed the claim on the basis of the negligence standard set forth in Article 1644.<sup>349</sup>

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<sup>345</sup> [Ex. R-0036](#), Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 7–8.

<sup>346</sup> [Ex. R-0036](#), Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 7–8.

<sup>347</sup> [Reply](#), ¶ 59 (emphasis added).

<sup>348</sup> [Reply](#), ¶ 59.

<sup>349</sup> *See* [Ex. R-0036](#), Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), p. 15.

**b. Review By the Appellate Court**

98. In Panama — in a case involving a legal claim for more than USD 5,000 — the merits ruling of a circuit court (*e.g.*, the First Instance Court) may be appealed to a superior tribunal (*e.g.*, the Appellate Court).<sup>350</sup> As Mr. Lee notes, “[t]he essential characteristic of the recourse of appeal is that it is [an] ordinary and open recourse, in the sense that an appellate court may address any errors . . . contained in the first instance decision, thus enabling the court of appeals to conduct a full review of the entire case, examining everything done in the proceedings.”<sup>351</sup> On 5 January 2011, Muresa and Tire Group took advantage of this opportunity, appealing the First Instance Decision to the Appellate Court.<sup>352</sup> The Bridgestone Litigants then filed an opposition to the appeal.<sup>353</sup>

99. As the Tribunal will have seen, Claimants argue in their Reply that “BSLS and BSJ had no[] opportunity to address and respond to the spurious suggestion that they had intimidated and acted recklessly,”<sup>354</sup> “did not have the opportunity to defend

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<sup>350</sup> See [First Lee Report](#), ¶ 40.

<sup>351</sup> See [First Lee Report](#), ¶ 39.

<sup>352</sup> See generally, [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011).

<sup>353</sup> See [Ex. C-0023](#), BSJ and BSLs Opposition to Muresa Appeal (14 January 2011).

<sup>354</sup> [Reply](#), ¶ 2(c).

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themselves against [Article 217 of the Judicial Code],”<sup>355</sup> and “had no opportunity to respond to and deal with the [Demand] Letter.”<sup>356</sup> None of this is true. Because the Appellate Court was permitted to review any and all aspects of the First Instance Decision, as discussed below, both parties resubmitted their arguments on the threshold question of the applicable law; on the merits of the dispute (and the two side debates discussed above)); and on damages. A review of the record confirms that the Bridgestone Litigants had (and even exercised) the opportunity to address the above items.

### **(i) Arguments Raised in the Parties’ Appellate Pleadings**

100. In their petition to the Appellate Court, Muresa and Tire Group asserted that the First Instance Court had committed various threshold errors, including: ignoring the expert reports produced by their accounting experts;<sup>357</sup> improperly considering irrelevant information from the Bridgestone Litigants’ accounting expert report;<sup>358</sup> and not considering evidence of the Bridgestone

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<sup>355</sup> Reply, ¶ 56.

<sup>356</sup> Reply, ¶ 2(c).

<sup>357</sup> See Ex. C-0022, Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), pp. 28–29.

<sup>358</sup> See Ex. C-0022, Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), pp. 26–28 (“As we can observe, the judge is presenting an analysis of the company’s increase in capital, something that does not have any bearing whatsoever on the purpose

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Litigants’ “campaign of prosecution” against Muresa and Tire Group.<sup>359</sup> In addition, Muresa and Tire Group requested that the First Instance Decision be overturned. In support of this request, Muresa and Tire Group asserted as follows:

- a. The Bridgestone Litigants had been negligent in initiating their Panamanian Opposition Proceeding and sending the Demand Letter,<sup>360</sup> which had been admitted with L.V. International’s *Coadyuvante* Petition.<sup>361</sup>
- b. In the Demand Letter, the Bridgestone companies had warned L.V. International to abstain from using the RIVERSTONE brand, “not only in the United States of America, but in any part of the world,”<sup>362</sup> and the Bridgestone Litigants followed up on this threat in the “location[s]

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of the expert report, given that, its intention is to demonstrate the damages and losses caused by the reduction in the sales of Riverstone y Diseño brand tires.”).

<sup>359</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), p. 20.

<sup>360</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), pp. 13–16.

<sup>361</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), p. 4.

<sup>362</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), pp. 13–14.

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where the application for registration of the RIVERSTONE brand was submitted.”<sup>363</sup>

- c. As a result of the Panamanian Opposition Proceeding, Tire Group had suspended the manufacturing of RIVERSTONE-branded tires, which had prevented Muresa from marketing the brand properly.<sup>364</sup>
- d. Because of the foregoing, Muresa and Tire Group had suffered damages of USD 5,775,793.84.<sup>365</sup>

101. On 14 January 2011, the Bridgestone Litigants filed their opposition to the appeal,<sup>366</sup> reasserting many of their defenses on the merits. For example, on the threshold issue of the applicable legal provision, the Bridgestone Litigants asserted again that the claim should have been submitted under Article 217 of the Judicial Code, and that the plaintiffs accordingly must prove Bridgestone Litigants’ conduct “was reckless or in bad faith in the opposition

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<sup>363</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), p. 49.

<sup>364</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), pp. 16–18.

<sup>365</sup> See [Ex. C-0022](#), Muresa and TFGL Appeal of Judgment No. 70 (5 January 2011), p. 48.

<sup>366</sup> See [Ex. C-0023](#), BSJ and BSLs Opposition to Muresa Appeal (14 January 2011).

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proceedings.”<sup>367</sup> The Bridgestone Litigants then argued that Muresa and Tire Group could not prove recklessness, asserting *inter alia* that the First Instance Court had already declared, with *res judicata* effect, that the Bridgestone Litigants had acted in good faith.<sup>368</sup>

102. In addition, the Bridgestone Litigants repeated their earlier objections to the consideration of evidence of Bridgestone group conduct abroad. Thus, for example — and as Claimants do again in their Reply<sup>369</sup> — the Bridgestone Litigations contended that a finding of liability based upon Bridgestone group actions abroad would contravene the principle of consistency.<sup>370</sup> In addition, the Bridgestone Litigants argued (again, as Claimants do now)<sup>371</sup> that the copy of the Demand Letter attached to the Muresa/TG Expert Report should not be given weight, because it

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<sup>367</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 4.

<sup>368</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), pp. 3, 19, 21, 26, 31, 37.

<sup>369</sup> See [Reply, 39\(c\)](#) (“The Supreme Court based its finding on grounds not raised by Muresa in its complaint, which BSLs and BSJ could therefore not respond to. This was a violation of the Panamanian principle of consistency”).

<sup>370</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 37 (“In addition, the alleged campaign of persecution in other countries is not the object of the claims of Point Six of the claim and therefore it is [ultra petita] and irrelevant with what is being claimed and should therefore be rejected”).

<sup>371</sup> See [Memorial, ¶¶ 185–90](#).

allegedly (1) was irrelevant to the Civil Proceeding,<sup>372</sup> (2) had been admitted into the record in violation of Articles 856, 857, 871, 877, and 878 of the Judicial Code,<sup>373</sup> and (3) had been presented extemporaneously.<sup>374</sup> (The Bridgestone Litigants did not mention or object to the admission of the Demand Letter as an exhibit introduced by the court-appointed expert.) The Bridgestone Litigants also repeated their prior arguments on damages, asserting that the Muresa/TG Expert Report was unreliable,<sup>375</sup> and emphasizing that their own expert had determined that damages were non-existent.<sup>376</sup>

## (ii) The Appellate Decision

103. On 23 May 2013, the Appellate Court issued its decision (“**Appellate Decision**”), affirming the merits ruling in the

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<sup>372</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 18 (“The letter does not refer to any of the parties to the proceedings, and therefore does not have any connection to these proceedings and is, therefore, irrelevant and incongruous. It was sent by a North American attorney to another North American attorney and relates to a case in the United States of America, and it is therefore irrelevant in these proceedings”).

<sup>373</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 17.

<sup>374</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 16 (“The claimant, using its experts, introduces a piece of documentary evidence that is extemporaneous and full of illegality so that it would not be subject to the right of reply”).

<sup>375</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 27 (arguing that the Plaintiffs’ experts “should have analyzed the behavior of sales in previous years in order to obtain an approximate or predictable pattern of revenues per year, something that was not done nor proven”).

<sup>376</sup> See [Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal \(14 January 2011\)](#), p. 29.

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First Instance Decision.<sup>377</sup> Importantly, however, the Appellate Court decided the claim under both Article 1644 of the Civil Code (as invoked by Muresa and Tire Group) and Article 217 of the Judicial Code (as requested by the Bridgestone Litigants). With respect to Article 217, the Appellate Court stated that “recklessness that gives rise to compensation, as stated in Article 217 of the Judicial Code, is comparable to gross negligence or willful conduct.”<sup>378</sup> The court applied this standard to the facts at hand, as follows:

From an exam[ination] of the record, this Court deems that the Plaintiffs did not comply with the burden to prove the factual requirements of the legal rules invoked in the case. The Plaintiffs evidently did not prove that there was recklessness, willful misconduct or gross negligence in the Respondents’ conduct when the Respondents opposed the trademark registration filed by the Plaintiffs before the Courts.<sup>379</sup>

This paragraph represents the entirety of the Appellate Court’s evidentiary analysis on the issue of recklessness under Article 217.

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<sup>377</sup> See [Ex. R-0037](#), Decision of the First Superior Court (23 May 2013).

<sup>378</sup> See [Ex. R-0037](#), Decision of the First Superior Court (23 May 2013), p. 20 (internal quotation marks omitted).

<sup>379</sup> [Ex. R-0037](#), Decision of the First Superior Court (23 May 2013), p. 20.

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104. Given that the Appellate Court determined that the conduct at issue did not satisfy the relevant threshold, it did not consider the question of damages.<sup>380</sup> However, it did uphold the First Instance Court’s conclusion that the finding of good faith in the context of the Panamanian Opposition Proceeding was not binding in the Civil Proceeding.<sup>381</sup>

### c. The Cassation Recourse at the Supreme Court

105. In Panama, rulings such as the Appellate Decision may reviewed by the Supreme Court by means of a mechanism known as a “cassation recourse.”<sup>382</sup> This mechanism is intended to address certain errors of fact or law. In the first instance, the Supreme Court will ascertain whether such an error is present (*e.g.*, if the lower court had applied the incorrect law), and (if so) whether such error affected the outcome.<sup>383</sup> If the answer to the

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<sup>380</sup> See [Ex. R-0037, Decision of the First Superior Court \(23 May 2013\)](#), pp. 20–21 (“Thus, if the aforementioned recklessness or willful conduct by the Respondents has not been proven, [they could] hardly examine whether the alleged damages . . . have been proven, let alone determine their quantum”).

<sup>381</sup> See [Ex. R-0037, Decision of the First Superior Court \(23 May 2013\)](#), p. 19 (“With regard to the Respondents’ position, when stating that a noncontractual civil liability claim is unacceptable because their actions were not reckless or in bad faith (as stated in the judgment on the petition for damages, *i.e.*, the judgment that resolved the opposition to the trademark registration.) It is not an essential condition for such conduct to have been previously stated in a previous proceeding for compensation to be due . . . *Consequently, one needs to verify whether the Respondents acted recklessly and bad faith when they opposed the trademark registration requested by the Plaintiffs*”).

<sup>382</sup> See [First Lee Report](#), ¶ 41.

<sup>383</sup> See [Second Lee Report](#), ¶ 85.

foregoing questions is yes, the Supreme Court will then rule upon the substantive issue.<sup>384</sup> As Mr. Lee explains, when completing this step, the Supreme Court possesses the same discretion matters of evidence<sup>385</sup> and law<sup>386</sup> as would a lower court.

106. On 1 July 2013 Muresa and Tire Group initiated a cassation recourse before the Supreme Court (“**Cassation Request**”). The Bridgestone Litigants participated fully in the ensuing proceeding.

**(i) The Parties’ Cassation Pleadings on Admissibility**

107. The Cassation Request was based on two of the grounds for cassation set out under Panamanian law. *First*, Muresa and Tire Group argued that the Appellate Court had ignored six items and/or categories of evidence that they claimed would have altered the Appellate Decision, if considered:

- a. the Demand Letter, which was presented as evidence of recklessness;<sup>387</sup>

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<sup>384</sup> See [Second Lee Report](#), ¶ 26.

<sup>385</sup> See [Second Lee Report](#), ¶ 26 (explaining that in this second phase, the Supreme Court can order the production of evidence *ex officio*).

<sup>386</sup> See [Second Lee Report](#), ¶ 103 (explaining that in this second phase, the Supreme Court can rule on the provision of law it considers applicable, pursuant to the principle of *iura novit curiae*).

<sup>387</sup> See [Ex. R-0046](#), Muresa and Tire Group’s Cassation Recourse to Supreme Court (1 July 2013), pp. 2–4.

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- b. certifications of tire sales issued by the companies' certified public accountant, which was presented as evidence that the companies had suffered a decrease in sales;<sup>388</sup>
- c. the withdrawal by the Bridgestone Litigants of their appeal in the Panamanian Opposition Proceeding, which was presented as evidence of bad faith;<sup>389</sup>
- d. witness testimony to the effect that damage to Muresa and Tire Group had been caused by the actions of the Bridgestone Litigants and Bridgestone group;<sup>390</sup>
- e. witness statements to the effect that Muresa and Tire Group had felt threatened by the Demand Letter and product seizures undertaken by Bridgestone entities in the Dominican Republic, China, and other countries;<sup>391</sup> and

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<sup>388</sup> See [Ex. R-0046](#), Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 2-4.

<sup>389</sup> See [Ex. R-0046](#), Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 2-4.

<sup>390</sup> See [Ex. R-0046](#), Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 2-4.

<sup>391</sup> See [Ex. R-0046](#), Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 2-4.

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- f. the Muresa/TG Expert Report, which was presented as evidence of a decrease in sales of RIVERSTONE branded tires.<sup>392</sup>

According to Muresa and Tire Group, the Appellate Court’s omission to consider this evidence constituted a violation of various provisions of Panamanian law (specifically, Articles 217 and 780 of the Judicial Code, Article 1644 of the Civil Code, and Article 1 of Law No. 57 of September 1, 1978).<sup>393</sup> *Second*, Muresa and Tire Group contended that the Appellate Court had violated Articles 217 and 1644 by omitting to hold the Bridgestone Litigants liable under either provision.<sup>394</sup>

108. In the Memorial, Claimants had asserted that “[a] judgment which is based on arguments not made by the appellants, so that the other side did not have the opportunity to respond to them, is a grave violation of th[e] principle [of consistency].”<sup>395</sup> However, the Bridgestone Litigants had an ample opportunity to respond to the “arguments made by the appellants” — which, as Claimants concede — included a “request[] that the Supreme Court

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<sup>392</sup> See [Ex. R-0046](#), Muresa and Tire Group’s Cassation Recourse to Supreme Court (1 July 2013), pp. 4.

<sup>393</sup> See [Ex. R-0046](#), Muresa and Tire Group’s Cassation Recourse to Supreme Court (1 July 2013), pp. 4–10.

<sup>394</sup> See [Ex. R-0046](#), Muresa and Tire Group’s Cassation Recourse to Supreme Court (1 July 2013), pp. 10–12.

<sup>395</sup> [Memorial](#), ¶ 194.

review the evidence *de novo* and issue a finding that Bridgestone ‘recklessly opposed’ the RIVERSTONE trademark, resulting in losses for Muresa and TGFL.”<sup>396</sup>

109. Thus, on 16 September 2013, the Bridgestone Litigants objected to the admissibility of the Cassation Request,<sup>397</sup> arguing (1) that the second proposed ground was duplicative of the first,<sup>398</sup> and (2) that the Appellate Court had properly applied both Articles 217 and 1644. In connection with the latter point, the Bridgestone Litigants observed that:

[Muresa and Tire Group] cite Articles 217 of the Judicial Code and 1644 of the Civil Code, allegedly infringed upon because of direct violation due to omission, a mistaken concept of violation, *given that these regulations were applied by the Superior [Court] at the time when the ruling was issued*. Even more, *based on both regulations*, the Superior [Court] denied the cause requested . . . *they were*

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<sup>396</sup> [Request for Arbitration, ¶ 39](#); see also [Response on Expedited Objections, ¶ 34](#) (conceding that Muresa had argued “that [the above argument] was a direct violation of Art. 217 of the Panamanian Judicial Code”).

<sup>397</sup> See [Ex. R-0047, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse \(16 September 2013\)](#).

<sup>398</sup> [Ex. R-0047, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse \(16 September 2013\)](#), p. 9 (“The issues regarding the existence or inexistence of evidence that demonstrates the allegedly improper conduct were set forth in the previous grounds (mistake of fact in the existence of the evidence), so, it is redundant to accept a grounds for direct violation the sole objective of which is to reignite the discussion of the first grounds cited”).

[REDACTED]

*applied as a result of the examined body of evidence.*<sup>399</sup>

Unlike in previous phases of the proceeding, however, the Bridgestone Litigants did not contend that the application of Article 217 would violate the principle of consistency.

110. In addition — and notably, in light of Claimants’ claims based on the purported brevity of the Supreme Court Judgment<sup>400</sup> — the Bridgestone Litigants also asserted that the one-paragraph analysis of evidence in the Appellate Decision had been sufficient. Thus, the Bridgestone Litigants acknowledged that “the appellate judge did not refer to each article of evidence individually,” but argued nevertheless that “the appellate judge did not ignore the body of evidence held in the case records, but after having evaluated all evidence, did not deem that said evidence would lead it to a conclusion that would imply acknowledgement of the cause of action.”<sup>401</sup> Notably, the Bridgestone Litigants also argued in the alternative that the evidence would not support a

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<sup>399</sup> See [Ex. R-0047](#), Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 8 (emphasis added); see also *id.* at p. 10.

<sup>400</sup> See *e.g.*, [Reply](#), 60.

<sup>401</sup> [Ex. R-0047](#), Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 2 (emphasis in original).

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conclusion of liability.<sup>402</sup> According to the Bridgestone Litigants, threats (*e.g.*, the Demand Letter) do not amount to injury *per se*.<sup>403</sup>

111. The Bridgestone Litigants also opined on the question of evidence pertaining to damages. Their position was that evidence regarding the *quantum* of damages would not have changed the outcome, because the Appellate Decision had been based on the finding that the Bridgestone Litigants had not acted recklessly (in the first place).<sup>404</sup>

112. On 4 December 2013, the Supreme Court issued a decision on admissibility, admitting the first ground but dismissing

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<sup>402</sup> [Ex. R-0047, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse \(16 September 2013\)](#), p. 6 (“[T]he alleged threats or seizures of merchandise in other countries, which were not even proven, do not evidence a damage occurring in Panama, which is why their examination or analysis would be irrelevant”).

<sup>403</sup> [See Ex. R-0047, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse \(16 September 2013\)](#), p. 7 (“[T]hreats or warnings do not constitute any type of damage, to the extent that the plaintiff had the opportunity to respond or not to respond to said alleged threats”).

<sup>404</sup> [See Ex. R-0047, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse \(16 September 2013\)](#), p. 7 (“Obviously this evidence does not have the capacity to reverse the decision issued, given that the provision of same is centered on valuating the alleged damage caused, not establishing what damaging event was caused by the filing of a complaint opposing the registry of a trademark”).

[REDACTED]

the second.<sup>405</sup> The Supreme Court agreed with the Bridgestone Litigants that the second ground was duplicative of the first.<sup>406</sup>

(ii) **The Parties' Cassation Pleadings on the Merits**

113. The parties then submitted additional written pleadings on their respective arguments.<sup>407</sup> In their submission, the Bridgestone Litigants continued to defend the Appellate Court's application of Article 217 to the facts of the case, by observing that:

[T]he Superior Court considered that there was no damage, since it could not be demonstrated that ' . . . the previous action or process was reckless (carried out with abuse of the right to litigate),' establishing, in addition, that the plaintiffs did not prove that the defendants ' . . . had incurred excesses that were beyond the exercise of a right that the law itself allows them in this type of activity . . . '<sup>408</sup>

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<sup>405</sup> See [Ex. R-0050](#), Decision by the Supreme Court on the Admission of the Cassation Recourse (4 December 2013).

<sup>406</sup> See [Ex. R-0050](#), Decision by the Supreme Court on the Admission of the Cassation Recourse (4 December 2013).

<sup>407</sup> See generally [Ex. R-0051](#), Muresa and Tire Group's Statement in Support of the Cassation Recourse (3 January 2014); [Ex. R-0052](#), Bridgestone Corporation and Bridgestone Licensing's Response to the Cassation Recourse (14 January 2014).

<sup>408</sup> See [Ex. R-0052](#), Bridgestone Corporation and Bridgestone Licensing's Response to the Cassation Recourse (14 January 2014), p. 4.

[REDACTED]

In this same submission, the Bridgestone Litigants acknowledged that the Appellate Court had dismissed their “*res judicata*” theory.<sup>409</sup> Accordingly, they continued to argue that Muresa and Tire Group had failed to prove recklessness.<sup>410</sup> In addition, the Bridgestone Litigants offered comments on the Demand Letter,<sup>411</sup> witness testimony,<sup>412</sup> and the issues of damages<sup>413</sup> and conduct abroad.<sup>414</sup>

### (iii) The Supreme Court Judgment

114. On 28 May 2014, the Supreme Court issued the Supreme Court Judgment, in which the majority of the Court<sup>415</sup> overturned the Appellate Decision. The Court found the

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<sup>409</sup> See [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#), p. 2 (“Despite the statements made by the court of the [Panamanian Opposition] case, the appellant insists that there has been “bad faith and recklessness” in the aforementioned judicial action exercised by our clients, *a claim that, in general terms, as stated by the First Superior Court of Justice, from the conceptual point of view, can be tried*”) (emphasis added).

<sup>410</sup> See generally [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#).

<sup>411</sup> See [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#), pp. 4–7.

<sup>412</sup> See [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#), p. 10 (“What can be observed is that all the testimonies fail to tell the truth, since the expert evidence revealed millionaire sales of RIVERSTONE Y DISEÑO tires by Muresa Intertrade, S.A. and Tire Group Of Factories Ltd., Inc, during the years of the patent suit of the registration of the RIVERSTONE Y DISEÑO brand”).

<sup>413</sup> See [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#), p. 12.

<sup>414</sup> See [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#), p. 12.

<sup>415</sup> The opinion of the dissenting justice will be discussed further below.

Bridgestone Litigants liable and ordered them to pay Muresa and Tire Group USD 5,000,000 in damages, plus USD 431,000 in costs.<sup>416</sup> In its Judgment, the Supreme Court summarized the procedural background and the arguments presented in the Cassation Request.<sup>417</sup>

115. The Supreme Court then determined based on “a thorough review of the challenged Decision”<sup>418</sup> that the Appellate Court had ignored the six items/categories of evidence referenced in the Cassation Request. According to the Court, the omission was dispositive; consideration of five out of the six type of evidence would have altered the Appellate Decision.<sup>419</sup>

116. Thus, the Supreme Court reviewed and made factual findings on the basis of the record, which included:

- a. evidence, such as the Muresa/TG Expert Report, demonstrating the economic importance of the RIVERSTONE-branded tires to Muresa and Tire

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<sup>416</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), p. 18.

<sup>417</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#).

<sup>418</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), p. 7 (“Thus, a thorough review of the challenged Decision shows that the evidence referred to in the Six Reasons was ignored”).

<sup>419</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), pp. 8–12, 14–16. The Court did not identify the second category of evidence (i.e., certifications of sales authored by the Certified public accountant), as able to influence the First Superior Court’s decision.

[REDACTED]

Group, given that these tires generated higher sales and profits than other tires;<sup>420</sup>

- b. the Demand Letter, through which Bridgestone entities had threatened international legal actions “without any legal basis, at least under Panamanian law;”<sup>421</sup> and
- c. evidence indicating that the Bridgestone Litigants “went to extremes to oppose the registration of a product brand that happened to be commercially competitive. Then, after spending a significant amount of time in litigation, they withdrew the appeal they had filed against an adverse Decision.”<sup>422</sup>

117. On the basis of the foregoing, the Supreme Court concluded that “the legal action was reckless and intimidating in order to cause harm”<sup>423</sup> and held that the Bridgestone Litigants’ conduct had amounted to “a violation of Article 780, Judicial Code,

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<sup>420</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 15–26.

<sup>421</sup> [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 15.

<sup>422</sup> [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 16.

<sup>423</sup> [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 14.

[REDACTED]



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and a violation of the provisions of Article 1644, Civil Code, in accordance with Article 217, Judicial Code.”<sup>424</sup>

118. The Supreme Court’s finding of fault was based on the unique factual circumstances presented. Thus, while Claimants continue to insist that “the Supreme Court expressly found that it was reckless to oppose a trademark if the applicant was already marketing competing products,”<sup>425</sup> the Court explicitly limited the scope of its ruling to the facts at hand:

*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* . . . 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

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<sup>424</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 13.

<sup>425</sup> **Reply**, ¶ 2(e).

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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.<sup>426</sup>

For years, Bridgestone representatives have ignored this important passage when discussing the Supreme Court Judgment. For example, in testimony to the Office of the United States Trade Representative, Claimants' witness Mr. Kingsbury claimed erroneously that the Panamanian Supreme Court had held that the mere filing of a trademark opposition proceeding could give rise to liability in damages.<sup>427</sup>

119. Claimants' assertion that "the Supreme Court did not provide any explanation as to the basis for a finding of loss" of USD 5,431,000<sup>428</sup> likewise is untrue. The Supreme Court based its determination on damages on the evidence presented and identified

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<sup>426</sup> [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 17 (emphasis added).

<sup>427</sup> [Ex. C-0032](#), 2015 Special 301 Public Hearing, Hearing Statement of Bridgestone Americas Inc. (24 February 2015) and [Bridgestone Americas Inc. Written Comments](#) (6 February 2015) p. 3 ("the Supreme Court's decision severely penalized Bridgestone simply for utilizing an ordinary opposition mechanism to protect its intellectual property as provided for under Panamanian law").

<sup>428</sup> [Reply](#), ¶ 2(e).

[REDACTED]

the pieces of evidence that it found compelling (*e.g.*, the consistent testimony of seven witnesses):

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.<sup>429</sup>

For the Court, such witness testimony clearly “show[ed] 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.”<sup>430</sup> The Court also found convincing and took into account the Muresa/TG Expert Report,<sup>431</sup> which as the Tribunal will recall, had determined that the decrease in sales had caused damages in the amount of USD 3,351,731.15 to Muresa and USD 2,424,062.69 to Tire Group.<sup>432</sup> The Supreme Court found that the Muresa/TG Expert

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<sup>429</sup> [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 11.

<sup>430</sup> [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 15.

<sup>431</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 11–12.

<sup>432</sup> [Ex. C-0162](#), Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 4, 7.

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Report's damages figures were compelling both for Muresa<sup>433</sup> and Tire Group.<sup>434</sup> However, because Muresa and Tire Group had requested USD 5,000,000.00 in their complaint, this figure served as a cap on the amount of damages that the Supreme Court could award.<sup>435</sup> The Supreme Court also awarded Muresa and Tire Group USD 431,000.00, explaining that this amount accounted for costs and expenses.<sup>436</sup>

(iv) **Justice Harley Mitchell's Dissent**

120. Justice Harley Mitchell did not agree with the majority's conclusion and issued a dissenting opinion, which Panama discussed in detail in its Counter-Memorial.<sup>437</sup> Many of Justice Mitchell's disagreements with the Supreme Court Judgment will seem familiar to the Tribunal, likely because they are the same arguments that Claimants raise in this arbitration. The following is a representative sample:

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<sup>433</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), pp. 11–12

<sup>434</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), pp. 11–12 (“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%”).

<sup>435</sup> See [Second Lee Report](#), ¶ 86.

<sup>436</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), p. 18.

<sup>437</sup> See [Counter-Memorial](#), ¶¶ 142–147; see also [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), pp. 19–26 (Mitchell dissenting).

[REDACTED]

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- a. In regard to the Demand Letter: “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.”<sup>438</sup>
- b. In regard to witness testimony: “Witness statements, ignored by the Upper Court, were not compared with the documentation on file provided by the Plaintiff itself.”<sup>439</sup>
- c. With regard to the Supreme Court’s Damages analysis: “I do not agree with the reasons behind the monetary sanction in this proceeding. No analysis was offered, based on arguments,

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<sup>438</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), pp. 19–20 (Mitchell dissenting), cf. [Memorial](#), ¶¶ 186–188 (“In violation of Article 856 of the Judicial Code, the Reservation of Rights Letter was not authenticated either by being recognised before a judge or notary, or through any of the other means provided in Article 856 . . . .In violation of Article 857 of the Judicial Code, a copy of the Reservation of Rights Letter (not the original) was included with Muresa and TGFL’s expert report, and the original was never provided and the copy was not authenticated . . . .In violation of Article 871 of the Judicial Code, the Reservation of Rights Letter was not verified by the author”).

<sup>439</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\)](#), p. 22 (Mitchell dissenting), cf. [Reply](#), ¶ 39(d) (arguing that the Supreme Court “relied on unsupported witness evidence that was contradicted by documentary evidence”).

[REDACTED]

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and scarce legal grounds, as to how the Five million Balboas figure was reached.”<sup>440</sup>

121. In their pleadings, Claimants advance precisely the same arguments, purporting to style them as claims of a denial of justice.<sup>441</sup>

#### **d. The Post-Supreme Court Decision Recourses**

122. Following the Supreme Court Judgment, the Bridgestone Litigants filed certain post-decision recourses, reasserting many of the contentions that had been the subject of debate during the Civil Proceeding. In other words, the Bridgestone Litigants were heard even after the Supreme Court Judgment was rendered.

##### **(i) The Motion for Clarification and Modification**

123. The first post-Judgment filing was a motion for clarification and modification of the Supreme Court Judgment (“**Motion for Clarification and Modification**”), in which the

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<sup>440</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), p. 25 (Mitchell dissenting), cf. [Reply](#), ¶ 39(e) (“The Supreme Court did not base its determination of the damages on any evidence or assessment whatsoever”).

<sup>441</sup> [Reply](#), ¶ 39; see also [Memorial](#), ¶¶ 185–90.

[REDACTED]

Bridgestone Litigants took issue with the amount of damages awarded.<sup>442</sup>

124. With regard to the damages suffered by Tire Group, the Bridgestone Litigants claimed, *inter alia*, that “[i]n the Judgment of May 28, 2014, the Chamber does not make any explanation or indication as to what amount of the damages awarded of US\$5,000,000.00, corresponds to the alleged damages sustained by TIRE GROUP OF FACTORIES LTD, INC., and does not explain how such amount has been quantified.”<sup>443</sup> Notably, however, the Bridgestone Litigants did not raise a similar argument in connection with the damages amount apportioned to Muresa. Instead, they asserted that figures on which the Supreme Court had based its damages award to Muresa — which the Bridgestone Litigants identified as those cited in page 14 of the Supreme Court Judgment (pages 11–12 of the translation) — had been calculated incorrectly by the plaintiffs’ expert.<sup>444</sup>

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<sup>442</sup> **Ex. R-0053**, Bridgestone Corporation and Bridgestone Licensing’s Motion for Clarification and Modification of the Decision of the Supreme Court of Panama (16 June 2014).

<sup>443</sup> **Ex. R-0053**, Bridgestone Corporation and Bridgestone Licensing’s Motion for Clarification and Modification of the Decision of the Supreme Court of Panama (16 June 2014), p. 5.

<sup>444</sup> *See* **Ex. R-0053**, Bridgestone Corporation and Bridgestone Licensing’s Motion for Clarification and Modification of the Decision of the Supreme Court of Panama (16 June 2014), pp. 1–5.

125. On 20 June 2014, Muresa and Tire Group filed a response to the Motion for Clarification and Modification, asserting: (1) that “the expert report had the purpose of demonstrating the decrease in sales of RIVERSTONE tires suffered by Muresa,” and had accomplished this objective;<sup>445</sup> and (2) that “clarifications” of judgments are only proper when the operative part of the judgment is ambiguous or contradictory, which was not the case for the Supreme Court Judgment.<sup>446</sup>

126. On 28 November 2014, in a unanimous ruling signed by Justice Harley Mitchell — the dissenting justice, whose criticism the Bridgestone Litigants had repackaged as a motion for modification — the Supreme Court confirmed that it would be an impermissible appeal to review the Supreme Court’s determination on damages, stating that the Bridgestone Litigants “intend[ ] that this Chamber enter[ ] again into making an analysis and of the merits of the case and an evaluation of the evidence included in the file, all of which is inappropriate.”<sup>447</sup>

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<sup>445</sup> **Ex. R-0054**, Muresa and Tire Group’s Opposition to the Motion for Clarification and Modification (20 June 2014), pp. 2–3.

<sup>446</sup> *See* **Ex. R-0054**, Muresa and Tire Group’s Opposition to the Motion for Clarification and Modification (20 June 2014), p. 4.

<sup>447</sup> **Ex. R-0055**, Decision by the Supreme Court of Panama on the Motion for Clarification and Modification (28 November 2014), p. 2.



(ii) **The Recourse for Review**

127. As Claimants explain in their Memorial, “[f]ollowing their unsuccessful challenge, BSLS and BSJ appointed a new Panamanian law firm, Morgan and Morgan, which had specific expertise in Supreme Court matters.”<sup>448</sup> The Bridgestone Litigants then filed a recourse for the review of the Supreme Court Judgment (“**Recourse for Review**”).<sup>449</sup> Specifically, the Bridgestone Litigants requested that the Supreme Court Judgment be overturned on the asserted bases (1) that the Supreme Court should not have considered the Demand Letter, because it had not been properly admitted as evidence;<sup>450</sup> and (2) that the Supreme Court judgment violated the *res judicata* of the Eighth Court’s decision in the Panamanian Opposition Proceeding about the Bridgestone Litigants’ good faith.<sup>451</sup> The Bridgestone Litigants also argued that their practice of “*warning* other corporations about the filing of proceedings of opposition to the registration of marks in other countries”<sup>452</sup> could not be used to show recklessness,

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<sup>448</sup> See **Memorial**, ¶ 105.

<sup>449</sup> See generally **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014).

<sup>450</sup> See **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), pp. 6–8.

<sup>451</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), pp. 10–19.

<sup>452</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), p. 8 (emphasis added).

because the Bridgestone Litigants had been successful in those opposition proceedings.<sup>453</sup> Yet, according to the Bridgestone Litigants, they had been unable to submit evidence of their successful foreign opposition proceedings.<sup>454</sup> For that reason, the Bridgestone Litigants sought to introduce a copy of a favorable ruling in Argentina.<sup>455</sup>

128. On 7 November 2014, in a ruling issued by Justice Secundino Mendieta — who had not been on the panel that had issued the Supreme Court Judgement — the Supreme Court denied the Bridgestone Litigants' Recourse for Review.<sup>456</sup>

### (iii) The Appeal of the Recourse for Review

129. On 16 December 2014, the Bridgestone Litigants filed an appeal of the 7 November 2014 denial of their Recourse for Review.<sup>457</sup> On 16 March 2016, in a ruling issued by Justice Angela Russo De Cedeño — another justice who had not been on the panel

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<sup>453</sup> [Ex. R-0056](#), Bridgestone Corporation and Bridgestone Licensing's Recourse for Review of the Supreme Court Decision (30 September 2014), pp. 10–11.

<sup>454</sup> [Ex. R-0056](#), Bridgestone Corporation and Bridgestone Licensing's Recourse for Review of the Supreme Court Decision (30 September 2014), p. 9.

<sup>455</sup> [Ex. R-0056](#), Bridgestone Corporation and Bridgestone Licensing's Recourse for Review of the Supreme Court Decision (30 September 2014), p. 19.

<sup>456</sup> [Ex. R-0073](#), Decision of the Supreme Court on the Recourse for Review (7 November 2014).

<sup>457</sup> *See* [Ex. R-0057](#), Bridgestone Corporation and Bridgestone Licensing's Appeal of the Supreme Court's Denial of the Recourse for Review (16 December 2014).

[REDACTED]

that issued the Supreme Court Judgment — the Supreme Court denied the appeal of its denial of the Recourse for Review.<sup>458</sup>

**(iv) The Final Motion for Clarification**

130. On 29 March 2016, the Bridgestone Litigants filed a Motion for Clarification of the Supreme Court’s denial of their request for review, which the Supreme Court subsequently denied.<sup>459</sup>

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131. As the foregoing amply demonstrates, the story of the Civil Proceeding is not a denial of justice, but rather one of a routine litigation within the domestic courts. It began with a first instance proceeding, in which threshold questions of applicable law were debated; merits arguments were presented; procedural questions arose; and considerable evidence was adduced and examined. Following the first instance decision, the losing party appealed, giving the parties a second chance to be heard on a variety of issues. Then, after the appellate court ruled, the unsuccessful appellant exercised its right to seek cassation, and the case proceeded on to the supreme court. During the ensuing

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<sup>458</sup> See [Ex. R-0058](#), Decision of the Supreme Court of Panama on the Appeal of its Prior Denial of the Recourse for Review (16 March 2016), p. 8.

<sup>459</sup> See [Ex. R-0059](#), Decision by the Supreme Court of Panama Denying the Motion for Clarification (9 May 2016).

[REDACTED]

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proceeding, both parties were fully able to present arguments, and the supreme court made its decision based on the record at hand.

132. Four points emerge from the narrative. *First*, the Bridgestone Litigants had ample opportunity to present their arguments to the Panamanian judiciary. *Second*, when reviewed in context, the outcome is understandable. *Third*, the present case is an unfounded and improper appeal. *Fourth*, the events at hand have nothing to do with Bridgestone Americas.

### III.LEGAL

133. As Panama has explained, and Claimants have not contested, the TPA imposes strict limits on the submission of a claim to arbitration. Indeed, the text is plain as to both what must (and must not) be part of a claim, and who may submit a claim (and on whose behalf and how). At bottom, the TPA requires that each claimant must separately prove that (1) specific “measure[s] adopted or maintained by [Panama] relating to”<sup>460</sup> the claimant’s investment in Panama<sup>461</sup> (2) breached an obligation set forth in

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<sup>460</sup> [Ex. R-0001](#), TPA, Art. 10.1.

<sup>461</sup> See [Ex. R-0001](#), TPA, Art. 10.1 (“This Chapter applies to measures adopted or maintained by a Party relating to: . . . covered investments . . . ”); see also [id.](#) at 2.1 (“**covered investment** means, with respect to a Party, an investment, as defined in [Article 10.29](#) (Definitions), in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter . . . ”).

[REDACTED]

Section A of TPA Chapter Ten, and (3) that each claimant has already incurred loss,<sup>462</sup> (4) as a result of that breach.<sup>463</sup>

134. In their submissions, Claimants often pay lip service to their burden and the pleading requirements. For example, at the outset of this arbitration, Claimants “confirm[ed] that each of BSLs and BSAM is submitting the claim to arbitration on its own behalf . . . .”<sup>464</sup> Later, they conceded that, “under the TPA, the Claimants must show both breach by the Respondent and loss incurred by the Claimant in order to submit a claim to arbitration.”<sup>465</sup> However, Claimants have insisted steadfastly on conflating their separate claims, and advancing global arguments on issues of merits,<sup>466</sup> injury/causation,<sup>467</sup> and quantum.<sup>468</sup> In addition, they go to lengths to disparage the design of the Panamanian State,<sup>469</sup> which plainly is not a “measure” to which

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<sup>462</sup> **Ex. R-0001**, TPA, Art. 10.16.

<sup>463</sup> **Ex. R-0001**, TPA, Art. 10.16.

<sup>464</sup> **Claimants’ Supplement to Request for Arbitration** (25 October 2016), p. 1 (emphasis added).

<sup>465</sup> **Rejoinder on Expedited Objections**, ¶ 62.

<sup>466</sup> See **Reply**, § IV (“Denial of Justice”); see also *id.* at ¶ 39 (where Claimants list “[t]he international law standards of due process that were violated by the Supreme Court Judgment,” without distinguishing between the merits of Claimants’ respective claims).

<sup>467</sup> See **Reply**, § VIII (“BSAM and BSLs’s Damages in Excess of \$5,431,000”).

<sup>468</sup> **Reply**, ¶ 84.

<sup>469</sup> See, e.g., **Memorial**, ¶ 122 (“[T]he National Assembly is the only body empowered to investigate Supreme Court justices, and the Supreme Court is the only body empowered to investigate members of the National Assembly. Consequently, there is something of a ‘non-aggression pact’ between the two, whereby neither ever

[FOOTNOTE CONTINUED ON NEXT PAGE]

Chapter Ten applies. And while Claimants have managed to make a fair bit of noise, they have not come anywhere close to articulating a viable claim. This is not for lack of trying. Over the course of this arbitration, Claimants have advanced and abandoned a number of merits theories — and talked themselves in circles on injury, causation, and quantum. But their case has proven baseless, and it is time to put it to rest. Indeed, all that remains are Claimants’ denial of justice claims,<sup>470</sup> which fail and must be dismissed. **Parts A** and **B** below discuss merits and damages, respectively.

135. Drawing on the expertise of Professor Jan Paulsson — whose treatise, as Claimants observe, is the “seminal work on denial of justice”<sup>471</sup> — Part A demonstrates that Claimants’ merits theory is meritless. Bridgestone Americas lacks standing to assert a denial of justice claim, and the claim by Bridgestone Licensing fails for legal and factual reasons. Because a denial of justice represents the “failure of a State’s justice system,”<sup>472</sup> any claim

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

investigates the other, despite numerous complaints of corruption and criminal behaviour”).

<sup>470</sup> See **Reply**, ¶ 75 (“Claimants have decided to withdraw their claims under Article 10.3 and 10.4 of the TPA”).

<sup>471</sup> See **Memorial**, ¶ 165.

<sup>472</sup> **CLA-0006**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016), ¶ 254 (Dupuy, Mantilla-Serrano, Thomas).

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faces an “extremely high” legal standard,<sup>473</sup> which has not been hurdled here. Further, as discussed in Part B, each Claimant has failed to complete a predicate task for an award of recovery — *i.e.*, proving that it has already “incurred loss” by reason of the alleged breach.<sup>474</sup> Given these failures, there is no need to consider the subject of quantum, but that issue is addressed below in any event.

**A. Claimants’ Respective Denial of Justice Claims Should Be Dismissed**

136. As explained above, the only Bridgestone entities that participated in the Civil Proceeding were the Bridgestone Litigants — *viz.*, Bridgestone Corporation and Bridgestone Licensing. Bridgestone Americas was not a party to the proceeding. In light of this, one would expect that each Claimant would have a materially distinct theory as to how it supposedly had been “denied justice.” Nevertheless, in their Notice of Arbitration, Request for Arbitration, and Memorial, Claimants entirely failed to distinguish between the denial of justice claims of Bridgestone Americas (a party absent from the Opposition and Civil Proceedings) and of Bridgestone Licensing (one of the parties thereto).

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<sup>473</sup> [RLA-0097, RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005 \(Final Award, 12 September 2010\)](#), ¶ 280 (Böckstiegel, Steyn, Berman).

<sup>474</sup> [Ex. R-0001, TPA, Art. 10.16.1.](#)

[REDACTED]

137. Claimants’ Reply features a section titled “BSAM’s Claim for Denial of Justice Under Article 10.5.”<sup>475</sup> But this title is misleading, as the rest of the Reply is clear that the “claim for denial of justice” pertains to Bridgestone Licensing and Bridgestone Corporation — the latter of which cannot submit claims under the TPA. Thus, for example, in listing grievances with the Civil Proceeding, Claimants argue that:

- a. “[t]he Supreme Court . . . violated BSLs and *BSJ*’s right to due process,”<sup>476</sup>
- b. “[t]he Supreme Court based its finding on grounds . . . which BSLs and BSJ could therefore not respond to,”
- c. “[t]his was a violation of . . . BSLs and *BSJ*’s right to due process,”<sup>477</sup>
- d. “[t]he Supreme Court . . . violated BSLs and *BSJ*’s right to a court process free from arbitrariness,”<sup>478</sup> and
- e. “[t]he Supreme Court . . . violated BSLs and *BSJ*’s right to a fair hearing.”<sup>479</sup>

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<sup>475</sup> Reply, § II.

<sup>476</sup> Reply, ¶ 39(a) (emphasis added); see also *id.* at ¶ 39(b).

<sup>477</sup> Reply, ¶ 39(c) (emphasis added).

<sup>478</sup> Reply, ¶ 39(d) (emphasis added).



[REDACTED]

In any event, as demonstrated below, even if it *did* have a claim, Bridgestone Americas does not have standing. Further, if it had standing, its claim would only fail, as the claim would be identical to the baseless claim of Bridgestone Licensing.

138. Over time, this claim appears to have evolved into a three-part argument: (1) an unfounded appeal of the Supreme Court Judgment (disguised as allegations of arbitrariness and lack of due process); (2) an offensive allegation of corruption; and (3) a collection of abstract complaints about the design of the Panamanian governmental system (generally). As demonstrated further, these arguments fail in law and fact.

**1. Bridgestone Americas Does Not Have Standing to Assert a Denial of Justice Claim in Connection with the Civil Proceeding**

139. Bridgestone Americas may not assert a denial of justice claim under Article 10.5 of the TPA on the basis of the Civil Proceeding.<sup>480</sup>

140. As stated by Professor Paulsson: “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

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

<sup>479</sup> Reply, ¶ 39(e) (emphasis added).

<sup>480</sup> See Counter-Memorial, ¶¶ 20–23.

[REDACTED]

party experiences over the course of a local (often judicial) proceeding.”<sup>481</sup> Accordingly, if a party has not (1) “participate[ed] in the process,”<sup>482</sup> (2) “attempt[ed] to participate in the proce[ss],”<sup>483</sup> or (3) “present[ed] any arguments in [the local] proceedings,”<sup>484</sup> then it is impossible for that party to assert a denial of justice claim.<sup>485</sup> This conclusion is a corollary to the requirement that a party must exhaust local remedies in order to submit a denial of justice claim; if a party does not even attempt to invoke “local remedies” in the first place, it cannot have exhausted them.<sup>486</sup>

141. Although there are circumstances that may allow for *certain* non-parties to claim a denial of justice,<sup>487</sup> those circumstances are not present here. For example, if a parent owns and controls a subsidiary that is a party to a local proceeding, the parent may be able to mount a denial of justice claim, on the theory that — as parent — it participated through its subsidiary.<sup>488</sup> Importantly, however, the inverse is not true: it would be a

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<sup>481</sup> [First Paulsson Report](#), ¶ 52 (emphasis added).

<sup>482</sup> [First Paulsson Report](#), ¶ 52.

<sup>483</sup> [First Paulsson Report](#), ¶ 53.

<sup>484</sup> [First Paulsson Report](#), ¶ 53.

<sup>485</sup> [First Paulsson Report](#), ¶¶ 52–53.

<sup>486</sup> [First Paulsson Report](#), ¶ 52.

<sup>487</sup> [First Paulsson Report](#), ¶ 54.

<sup>488</sup> [First Paulsson Report](#), ¶ 54.

slippery slope indeed if a tribunal were to allow a non-party to assert a denial of justice simply because its parent company had been involved in a judicial proceeding.

142. In the Reply, Bridgestone Americas did not grapple with any of these conceptual issues. However, it *did* devote a few paragraphs to discussing the *Arif v. Moldova* award,<sup>489</sup> which Panama had cited in its Counter-Memorial.<sup>490</sup> As the Tribunal may recall, in *Arif*, the tribunal held that under customary international law, a “free-standing claim for denial of justice . . . can **only** be successfully pursued by a person that was denied justice through court proceedings ***in which it participated as a party.***”<sup>491</sup>

143. In the Reply, Bridgestone Americas acknowledges that “*Arif v. Moldova* is authority for the proposition that the claimant must have been a party to the proceedings in a denial of justice claim brought under ***customary international law***,”<sup>492</sup> but claims that “BSAM’s claim in the current arbitration”<sup>493</sup> is different, because it “is explicitly brought under the fair and

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<sup>489</sup> See Reply, ¶¶ 12–13, 25.

<sup>490</sup> See Counter-Memorial, ¶ 22.

<sup>491</sup> RLA-0063, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 435 (Cremades, Hanotiau, Knieper) (emphasis added).

<sup>492</sup> Reply, ¶ 12 (emphasis added).

<sup>493</sup> Reply, ¶ 12.

equitable treatment standard at Article 10.5 of the TPA.”<sup>494</sup> This argument ignores both the *Arif* tribunal’s careful reasoning and the text of Article 10.5 of the TPA.

144. In its award, the *Arif* tribunal drew a distinction between the claimant’s denial of justice claim under customary international law and its denial of justice claim under the fair and equitable treatment provision of the France-Moldova BIT,<sup>495</sup> the source of the *Arif* tribunal’s jurisdiction.<sup>496</sup> The *Arif* tribunal drew this distinction because the France-Moldova BIT contains an autonomous fair and equitable treatment provision<sup>497</sup> — *i.e.*, a fair and equitable treatment provision requiring treatment in addition to the minimum standard of treatment under customary international law.<sup>498</sup> The *Arif* tribunal determined that a denial of justice claim under this autonomous fair and equitable treatment standard could be asserted by a party that had not participated in the local

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<sup>494</sup> Reply, fn. 56.

<sup>495</sup> See [RLA-0063](#), *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 526 (Cremades, Hanotiau, Knieper) (quoting Article 3 of the France-Moldova BIT).

<sup>496</sup> See [RLA-0063](#), *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 1 (Cremades, Hanotiau, Knieper).

<sup>497</sup> See [RLA-0063](#), *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 526 (Cremades, Hanotiau, Knieper) (quoting Article 3 of the France-Moldova BIT).

<sup>498</sup> See, e.g., [RLA-0080](#), *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 591 (Hanotiau, Born, Landau) (quoting Professor Schreuer in support of the conclusion that “the Contracting States here ought to be taken to have intended the adoption of an autonomous [fair and equitable treatment] standard”).

proceedings at issue.<sup>499</sup> By contrast, a claimant that had not been a party to the local proceedings would *not* have standing to assert a denial of justice claim under the customary international law standard.<sup>500</sup>

145. Claimants’ reliance on *Arif* is based on the false premise that, like the *Arif* claimant, Bridgestone Americas can assert a denial of justice claim under the TPA on the basis of an autonomous fair and equitable treatment standard — independent of the customary international law standard. However, under the TPA, a denial of justice claim for breach of the fair and equitable treatment standard *is* a denial of justice claim under customary international law. This is evident from the text of Article 10.5, which sets forth the fair and equitable treatment obligation. Article 10.5.1 states that “[e]ach Party shall accord to covered investments treatment *in accordance with customary international law*, including fair and equitable treatment . . . .”<sup>501</sup>

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<sup>499</sup> See [RLA-0063](#), *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 438 (Cremades, Hanotiau, Knieper).

<sup>500</sup> [RLA-0063](#), *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 435 (Cremades, Hanotiau, Knieper) (“It follows from there, firstly, that international law allows a free-standing claim for denial of justice and secondly, that such claim can only be successfully pursued by a person that was denied justice through court proceedings in which it participated as a party”).

<sup>501</sup> [Ex. R-0001](#), TPA, Art. 10.5.1 (emphasis added).

146. The following sub-paragraph (Article 10.5.2) provides further clarity as to the nature of the fair and equitable treatment obligation:

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:

[. . .] ‘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.<sup>502</sup>

147. The terms of the TPA thus make clear that the fair and equitable treatment provision contained therein reflects the customary international law minimum standard of treatment, rather than an autonomous fair and equitable treatment standard requiring different or “addition[al]” protection.<sup>503</sup> This interpretation, which

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<sup>502</sup> Ex. R-0001, TPA, Art. 10.5.2 (emphasis added).

<sup>503</sup> See Ex. R-0001, TPA, Art. 10.5.2.

[REDACTED]

has been adopted in past cases involving identical treaty text,<sup>504</sup> was affirmed by the United States in its submission to this Tribunal: “[T]o 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*.”<sup>505</sup>

148. Thus, in sum, Claimants have asserted a denial of justice claim that must be based on the customary international law standard, and consistent with the reasoning in the *Arif* award, that claim can only be asserted by a claimant that was a party to the local proceeding at issue. Claimants do not — and cannot — dispute that Bridgestone Americas was absent as a party to the Supreme Court Proceeding. Accordingly, Bridgestone Americas does not have standing to assert a denial of justice claim related to the Supreme Court Proceeding, and its claim must be dismissed.

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<sup>504</sup> See, e.g., [CLA-0073, \*Mondev International Ltd., v. United States of America\*, ICSID Case No. ARB\(AF\)/99/2 \(Award, 11 October 2002\), ¶¶ 100 et seq.](#) (Stephen, Crawford, Schwebel) (In pursuance of these provisions, on 31 July 2001 the FTC adopted, among others, ‘the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions’: ‘B. Minimum Standard of Treatment in Accordance with International Law 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party[; and] 2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens’’).

<sup>505</sup> [Third U.S. Submission \(7 December 2018\), ¶ 3](#) (emphasis added).

[REDACTED]

## 2. Bridgestone Licensing’s Denial of Justice Claim Fails

### a. The Legal Standard for Denial of Justice

149. As Claimants observe in the Reply, “[t]here is no definitive test for [establishing a] denial of justice . . . .”<sup>506</sup> However, there *are* mandatory elements and certain procedural prerequisites — not to mention a variety of “definitive tests” to prove that a denial of justice has *not* occurred. Panama had set out the relevant standard in its Counter-Memorial,<sup>507</sup> and for the Tribunal’s convenience, synthesizes the relevant points below. The discussion also draws on Professor Paulsson’s report.

#### (i) The History of the Denial of Justice Claim

150. The obligation not to deny justice — and the corresponding cause of action — arose out of a desire to protect foreign entities from grave miscarriages of justice that were predicated on anti-foreign sentiment.<sup>508</sup> As observed by Charles de Visscher in 1935, inherent in a denial of justice claim is the distinction between “the simple *mal jugé*, to be equated with judicial error” and a “grave manifest injustice stemming from aggravated fault or from malice toward foreigners as a

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<sup>506</sup> Reply, ¶ 34.

<sup>507</sup> See Counter-Memorial, ¶¶ 48–52.

<sup>508</sup> First Paulsson Report, ¶ 34.



group . . . .”<sup>509</sup> This history has carried through the standard of denial of justice applied by modern investment tribunals. For example, as the *Loewen v. United States* tribunal observed, “It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice.”<sup>510</sup>

151. Notably, such considerations are not at play in this case. As stated by the Tribunal in its Decision on Expedited Objections, and as discussed above,<sup>511</sup> the present dispute “arises in the context of a world-wide battle between two groups of companies” — one Japanese, one Chinese — “that manufacture and sell tires.”<sup>512</sup> Missing from this equation is the type of anti-foreigner sentiment that drove the development and application of the customary international law claim of denial of justice. Indeed, although Claimants originally had hoped to build a case against Panama for nationality-based discrimination, they abandoned their

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<sup>509</sup> See **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW 89* (2005) (citing Charles de Visscher, *Le déni de justice en droit international*, 54 *Recueil des cours* 370, 399 (1935)).

<sup>510</sup> **RLA-0093**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Final Award, 26 June 2003), ¶ 213 (Manson, Mikva, Mustill).

<sup>511</sup> See *supra* **Section I**.

<sup>512</sup> **Decision on Expedited Objections**, ¶ 48.

national treatment and most-favored nation treatment claims after “extensive research” failed to yield any viable path forward.<sup>513</sup>

(ii) **The Meaning of a Denial of Justice**

152. As Panama observed in its Counter-Memorial,<sup>514</sup> numerous tribunals have held that the international responsibility of a State for a denial of justice arises as a result of the failure of a national legal system to provide due process.<sup>515</sup> Thus, a finding of responsibility necessarily entails a systemic failure. Because of this, the standard for finding a denial of justice is an extremely high one,<sup>516</sup> and as Claimants themselves acknowledge, must be

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<sup>513</sup> Reply, ¶ 75.

<sup>514</sup> See Counter-Memorial, ¶ 48.

<sup>515</sup> See, e.g., **CLA-0006**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016), ¶ 254 (Dupuy, Mantilla-Serrano, Thomas); **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), ¶ 279 (Böckstiegel, Hobér, Crawford); **RLA-0102**, *Republic of Italy v. Republic of Cuba* (Award, 15 January 2008), ¶164 (Derains, Cobo Roura, Tanz); **RLA-0097**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Final Award, 12 September 2010), ¶ 279 (Böckstiegel, Steyn, Berman); **RLA-0103**, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL (Award, 12 January 2011), ¶ 223 (Nariman, Anaya, Crook); **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 225 (Kaufmann-Kohler, Wladimiroff, Trapl); **RLA-0104**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 345 (Cremades, Hanotiau, Knieper); **CLA-0041**, *Apotex Inc. v. Government of the United States of America*, ICSID Case No. UNCT/10/2 (Award on Jurisdiction and Admissibility, 14 June 2013), ¶ 281 (Landau, Davidson, Smith); **RLA-0099**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15 (Award, 6 May 2014), ¶ 400 (Cremades, Heiskanen, Gharavi).

<sup>516</sup> **RLA-0097**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Final Award, 12 September 2010), ¶ 280 (Böckstiegel, Steyn, Berman); see

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established by the claimant with evidence.<sup>517</sup> This burden is “not lightly discharged, given that a national legal system will benefit from the general evidential principle . . . that the court or courts have acted properly.”<sup>518</sup> Indeed, “the factual circumstances must be *egregious* if state responsibility is to arise on the grounds of denial of justice.”<sup>519</sup>

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

also **RLA-0098**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Award, 8 July 2016), ¶ 500 (Bernardini, Born, Crawford); **RLA-0099**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15 (Award, 6 May 2014), ¶ 400 (Cremades, Heiskanen, Gharavi); **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), ¶ 274 (Böckstiegel, Hobér, Crawford); **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 291 (Kaufmann-Kohler, Wladimiroff, Trapl).

<sup>517</sup> See **Reply**, ¶ 35.

<sup>518</sup> **RLA-0182**, *Chevron Corporation and Others v. The Republic of Ecuador*, PCA Case No. 2009-23 (Second Partial Award on Track II, 30 August 2018), ¶ 8.41 (Veeder, Naón, Lowe) (“A claimant’s legal burden of proof is therefore not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly.... This general principle subsumes a second principle, namely that a court is permitted a margin of appreciation before the threshold of a denial of justice can be met”).

<sup>519</sup> **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 60 (2005) (emphasis added).

[REDACTED]

(iii) **Standards Applicable To The Specific Theories Advanced**

153. In his treatise, Professor Paulsson identifies different fact patterns that often underlie a denial of justice claim,<sup>520</sup> and — in the Memorial — Bridgestone Licensing had structured its denial of claim by reference to these “categories.”<sup>521</sup> The organization of the various arguments is less clear in the Reply, but only three of the former “categories”<sup>522</sup> appear to still be in play: arbitrariness,<sup>523</sup> due process violations,<sup>524</sup> and corruption.<sup>525</sup>

154. **Arbitrariness.** Although a denial of justice claim may be asserted on the basis of arbitrariness,<sup>526</sup> the bar for success is high. In the words of the International Court of Justice, arbitrariness is “not so much something opposed to *a* rule of law, as

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<sup>520</sup> See generally [RLA-0113](#), Jan Paulsson, [DENIAL OF JUSTICE IN INTERNATIONAL LAW](#), Chapter 7 (2005).

<sup>521</sup> See [Memorial](#), ¶ 165 (“In his seminal work on denial of justice, Jan Paulsson lists a number of categories of denial of justice by the decision-maker”).

<sup>522</sup> Bridgestone Licensing had referenced four categories in its Memorial: arbitrariness, due process, corruption, and incompetence. See [Memorial](#), ¶ 165. In its Reply, there is only a single reference to “incompetent” or “incompetence.” See [Reply](#), ¶ 53. Given that Bridgestone Licensing appears to have abandoned this aspect of its claim, Panama will not address it here. In any event, as explained in Panama’s Counter-Memorial, “Bridgestone Licensing’s arguments concerning the Supreme Court’s ‘incompetence’ are duplicative of the previous categories.” [Counter-Memorial](#), ¶ 54.

<sup>523</sup> See [Memorial](#), ¶¶ 5, 165, 198–207, 211; [Reply](#), ¶¶ 2, 14, 33, 35, 53, 74.

<sup>524</sup> See [Memorial](#), ¶¶ 9, 165–97; [Reply](#), ¶¶ 2, 15, 37–39, 53–57.

<sup>525</sup> See [Memorial](#), ¶¶ 7–9, 13, 116–30; [Reply](#), ¶¶ 3, 5–10, 40–42, 45–48, 53.

<sup>526</sup> [RLA-0113](#), Jan Paulsson, [DENIAL OF JUSTICE IN INTERNATIONAL LAW](#) 196 (2005).

something opposed to *the* rule of law.”<sup>527</sup> A judgment that is merely incorrect as a matter of law or fact will not satisfy this test.<sup>528</sup> Nor will a decision about “which reasonable people may differ.”<sup>529</sup> As Professor Paulsson explains, a claimant “would . . . have to show the absence of any plausible justification” in order to be seen as arbitrary,<sup>530</sup> such that *no* reasonable decision-maker could have reached that decision.<sup>531</sup> This requirement is a corollary to the well-established principle that denial of justice provides for procedural, rather than substantive, protection.<sup>532</sup> Thus, when evaluating a claim that a domestic decision is arbitrary, a tribunal

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<sup>527</sup> **RLA-0112**, *Electronica Sicula S.p.A. (ELSI), United States of America v. Italy*, 1989 ICJ Reports 15 (Award, 20 July 1989), ¶ 128 (Ruda, Oda, Schwebel) (emphasis added).

<sup>528</sup> According to Fitzmaurice, “if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, even though it results in serious injustice, the state is not responsible.” **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, 82, 98 (2005) (quoting Sir Gerald Fitzmaurice, *The Meaning of the Term “Denial of Justice,”* 13 BR. Y.B. INT’L L. 93 (1932)).

<sup>529</sup> **RLA-0064**, *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 (Award, 16 May 2012), ¶ 278 (Kessler, Berman, Cremades); **First Paulsson Report**, ¶ 37.

<sup>530</sup> See **First Paulsson Report**, ¶ 74.

<sup>531</sup> See **RLA-0134**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38 (Award, 14 December 2017) ¶ 471 (McLachlan, Fortier, Kohen); see also **First Paulsson Report**, ¶ 24.

<sup>532</sup> See **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), pp. 7, 82 (“Denial of justice is always procedural . . . [I]n modern international law there is no place for substantive denial of justice.”).

should not (and need not) consider decision's merit<sup>533</sup> (*i.e.*, whether the decision is substantively correct).

155. **Fundamental Violations of Due Process.** If a claimant wishes to assert a denial of justice claim about due process, it must be prepared to provide evidence of “[*f*]undamental breaches of due process.”<sup>534</sup> As the word “fundamental” suggests, such breaches must be serious in order to trigger international responsibility; to wit, in a case that Bridgestone Licensing cites in support of its claim,<sup>535</sup> the tribunal found a denial of justice in circumstances in which “[b]y any standard of measurement, the trial involving [the claimant] was a disgrace.”<sup>536</sup> Examples of such serious violations that may give rise to international responsibility include: lack of access to *any* court,<sup>537</sup> absence of an impartial

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<sup>533</sup> **RLA-0099**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15 (Award, 6 May 2014), ¶ 400 (Cremades, Heiskanen, Gharavi); **RLA-0106**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5 (Award, 19 September 2013), ¶ 4.764 (Berman, Bucher, Thomas).

<sup>534</sup> **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 208 (2005) (emphasis added).

<sup>535</sup> See **Memorial**, ¶ 158–59, fns. 424, 426.

<sup>536</sup> **RLA-0093**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Final Award, 26 June 2003) ¶ 119 (Manson, Mikva, Mustill).

<sup>537</sup> See **RLA-0111**, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16 (Award, 6 July 2012), ¶ 263 (Guillaume, Price, Thomas) (“Not to deny justice implies at a minimum giving access to the courts.”).

decision maker;<sup>538</sup> absence of *any* opportunity to be heard;<sup>539</sup> and absence of a reasoned decision (*i.e.*, no reasons given).<sup>540</sup>

156. **Corruption.** As Panama has explained, the jurisprudence is clear that a claim of corruption entails an extremely high standard of proof,<sup>541</sup> particularly for allegations against high-level officials. The claiming party bears the burden of presenting “clear and convincing” evidence<sup>542</sup> of corruption in the

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<sup>538</sup> **RLA-0182**, *Chevron Corporation and Others v. The Republic of Ecuador*, PCA Case No. 2009-23 (Second Partial Award on Track II, 30 August 2018) ¶ 8.37 (Veeder, Naón, Lowe); **CLA-0071**, *Robert Azinian et al v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award, 1 November 1999), ¶¶ 102–03 (Paulsson, von Wobeser, Civiletti).

<sup>539</sup> **CLA-0071**, *Robert Azinian et al v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award of 1 November 1999), ¶¶ 102–03 (Paulsson, von Wobeser, Civiletti).

<sup>540</sup> **RLA-0213**, Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, ICJ Reports (Advisory Opinion, 12 July 1973), ¶ 92; *see also* **RLA-0214**, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development (Advisory Opinion, 1 February 2012), ¶ 30.

<sup>541</sup> *See* **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 303 (Kaufmann-Kohler, Wladimiroff, Trapl); **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), ¶¶ 422, 424 (Böckstiegel, Hobér, Crawford); **RLA-0064**, *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20 (Award, 16 May 2012), fn. 8 (Kessler, Berman, Cremades); **RLA-0115**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 (Award, 10 December 2014), ¶ 479 (Bernardini, Alexandrov, van den Berg).

<sup>542</sup> **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009), ¶ 221 (Bernardini, Derains, Rovine). *See also* **RLA-0117**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 (Award, 22 August 2017), ¶ 492 (Derains, Edward, Grigera Naón).

specific proceeding at issue.<sup>543</sup> The standard for proving corruption is discussed in greater detail below.<sup>544</sup>

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157. As noted above, there are also certain tests that confirm that a denial of justice claim must fail. For example, if a claim consists of an allegation of a violation of domestic law — and/or amounts to an appeal — it fails as a matter of law. As Professor Paulsson explains, “[t]he mere violation of internal law may *never* justify an international claim based on denial of justice.”<sup>545</sup> Similarly, a tribunal lacks authority to overturn a local court’s appreciation of the evidence (or of evidentiary rules).<sup>546</sup> Further, an international tribunal is not permitted to sit in appeal of a domestic court’s decision.<sup>547</sup> The Parties to the TPA are in

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<sup>543</sup> **First Paulsson Report**, ¶¶ 79–82.

<sup>544</sup> See *infra* Part A.2.c.

<sup>545</sup> **RLA-0113**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 101 (2005) (emphasis added).

<sup>546</sup> **First Paulsson Report**, ¶¶ 40, 59, 62. As Professor Paulsson advises, opposing views as to the materiality of evidence will not amount to a denial of justice. **First Paulsson Report**, ¶¶ 37, 66.

<sup>547</sup> See **RLA-0110**, *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01 (First Partial Award, 29 April 2014), ¶ 327 (Veeder, van den Berg, Sachs); **CLA-0071**, *Robert Azinian et al., v. United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award, 1 November 1999), ¶ 99 (Paulsson, von Wobeser, Civiletti); **CLA-0073**, *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002), ¶ 126 (Stephen, Crawford, Schwebel); **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), ¶ 274 (Böckstiegel, Hobér, Crawford); **RLA-0097**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Final Award, 12 September 2010), ¶ 489 (Böckstiegel, Steyn, Berman); **CLA-0073**, *Mondev International*

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agreement in this respect: “[I]nternational tribunals, such as U.S.-Panama TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court’s application of domestic law.”<sup>548</sup>

**b. Bridgestone Licensing’s Claim Based on the Supreme Court Judgment Fails**

158. In recent years, various Bridgestone entities have attempted to persuade the Panamanian Supreme Court to “vacate,” “overturn,” and/or “modify” the Supreme Court Judgment.<sup>549</sup> But irrespective of the Bridgestone group’s apparent conviction that “the Supreme Court’s understanding and application of Panamanian law was wrong,”<sup>550</sup> an investment arbitration is not an

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*Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002), ¶ 127 (Stephen, Crawford, Schwebel); **RLA-0104**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 441 (Cremades, Hanotiau, Knieper); **RLA-0106**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5 (Award, 19 September 2013), ¶ 4.764 (Berman, Bucher, Thomas); **RLA-0107**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6 (Award, 12 April 2002), ¶ 159 (Böckstiegel, Bernardini, Wallace); **RLA-0108**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability, 14 January 2010), ¶ 283 (Fernández-Armesto, Paulsson, Voss).

<sup>548</sup> **Third U.S. Submission**, ¶ 4.

<sup>549</sup> **Notice of Arbitration**, ¶ 13; **Request for Arbitration**, § III.I; *see also* **Hearing on Expedited Objections (Day 2)**, Tr. 338:19–22 (Claimants’ counsel) (explaining that, “after spending two years trying to *overturn* the [May 2014] Supreme Court Judgment,” “BSLS and BSJ . . . had to decide between themselves which entity would pay”) (emphasis added).

<sup>550</sup> **Memorial**, ¶ 214.

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avenue for appeal.<sup>551</sup> The claim by Bridgestone Licensing contravenes this cardinal rule.

159. Indeed, there can be no conclusion other than that Bridgestone Licensing is mounting an appeal. The Reply encourages the Tribunal to re-examine the evidence,<sup>552</sup> and expressly asserts that the Tribunal “must understand what the relevant standards of Panamanian law were” and “see whether the Supreme Court Judgment adhered to them.”<sup>553</sup>

160. Although the asserted complaints about the Supreme Court Judgment have shifted over time, Bridgestone Licensing appears to have settled on the five complaints listed below — the

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<sup>551</sup> See **Counter-Memorial**, ¶ 49 (explaining that “the submission and evaluation of a claim of a denial of justice does not permit an international tribunal to sit in appeal of a domestic court’s decision”) (citing **CLA-0071**, *Robert Azinian et al v. the United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award, 1 November 1999), ¶ 99 (Paulsson, von Wobeser, Civiletti); **CLA-0073**, *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002), ¶ 126 (Stephen, Crawford, Schwebel); **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), ¶ 274 (Böckstiegel, Hobér, Crawford); **RLA-0097**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Final Award, 12 September 2010), ¶ 489 (Böckstiegel, Steyn, Berman); **CLA-0073**, *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award, 11 October 2002), ¶ 127 (Stephen, Crawford, Schwebel); **RLA-0104**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 441 (Cremades, Hanotiau, Knieper); **RLA-0106**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5 (Award, 19 September 2013), ¶ 4.764 (Berman, Bucher, Thomas)).

<sup>552</sup> See, e.g., **Reply**, ¶ 39(d) (asserting that “[t]he Supreme Court did not conduct a reasoned examination of the evidence because it ignored evidence submitted by BSLS and BJS, and relied on unsupported witness evidence that was contradicted by documentary evidence”).

<sup>553</sup> **Reply**, ¶ 37.

first of which the Reply labels as “arbitrariness,” and the remainder of which the Reply labels as due process violations.

- a. Argument 1: “The Supreme Court did not conduct a reasoned examination of the evidence . . . and relied on unsupported witness evidence that was contradicted by documentary evidence;”<sup>554</sup>
- b. Argument 2: “The Supreme Court based its finding on a provision of law other than that contained in the claim,”<sup>555</sup> *i.e.*, Article 217 of the Judicial Code;
- c. Argument 3: “The Supreme Court relied on evidence that was not properly admitted,” *i.e.*, the Demand Letter;<sup>556</sup>
- d. Argument 4: “The Supreme Court based its finding on grounds not raised by Muresa in its complaint;”<sup>557</sup> and
- e. Argument 5: “The Supreme Court did not base its determination of the damages on any evidence or assessment whatsoever.”<sup>558</sup>

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<sup>554</sup> Reply, ¶ 39(d).

<sup>555</sup> Reply, ¶ 39(a).

<sup>556</sup> Reply, ¶ 39(b).

<sup>557</sup> Reply, ¶ 39(c).

161. However, the addition of these labels does not alter the fact that four of the five arguments (*viz.*, Arguments 1, 3, 4, and 5) are recycled — almost verbatim — from the Civil Proceeding. For its part, the fifth argument (*viz.*, Argument 2) is the direct *opposite* of what the Bridgestone Litigants had argued in the Civil Proceeding.

**Table 4**

<b>Purported Denial of Justice Claim</b>	<b>Argument in Local Proceeding</b>
“The Supreme Court did not conduct a reasoned examination of the evidence . . . and relied on unsupported witness evidence that was contradicted by documentary evidence.” <sup>559</sup>	<b>Same argument:</b> The Bridgestone Litigants argued that the Supreme Court relied on “the incorrect appreciation of amount of evidence provided by the acting parties, such as the testimonies from personnel working for the plaintiffs, expert reports provided by the experts designated by [Muresa] and [Tire Group], and paying special attention to [the Demand Letter.]” <sup>560</sup>

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<sup>558</sup> Reply, ¶ 39(c).

<sup>559</sup> Reply, ¶ 39(d).

<sup>560</sup> See Ex. R-0125, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), p. 7.

Purported Denial of Justice Claim	Argument in Local Proceeding
“[T]hese proceedings should be analyzed and applied from the point of view of Article 217 of the Judicial Code as they involve damages and losses arising from proceedings.” <sup>561</sup>	<b>Opposite argument:</b> “BSLS and BSJ did not ‘request’ that Article 217 of the Judicial Code be applied to the dispute.” <sup>562</sup>
“The Supreme Court relied on evidence that was not properly admitted,” viz., the Demand Letter. <sup>563</sup>	<b>Same argument:</b> “With the introduction of [the Demand Letter], the claimants have curtailed the right of our clients to fairness on the letter dated November 3, 2004, which as we have stated does not comply with procedural requirement to be admitted as proof.” <sup>564</sup>

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<sup>561</sup> [Ex. C-0023](#), BSJ and BSLS Opposition to Muresa Appeal (14 January 2011), p. 20.

<sup>562</sup> [Reply](#), ¶ 67.

<sup>563</sup> [Reply](#), ¶ 39(b).

<sup>564</sup> [Ex. C-0200](#), Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), p. 12.

Purported Denial of Justice Claim	Argument in Local Proceeding
<p>“The Supreme Court based its finding on grounds not raised by Muresa in its complaint,” <i>viz.</i>, recklessness.<sup>565</sup></p>	<p><b>Same argument:</b> The Bridgestone Litigants asserted that “the claimant is attempting for Your Honor to consider facts other than those stated in the claim and for you to proffer an <i>ultra petita</i> judgment.”<sup>566</sup></p> <p>The Bridgestone Litigants further argued that “the alleged campaign of persecution in other countries is not the object of the claims of Point Six of the claim and therefore it is [ultra petita] and irrelevant with what is being claimed and should therefore be rejected.”<sup>567</sup></p>

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<sup>565</sup> Reply, ¶ 39(c); *see also id.* at ¶ 55.

<sup>566</sup> Ex. C-0200, Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), p. 19.

<sup>567</sup> Ex. C-0023, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), p. 37.

Purported Denial of Justice Claim	Argument in Local Proceeding
“The Supreme Court did not base its determination of the damages on any evidence or assessment whatsoever.” <sup>568</sup>	<b>Same argument:</b> The Bridgestone Litigants requested “the clarification and amendment of the [Supreme Court] Judgment . . . to the effect that the [ ] judgment is clarified and amended with respect to the amount of damages . . . because of the errors in the calculation of such amount. . . . [The Judgment] does not explain in detail how such total was mathematically reached[.]” <sup>569</sup>

162. All five of Bridgestone Licensing’s arguments fail for these threshold reasons alone. However, as discussed below, a close review reveals additional flaws. Below, Panama addresses in turn Bridgestone Licensing’s arguments that the Supreme Court Judgment (a) was arbitrary, and (b) violated Bridgestone Licensing’s due process rights.

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<sup>568</sup> Reply, ¶ 39(e).

<sup>569</sup> See Ex. R-0053, Bridgestone Corporation and Bridgestone Licensing’s Motion for Clarification and Modification of the Decision of the Supreme Court of Panama (16 June 2014), p. 1.

(i) **Bridgestone Licensing’s First Argument Fails**

163. Throughout the Reply, Bridgestone Licensing insists that the Supreme Court Judgment was “arbitrary,”<sup>570</sup> and that this in turn amounted to a denial of justice. However, in order to establish such a claim, Bridgestone Licensing would have needed to demonstrate that the Supreme Court Judgment could not be justified on *any* grounds, and/or that it affronted not *a* rule of law, but *the* rule of law itself.<sup>571</sup> Bridgestone Licensing has not made any such showing.

164. Indeed, its only argument 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.”<sup>572</sup> This argument fails for three simple reasons. *First*, it is squarely within the discretion — and mandate — of a domestic court to weigh the evidence and reach a decision in favor of one party.<sup>573</sup> *Second*, an international tribunal “has no

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<sup>570</sup> See, e.g., **Reply**, ¶¶ 2, 3, 14, 35, 53, 74–75.

<sup>571</sup> See **RLA-0112, Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)**, 1989 ICJ Reports 15 (Judgment, 20 July 1989) ¶ 128 (Ruda, Oda, Schwebel); **First Paulsson Report**, ¶ 66 (“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.”).

<sup>572</sup> **Reply**, ¶ 39(d).

<sup>573</sup> **First Paulsson Report**, ¶ 40 (“[I]nternational law recognizes that national courts enjoy broad discretion over questions concerning the admission and reliance upon

[FOOTNOTE CONTINUED ON NEXT PAGE]



competence to retrace and reappraise the factual evidence.”<sup>574</sup>

*Third*, the Supreme Court *did* conduct a reasoned examination.

165. To recall, the task before the Supreme Court had been to determine whether the outcome in a lower court proceeding would have been different if the lower court had considered certain evidence. To decide that question, the Supreme Court reviewed the lower court’s decision,<sup>575</sup> and concluded that the court had not considered the evidence in question.<sup>576</sup> It then examined such evidence, and concluded that it was dispositive — which meant that the Supreme Court was required to rule on the substance. In

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evidence. . . . The major international arbitration rules (which, *a fortiori*, reflect international standards of due process) make clear that arbitrators are vested with unfettered discretion in handling evidence, subject only to their overriding duty as adjudicators. National courts have equal autonomy to admit and assess evidence without crossing the line of denial of justice”).

<sup>574</sup> [RLA-0104, Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23 \(Award, 8 April 2013\), ¶ 485 \(Cremades, Hanotiau, Knieper\)](#) (“The Tribunal is not in apposition and has no competence to retrace and reappraise the factual evidence.”). See also *id.* at ¶ 463 (“The Tribunal is not entitled to make a final finding on the question. That would amount to a revision of the merits and be beyond its competence. . . .”); [RLA-0216, Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9 \(Decision on Annulment, 15 January 2016\) ¶ 129](#) (“It is not within an *ad hoc* committee’s remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. . . . If the Committee were to proceed to a re-examination of the facts of the present case and an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body”).

<sup>575</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\), p. 7](#) (“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”); see also *id.* at pp. 15–17.

<sup>576</sup> See [Ex. R-0034, Decision of the Supreme Court of Panama \(28 May 2014\), p. 7](#).

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doing so, the Court relied on evidence that it considered dispositive: the Demand Letter,<sup>577</sup> Bridgestone Licensing's withdrawal of its appeal of the Opposition Proceeding ruling to the Third Circuit Court,<sup>578</sup> the consistent testimony of seven witnesses on the subject of tire sales,<sup>579</sup> and the accounting report of two experts addressing the decrease in sales of RIVERSTONE tires.<sup>580</sup>

166. For these reasons, Bridgestone Licensing's complaint about the weight ascribed to certain evidence by the Supreme Court should be dismissed.

### **(ii) Bridgestone Licensing's Remaining Arguments Fail**

167. In the Reply, Bridgestone Licensing claims that the Supreme Court Judgment had violated "international law standards of due process" in four ways.<sup>581</sup> However, for such a claim to prevail, "the factual circumstances must be egregious . . . ."<sup>582</sup> As explained by the *Philip Morris* tribunal, only "grave procedural

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<sup>577</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 8–9, 15–16.

<sup>578</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 9, 16.

<sup>579</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 9–12, 15.

<sup>580</sup> See [Ex. R-0034](#), Decision of the Supreme Court of Panama (28 May 2014), pp. 11–12, 14–15.

<sup>581</sup> See [Reply](#), ¶ 39.

<sup>582</sup> [RLA-0113](#), Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005).

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errors” will satisfy the “elevated standard of proof [that] is required for finding a denial of justice.”<sup>583</sup> For example, in *Metalclad v. Mexico*, it was only because a party had been given “no notice[,]” “no invitation[,]” and “no opportunity to appear” in the proceedings,<sup>584</sup> that the tribunal found a violation of the claimant’s due process rights.<sup>585</sup> As discussed below, however, all four strands of Bridgestone Licensing’s due process arguments lack merit.

### (a) Argument 2: The Application of Article 217 of the Judicial Code

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<sup>583</sup> **RLA-0098**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Award, 8 July 2016), ¶¶ 499, 501; see also **RLA-0099**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15 (Award, 6 May 2014), ¶ 403 (““Even if the Tribunal were to assume for the sake of argument that the decision was as erroneous and defective as the Claimant claims, the Claimant has failed to prove that the decision of the Cairo Court of Appeals was “manifestly unjust”, or that there had been a “gross deficiency” in the administration of the process, resulting in a denial of justice. The evidence presented by the Parties, including the Claimant’s own submissions confirm, if anything, that the Claimant had the opportunity not only to participate in the local proceedings but also to present its claims and counterclaims”); **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), ¶¶ 769–70 (“[A] review of the material before it and a careful reading of the Supreme Court’s decision enabled the Tribunal to conclude that it is not clearly improper, discreditable or in shocking disregard of Albanian law. The judgment is reasoned, understandable, coherent and embedded in a legal system that is characterized by a division between public and private law as well as civil and administrative procedures. Therefore, the Tribunal rejects the claim for denial of justice”).

<sup>584</sup> **CLA-0089**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award, 30 August 2000), ¶ 91 (Lauterpacht, Civiletti, Siqueiros).

<sup>585</sup> **RLA-0217**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Award, 29 May 2003), ¶ 162 (Naón, Fernández Rosas, Bernal Vereza).

168. The first strand of the claim consists of the allegation that the Supreme Court Judgment contravened due process by “bas[ing] its finding on a provision of law [*viz.*, Article 217] other than that contained in the [complaint]”<sup>586</sup> submitted by Muresa and Tire Group to the First Instance Court. According to Bridgestone Licensing, this in turn meant that “the decision was based on a legal point that [Bridgestone Licensing] did not have the opportunity to address.”<sup>587</sup> However, the reality is that Bridgestone Licensing had *every* opportunity to address the applicability of Article 217.

169. Indeed, as explained above, the Bridgestone Litigants were the parties to first raise Article 217, arguing in their answers to the First Instance Court that Article 217 should apply.<sup>588</sup> They then repeated this argument throughout the Civil Proceeding,<sup>589</sup> even describing Article 217 as the “govern[ing]”

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<sup>586</sup> Reply, ¶ 39(a).

<sup>587</sup> Reply, ¶ 39(a).

<sup>588</sup> See [Ex. R-0045, Answer of Bridgestone Licensing to the Civil Torts Claim \(13 October 2008\)](#), p. 2. (“In order for a plaintiff to be liable for damages and consequences of a proceedings, by express and clear mandate of Article 217, Judicial Code, it is imperative for such plaintiffs to have acted recklessly or in bad faith”); see also [Ex. C-0019, Answer of Bridgestone Corporation to the Civil Torts Claim \(19 August 2009\)](#), p. 4 (“Our legislation is clear in terms of the possible damages that could be caused as the consequence of legal or litigious proceedings and in this regard it establishes a strict liability, which is found in Article 217 of the Judicial Code”).

<sup>589</sup> See [Ex. C-0200, Closing arguments of Bridgestone Corporation and Bridgestone Licensing \(11 June 2010\)](#), pp. 2–3.

law to the Appellate Court.<sup>590</sup> And then, once the Appellate Court agreed — and applied Article 217 to reach its merits decision<sup>591</sup> — the Bridgestone Litigants defended that decision to the Supreme Court.<sup>592</sup>

170. In addition, the Bridgestone Litigants presented merits defenses on the topic, and had an opportunity to confront the plaintiffs’ evidence.<sup>593</sup> Accordingly, this claim should be rejected

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<sup>590</sup> [Ex. C-0023, Bridgestone Corporation and Bridgestone Licensing Opposition to Muresa Appeal \(14 January 2011\)](#), p. 4 (“[W]e have always opposed the legal basis of the claimant’s claim, that is to say, Article 1644 of the Civil Code that refers to the subjective non-contractual civil liability, due to the fact that in the case in question, as it involves alleged damages caused as a consequence of judicial proceedings, *the objective civil non-contractual liability of Article 217 of the Judicial Code is what governs the circumstances in question*”) (emphasis added).

<sup>591</sup> See [Ex. R-0037, Decision of the First Superior Court \(23 May 2013\)](#), p. 20 (“[R]ecklessness that gives rise to compensation, as stated in Article 217 of the Judicial Code, is comparable to ‘gross negligence’ or willful conduct . . . From an exam[ination] of the record, this Court deems that the Plaintiffs did not comply with the burden to prove the factual requirements of the legal rules invoked in the case. The Plaintiffs evidently did not prove that there was *recklessness, willful misconduct or gross negligence* in the Respondents’ conduct when the Respondents opposed the trademark registration filed by the Plaintiffs before the Courts”) (emphasis added) (internal citations omitted).

<sup>592</sup> See [Ex. R-0047, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse \(16 September 2013\)](#), p. 8 (“[The Plaintiffs] cite Articles 217 of the Judicial Code and 1644 of the Civil Code, allegedly infringed upon because of direct violation due to omission, [but this is] a mistaken concept of violation, given that these regulations *were applied* by the Superior [Tribunal] at the time when the ruling was issued. Even more, *based on both regulations, the Superior denied the cause requested*, and therefore the idea of a violation cannot be “direct violation due to omission,” to the degree that said idea would imply that the regulations were unknown, a situation that is not occurring in these proceedings; to the contrary, *they were applied as a result of the examined body of evidence*”) (emphasis added).

<sup>593</sup> See [Ex. R-0052, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse \(14 January 2014\)](#), p. 9 (“According to the appellant, this evidence shows willful misconduct and bad faith on the part of the defendants. Nothing is further from reality. The withdrawal of an appeal does not constitute proof of “damage,”

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on the same basis as the unfounded claim in *Arif v. Moldova*. In that case, the claimant had alleged that it had been “prevented from making submissions [on an oral amendment to a pleading] and from formulating objections thereto.”<sup>594</sup> However, upon examining the record, the *Arif* tribunal held that the documents demonstrated that the claimant was “fully aware of the amendment of the claim,” that the “party’s right to be heard was respected during the national court proceedings[,] and that the oral amendment of the claim and its subsequent submission in hand-written form, however peculiar they may seem, have not violated due process.”<sup>595</sup> The facts presented here are even more clear cut: Bridgestone Licensing itself raised and then submitted multiple arguments on the very subject that it claims it was denied the opportunity to address.

### (b) Argument 3: The Admission of the Demand Letter

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nor does it represent an abuse of the right to litigate. Quite the contrary, it is an indication of the assessing decisions that implied, at the time, withdrawing the discussion that had been initially raised, which does not always happen; contrarily, in many cases, legal discussions such as this one are perpetuated, which are extended until the last instances, without this implying an abuse of the right to litigate nor proof of recklessness or bad faith”) (emphasis in original).

<sup>594</sup> **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013) ¶ 490 (Cremades, Hanotiau, Knieper).

<sup>595</sup> **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶¶ 490-497 (Cremades, Hanotiau, Knieper).

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171. The second strand of the claim is predicated on the assertion that the Demand Letter “was not properly admitted into the proceedings,”<sup>596</sup> and that the Supreme Court Judgment’s reliance on such Letter therefore “violated BSLs and BSJ’s right to due process because they were not able to respond to the evidence against them on an equal level.”<sup>597</sup> However, this argument likewise fails, for three reasons.

172. *First*, Bridgestone Licensing’s criticism of the Supreme Court is misdirected: Bridgestone Licensing has asserted that the *Supreme Court* committed a denial of justice, but it was the *First Instance Court* that admitted the Demand Letter.<sup>598</sup> By the time that the case reached the Supreme Court, at least three copies of the Demand Letter had been admitted into the record. Thus, while Claimants may complain about the probative value that the Supreme Court granted to the Demand Letter, its admissibility had already been determined<sup>599</sup> by the First Instance Court — a decision that the Bridgestone Litigants never challenged.<sup>600</sup>

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<sup>596</sup> Reply, ¶ 57.

<sup>597</sup> Reply, ¶ 39(b).

<sup>598</sup> See **Ex. R-0102**, Edict No. 1230, Eleventh Civil Circuit Court (26 July 2012); see also **Second Lee Report**, ¶¶ 37–44, 64–70.

<sup>599</sup> See **Ex. R-0102**, Edict No. 1230, Eleventh Civil Circuit Court (26 July 2012); see also **Second Lee Report**, ¶¶ 37–44, 64–70.

<sup>600</sup> See **Ex. R-0036**, Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 11–14.

173. **Second**, the Demand Letter was properly admitted. In the Reply, Claimants alleged that the Demand Letter had been “produced **only** as an attachment to the report of Muresa’s quantum expert” during the Civil Proceeding<sup>601</sup> and “was admitted . . . in violation of the different mandatory requirements of” the Judicial Code.<sup>602</sup> However, their arguments are unfounded as a matter of Panamanian law,<sup>603</sup> and in any event, the Demand Letter was admitted as evidence by the First Instance Court on at least two other occasions.<sup>604</sup> Bridgestone Licensing has not advanced any claim of impropriety in respect of either of those instances.

174. **Third**, Bridgestone Licensing had multiple opportunities to address the admission and significance of the Demand Letter throughout the Civil Proceeding, including before the First Instance Court. Indeed, the Bridgestone Litigants made

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<sup>601</sup> Reply, ¶ 2(b) (emphasis added).

<sup>602</sup> Reply, ¶ 2(b).

<sup>603</sup> Given the other glaring defects in Bridgestone Licensing’s claim, it did not seem necessary to set out in this Rejoinder the many problems with Bridgestone Licensing’s Panamanian law arguments. Nevertheless, those issues are addressed in Mr. Lee’s second report. For a detailed explanation of the Panamanian law bases for the admission of the Demand Letter, *see generally* **Second Lee Report**, ¶¶ 37–70.

<sup>604</sup> *See* **Ex. R-0110**, Demand Letter Included as an Exhibit with L.V. International’s Third-Party Coadyuvante Petition (date submitted 11 May 2010); *see also* **Ex. R-0111**, Demand Letter Included as an Exhibit with Court-Appointed Expert Report (date submitted 24 May 2010); **Ex. R-0112**, Demand Letter Included as an Exhibit with José Antonio Aguilar De Sedas and Ms. Psiquies De León Expert Report (date submitted 24 May 2010).



arguments in respect of the admissibility and/or relevance of the Demand Letter on at least nine occasions, namely:

- a. During the cross-examination of the plaintiffs' experts,<sup>605</sup>
- b. During the cross-examination of Muresa's witnesses,<sup>606</sup>
- c. During the cross-examination of the Tribunal's expert,<sup>607</sup>
- d. In their opposition to L.V. International's appeal of the trial court's denial of their Third-Party Intervener Petition,<sup>608</sup>

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<sup>605</sup> See e.g., [Ex. C-0198, Interrogatory of Jose Antonio Aguilar and Psiquies de Leon \(26 May 2010\)](#), p. 11 (Bridgestone Litigants asking a question to the Muresa Plaintiffs' expert, challenging the admissibility of the letter. Muresa Plaintiffs' objected to the question, but the trial court rejected the objection.); see also [Ex. C-0199, Continuation Interrogatory of Jose Antonio Aguilar and Psiquies de Leon \(27 May 2010\)](#), pp. 1-3 (Bridgestone Litigants asking two questions to the Muresa Plaintiffs' expert, challenging the admissibility of the letter. Muresa Plaintiffs' objected to the questions, and the trial court admitted this objection.). Bridgestone also often objected to the Muresa Plaintiffs' questions regarding the Demand Letter.

<sup>606</sup> See e.g., [Ex. C-0147, Testimony by Jorge Alberto Luque Gonzalez - part 2 \(14 May 2010\)](#), pp. 5-6.

<sup>607</sup> See [Ex. C-0196, Interrogatory of Vera Lindo de Gutierrez \(25 May 2010\)](#), p. 7 (answering that she was given a letter that she included in her report); p. 9 (objection by the Bridgestone Litigants regarding a question related to the Demand Letter was sustained).

<sup>608</sup> See [Ex. R-0103, Excerpt of Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to L.V. International Inc.'s Appeal of Judgment No. 629 \(2 June 2011\)](#), pp. 1-3.

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- e. In their closing arguments before the First Instance Court,<sup>609</sup>
- f. In their opposition to the plaintiffs' appeal;<sup>610</sup>
- g. In their opposition to the admissibility of the plaintiffs' cassation petition to the Supreme Court,<sup>611</sup>
- h. In their opposition to the merits of the plaintiffs' cassation petition to the Supreme Court;<sup>612</sup> and
- i. In their Recourse for Review.<sup>613</sup>

Neither the First Instance Court,<sup>614</sup> the Appellate Court,<sup>615</sup> nor the Supreme Court sustained the Bridgestone Litigants' arguments about the admission of the Demand Letter<sup>616</sup> — even though two of those courts ruled in favor of the Bridgestone Litigants on the

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<sup>609</sup> See **Ex. C-0200**, Closing arguments of Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 June 2010), pp. 12–15, 17, 19–21.

<sup>610</sup> See **Ex. C-0023**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to Muresa and TGF Appeal (14 January 2011), pp. 15, 17, 31–32.

<sup>611</sup> **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing's Objection to the Admission of the Cassation Recourse (16 September 2013), p. 4.

<sup>612</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing's Response to the Cassation Recourse (14 January 2014), pp. 4–7.

<sup>613</sup> See **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing's Recourse for Review of the Supreme Court Decision (30 September 2014), pp. 6-8.

<sup>614</sup> See **Second Lee Report**, ¶ 68.

<sup>615</sup> **Ex. R-0101**, Excerpt of Decision on L.V. International's Third-Party Coadyuvante Petition, First Superior Court of the Judicial District (19 June 2012).

<sup>616</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 18.

[REDACTED]

[REDACTED]

merits. It is disingenuous for Bridgestone Licensing to now assert that it was not given the opportunity to be heard on the subject of the Demand Letter.

**(c) Argument 4: The Evidence of the  
Bridgestone Litigants’ Conduct Outside  
of Panama**

175. The third strand of the claim appears to be a gloss on the first. Thus, again Bridgestone Licensing complains that “[t]he Supreme Court based its finding on grounds not raised by Muresa in its complaint [in the first instance proceeding].”<sup>617</sup> However, whereas previously, Bridgestone Licensing had complained about the Supreme Court’s decision to apply Article 217, in this third strand, the complaint is that “the Supreme Court decided that BSLS and BSJ were liable because they were reckless and intimidating in filing opposition actions against the RIVERSTONE mark in several countries,”<sup>618</sup> even though the plaintiffs’ complaint had referenced the Panamanian Opposition Proceeding.<sup>619</sup> According to Bridgestone Licensing, the Supreme Court violated the principle of consistency and thereby infringed

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<sup>617</sup> Reply, ¶ 39(c).

<sup>618</sup> Reply, ¶ 54.

<sup>619</sup> Reply, ¶ 54.

[REDACTED]

Bridgestone Licensing's right to be heard.<sup>620</sup> This argument fails for two reasons.

176. *First*, the Supreme Court did not violate the principle of consistency. As the Tribunal will recall, pursuant to Article 991, judgments must “be in accordance with the petitions made in the claim, or subsequently alleged in cases specifically foreseen . . . if so required by Law.”<sup>621</sup> One such “case” is the admission of a *coadyuvante* petition; pursuant to Article 603 of the Judicial Code, a court is obliged to review, consider, and resolve the issues raised in an admitted *coadyuvante* petition.<sup>622</sup> In the Civil Proceeding, to recall, L.V. International had submitted a *coadyuvante* petition, which had been approved by the time that the Supreme Court was called upon to rule on the case. In that petition, L.V. International had asserted (and appended evidence showing) that the Bridgestone Litigants had harmed Muresa, Tire Group and L.V. International by pursuing opposition actions in Panama and worldwide,<sup>623</sup> and by making threats, such as the

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<sup>620</sup> See [Reply](#), ¶ 39(c).

<sup>621</sup> [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 991.

<sup>622</sup> See [Ex. R-0138](#), Judicial Code of the Republic of Panama, Art. 603 (“The request for intervention must contain the facts and the legal grounds on which it is based, and the relevant evidence will be attached to it. *If the judge considers the intervention appropriate, he will accept it outright and will consider the petitions that the intervener made in the same brief*”) (emphasis added).

<sup>623</sup> See [R-0126](#), Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010) (3 June 2010) p. 4

Demand Letter.<sup>624</sup> Accordingly, the Supreme Court was well justified in relying upon the Demand Letter and other evidence. In fact, as Mr. Lee explains, the Supreme Court was *required* to rule on L.V. International's allegations.<sup>625</sup>

177. *Second*, even assuming *arguendo* that the Supreme Court Judgment *had* run afoul of Article 991, Bridgestone Licensing had myriad opportunities to be heard on the subject of Bridgestone group conduct outside of Panama during the Civil Proceeding. For example:

- a. The Bridgestone Litigants sought and secured the admission as evidence of the U.S. Opposition Proceeding.<sup>626</sup>
- b. Bridgestone Licensing objected before both the First Instance Court<sup>627</sup> and the Appellate Court<sup>628</sup> to

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<sup>624</sup> See **R-0126**, Corrected L.V. International Inc. Third-Party Coadyuvante Petition (3 June 2010) (3 June 2010) pp. 5-6.

<sup>625</sup> The Supreme Court would have violated the principle of consistency had it not done so, as Article 991 establishes that (“[i]f several petitions were filed, a corresponding statement shall be made with regard to each one of them.”) See **Second Lee Report**, ¶ 118; **Ex. R-0138**, Judicial Code of the Republic of Panama, Art. 991.

<sup>626</sup> See **Ex. R-0121**, List of Evidence Submitted by the Bridgestone Corporation and Bridgestone Licensing Services, Inc. (1 October 2009).

<sup>627</sup> See **Ex. C-0200**, Closing arguments of Bridgestone Corporation and Bridgestone Licensing Services, Inc. (11 June 2010), p. 19.

<sup>628</sup> See **Ex. C-0023**, Bridgestone Corporation and Bridgestone Licensing Services, Inc.'s Opposition to Muresa's Appeal, p. 37.

[REDACTED]

the idea of the relevant court’s reliance on evidence of Bridgestone group conduct abroad.

- c. The foreign opposition actions were discussed in the testimony of several witnesses,<sup>629</sup> during which Bridgestone Licensing had an opportunity to ask questions and make objections.<sup>630</sup>
- d. During the Supreme Court Proceeding, Bridgestone Licensing could have reasserted — but chose not to — reassert its objection to court’s reliance on evidence of Bridgestone group conduct abroad.

178. Accordingly, this strand of the argument fails.

#### **(d) Argument 5: The Award of Damages in the Supreme Court Judgment**

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<sup>629</sup> See [Ex. C-0155, Testimony by Gricelda Pineda Castillo \(22 April 2010\)](#), p. 3; see also, [Ex. C-0160, Testimony by Fernan Jesus Luque Gonzalez – Part 1,\(27 April 2010\)](#), p. 3 (“QUESTION #9: Will the witness state if he knows whether the registration of the RIVERSTONE brand was also challenged in other countries, and if so to indicate which countries? REPLY: We were challenged by BRIDGESTONE FIRESTONE in the following countries: the United States, Argentina, Chile, the Dominican Republic, Colombia, Venezuela, South Africa, South Korea and currently we have been challenged for seven years in China . . .”).

<sup>630</sup> See e.g. [Ex. C-0159, Testimony by Laura Esther Murgas de Bracho \(5 May 2010\)](#), pp. 2 – 3 (the First Instance Court overruling an objection from Bridgestone Licensing based on relevance to a question related to opposition proceedings in other countries); [Ex. C-0147, Testimony by Jorge Alberto Luque Gonzalez – Part 2 \(14 May 2010\)](#), pp. 1 – 2 (the First Instance Court overruling an objection from Bridgestone Licensing that “[t]he information relating to objection proceedings in the United States is irrelevant and immaterial to the proceedings for damages and losses caused by the objection to a registration in Panama”).

[REDACTED]

179. The fourth and final strand of Bridgestone Licensing’s due process claim is predicated on the theory that “[t]he Supreme Court did not base its determination of the damages on any evidence or assessment whatsoever.”<sup>631</sup> However, this, too, is incorrect. The Supreme Court actually found — on the basis of the expert opinions and witness evidence — that RIVERSTONE tire sales had decreased during the relevant period, which substantiated the plaintiffs’ claim of loss.<sup>632</sup> Specifically, the Supreme Court relied upon the consistent testimony of seven witnesses, who affirmed that Muresa and Tire Group had suffered financially as a result of the Bridgestone Litigants’ actions.<sup>633</sup> As to the quantum of damages, the Supreme Court also found convincing the expert report adduced by Muresa and Tire Group,<sup>634</sup> which had determined that the decrease in RIVERSTONE tire sales had caused damages of USD 5,775,793.84.<sup>635</sup> These sales figures were also supported by the court-appointed expert’s findings, who often concluded that the RIVERSTONE tire sales were lower than

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<sup>631</sup> **Reply**, ¶ 39(e).

<sup>632</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014); see also **First Lasso de la Vega Ferrari Report**, ¶ 57.

<sup>633</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 11.

<sup>634</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 11–12.

<sup>635</sup> **Ex. C-0162**, Accounting Expert Report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 4, 7.

the figures proposed by Muresa and Tire Group’s own experts.<sup>636</sup> However, because Article 991 of the Judicial Code states that a “defendant cannot be sentenced to pay a superior amount” to the one requested in the claim, the Supreme Court could only award damages in the amount of USD 5,000,000.00.<sup>637</sup>

180. As for the length and detail of the text of the Judgment: The Supreme Court renders thousands of Supreme Court decisions every single year.<sup>638</sup> Those decisions are not treated as precedent and cited in future pleadings as they are in common law jurisdictions.<sup>639</sup> For these reasons, a court is unlikely to go into detail on every element of every issue. Indeed, many supreme courts in civil law jurisdictions issue decisions that would appear overly concise to common law judges; Mr. Lee has appended examples of such decisions, including decisions drafted

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<sup>636</sup> Compare **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 4, 7 with **Ex. C-0163**, Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) (24 May 2010), pp. 6, 12.

<sup>637</sup> **Ex. R-0138**, Judicial Code of the Republic of Panama, Art. 991.

<sup>638</sup> See **Second Lee Report**, ¶ 31. As opposed to, for example, the Supreme Court of the United States, which roughly issues only 120 opinions a year. See **Ex. R-0136**, Information About Opinions, Supreme Court of the United States (7 June 2019), p. 2 (“Several days after an opinion is announced by the Court, it is printed in a 6" x 9" self-cover pamphlet called a ‘slip opinion.’ Each slip opinion consists of the majority or plurality opinion, any concurring or dissenting opinions, and the syllabus. . . . The number of slip opinions published each Term has varied over the years from as few as 75 to as many as 170”).

<sup>639</sup> See **Second Lee Report**, ¶¶ 34–35.



by Mr. Arjona, as well as decisions issued by the Supreme Court of Spain.<sup>640</sup>

**c. Bridgestone Licensing’s Denial of Justice Claim Based on Corruption Fails**

181. In the Reply, Bridgestone Licensing boldly asserts that “corruption . . . gave rise to the impugned judgment.”<sup>641</sup> Yet, as the Tribunal will have seen, Bridgestone Licensing does not offer *any* facts (or even factual allegations) to support that serious claim. This is wantonly irresponsible, as the pleadings are presumptively public, and — to paraphrase Churchill — “[fiction] gets halfway around the world before the truth has a chance to get its pants on.”<sup>642</sup> Further, to the extent that the argument could even qualify as a “claim,” it would suffer from three manifest defects, as discussed below.

182. The *first* is that Bridgestone Licensing has not provided any factual allegations to support its claim of corruption.

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<sup>640</sup> [Ex. R-0070](#), Decision of the Third Administrative Chamber of the Supreme Court of Justice of Panama (22 June 2004); [Ex. R-0071](#), Decision of the Third Administrative Chamber of the Supreme Court of Justice of Panama (28 June 2008); [Ex. R-0072](#), Decision of the First Civil Chamber of the Supreme Court of Justice of Panama (30 July 2010); [Ex. R-0127](#), STS 1015/2003, Judgment of Civil Cassation Recourse, Supreme Court of Spain (17 February 2003); [Ex. R-0129](#), STS 3064/2004, Judgment of Civil Cassation Recourse, Supreme Court of Spain (6 May 2004).

<sup>641</sup> [Reply](#), ¶ 35.

<sup>642</sup> [Ex. R-0208](#), [Demanding the Truth](#), [The Heritage Foundation](#) (last accessed on 17 June 2019) (“Winston Churchill said: “A lie gets halfway around the world before the truth has a chance to get its pants on.” That was in the pre-digital age”).

This serves to distinguish this case from others that have involved allegations of corruption. Indeed, in previous cases, denial of justice claims based on corruption have been predicated, *inter alia*, on evidence of concealed payments between two specific individuals<sup>643</sup> and evidence that a plaintiff in a domestic proceeding ghost-wrote a judgment in exchange for a bribe.<sup>644</sup>

183. Yet Bridgestone Licensing has failed to provide even a factual narrative of corruption during the Supreme Court Proceeding, let alone supporting evidence. In the Reply, Bridgestone Licensing used the word “corruption” 60 times;<sup>645</sup> it referred to the alleged “existence of corruption,”<sup>646</sup> “complaints of corruption,”<sup>647</sup> “documents on corruption,”<sup>648</sup> and even “the *whiff*

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<sup>643</sup> **RLA-0205**, *World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7 (Award, 4 October 2006), ¶ 136 (Guillaume, Rogers, Veeder) (“Under these circumstances, such as described by Mr. Ali himself, the Tribunal has no doubt that the concealed payments made by Mr. Ali on behalf of the House of Perfume to President Moi and Mr. Sajjad could not be considered as a personal donation for public purposes. Those payments were made not only in order to obtain an audience with President Moi (as submitted by the Claimant), but above all to obtain during that audience the agreement of the President on the contemplated investment. The Tribunal considers that those payments must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement”).

<sup>644</sup> See **RLA-0182**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23 (Second Partial Award on Track II, 30 August 2018), ¶ 6.1 (Grigera Naón, Lowe, Veeder). Notably, even the extensive evidence was insufficient to “provide a definitive answer” and satisfy Claimants’ “burden of proof.” *Id.* ¶¶ 6.106–107; see also **First Paulsson Report**, ¶¶ 76–77.

<sup>645</sup> See **Reply**, ¶¶ 3, 5–10, 16, 35–36, 40–48, 53, 109.

<sup>646</sup> **Reply**, ¶ 42.

<sup>647</sup> **Reply**, ¶¶ 7, 9.

of corruption.”<sup>649</sup> The Memorial was likewise replete with such vagaries.<sup>650</sup> These repeated references to corruption belie that which is missing from the pleadings — namely, any specific factual allegations to flesh out the vague theory of corruption. For example, Bridgestone Licensing does not even suggest how many or which Supreme Court Justices were allegedly involved, which (if any) of the plaintiffs in the Civil Proceeding took part, or any mechanics of the alleged corruption (*e.g.*, what, if anything, changed hands).

184. This absence of any such factual allegations has practical implications for this Tribunal. In order to uphold Bridgestone Licensing’s claim, this Tribunal would be required (1) to make a general finding of “corruption,” without finding any specific facts; and/or (2) fashion a factual narrative to support Bridgestone Licensing’s narrative. In light of the requirements of the ICSID Convention<sup>651</sup> and international law,<sup>652</sup> neither option is viable.

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

<sup>648</sup> Reply, ¶ 8.

<sup>649</sup> Reply, ¶ 6 (emphasis added).

<sup>650</sup> The word “corruption” appears 75 times in Claimants’ Memorial. *See, e.g.*, Memorial, ¶¶ 7–9, 13, 114–122, 130.

<sup>651</sup> *See* ICSID Convention, Art. 48(3) (“The award shall deal with every question submitted to the Tribunal, and ***shall state the reasons upon which it is based.***”) (emphasis added); ICSID Arbitration Rules, Rule 47(1) (“The award shall be in writing and shall contain: . . . (g) a statement of the facts as found by the Tribunal”).

185. The *second* defect is that it was not until after this arbitration began that Claimants first purported to complain of corruption. As explained by the *UFG v. Egypt* award — upon which Bridgestone Licensing relies<sup>653</sup> — a lapse of time between the alleged acts of corruption and the first claim of corruption “raise[s] doubts as to why such allegations were not raised and investigated . . . long before . . . .”<sup>654</sup> As discussed in greater detail below, Bridgestone Licensing could have submitted a complaint to the Credentials Committee of the National Assembly,<sup>655</sup> which is authorized to review and investigate complaints against Supreme Court Justices.<sup>656</sup> Instead, it decided to peddle propaganda in a

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<sup>652</sup> See **RLA-0206**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 (Award, 8 March 2019), ¶ 270 (Zuleta, Bucher, Fortier) (“The Tribunal further notes that the remedy it will retain must be connected to actual facts and reflect the Tribunal’s knowledge. The Award ‘shall state the reasons upon which it is based’ (Art. 48(3) of the ICSID Convention, Arbitration Rule 47(1)(i)). Members of the Tribunal must be capable of exercising independent judgment (Art. 14(1), 40(2) ICSID Convention). When reading these provisions together, it means that the opinion of experts must be capable of being translated into reasons to be provided by the Tribunal”); **RLA-0194**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 (Decision on Annulment, 30 December 2015), ¶ 152 (Tomka, Booth, Schreuer) (“The obligation for tribunals to give reasons for their decisions arises out of the overriding duty to afford the parties a fair hearing, guaranteed in Article 48(3) of the ICSID Convention and ICSID Arbitration Rule 47(1)(i), and reiterated in numerous decisions of ICSID *ad hoc* committee”).

<sup>653</sup> **Reply**, ¶¶ 5, 41.

<sup>654</sup> **CLA-0137**, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018) (Veeder, Rowley, Clodfelter), ¶ 7.53.

<sup>655</sup> See *infra* **Part A.2.d**.

<sup>656</sup> See **Ex. R-0066**, *Constitution of the Republic of Panama*, Art. 160 (“It is a judicial function of the National Assembly to hear accusations or complaints filed against

[FOOTNOTE CONTINUED ON NEXT PAGE]

public forum — and then to cast aspersions on the Credentials Committee as well.

186. Indeed, Bridgestone Licensing’s theory of corruption appears to have developed during — and in furtherance of their claims in — this arbitration. For example, the Notice of Arbitration, which was submitted within 16 months of the Supreme Court Judgment, and had contained a synopsis of the alleged problems with the Civil Proceeding,<sup>657</sup> does not make any mention whatsoever of corruption. And in the Request for Arbitration, dated 7 October 2016, Bridgestone Licensing again omits any mention of corruption. Interestingly, the Request for Arbitration does address the meeting that took place in March 2015 between Ambassador Gonzalez-Revilla (Panama’s Ambassador to the United States), and certain Bridgestone representatives (the “**March 2015 Meeting**”). But the Request for Arbitration had simply recounted the meeting as follows:

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

the President of the Republic and the justices of the Supreme Court of Justice, and to judge them, if so is the case, for acts performed in the exercise of their functions to the detriment of the free functioning of public power, or that violate the Constitution or the law”).

<sup>657</sup> See **Notice of Arbitration**, ¶ 14 (“The Panamanian Supreme Court’s decision to sanction BSL and Bridgestone Corporation for enforcing their rights to protect their IP investments is based on factual mischaracterizations and ignores multiple laws, precedents, and procedural due process rights and protections. In doing so, Panama has arbitrarily penalized the company for its legitimate efforts to protect its IP investments through the legal mechanisms provided for under the laws of the host country”).

[REDACTED]

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.<sup>658</sup>

187. In the Memorial, however, the March 2015 Meeting was transformed from a simple “attempt[] to resolve the matter through diplomatic channels”<sup>659</sup> into a formal — so it was alleged — “admission of corruption” on behalf of the Republic of Panama.<sup>660</sup> Yet if such an “astonish[ing]” event<sup>661</sup> had actually occurred, presumably it would have featured in the pleadings long before the 11 May 2018 Memorial, and at the very least, in the first description of the March 2015 Meeting. This delay and evident inconsistency, in combination with the manifold problems discussed below, fatally undermines Bridgestone Licensing’s unsubstantiated claim that the Supreme Court Judgment was the product of corruption.

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<sup>658</sup> [Request for Arbitration](#), ¶ 50.

<sup>659</sup> *See* [Request for Arbitration](#), § III.J.

<sup>660</sup> [Memorial](#), ¶ 115.

<sup>661</sup> [First Akey Statement](#), ¶ 8.

[REDACTED]

188. The *third* defect is that Bridgestone Licensing has not satisfied its heavy burden of proving the existence of corruption during the Civil Proceeding. As explained in Panama’s Counter-Memorial,<sup>662</sup> investment tribunals have consistently held that a party alleging corruption must satisfy a high standard of proof,<sup>663</sup> particularly when it “involves officials at the highest level of the [Respondent’s] Government.”<sup>664</sup> This is consistent with the well-established presumption of judicial regularity under international

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<sup>662</sup> See **Counter-Memorial**, ¶ 56.

<sup>663</sup> See **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 303 (Kaufmann-Kohler, Wladimiroff, Trapl) (“Mere insinuations cannot meet the burden of proof [for allegations of corruption]”); **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), ¶¶ 422, 424 (Böckstiegel, Hobér, Crawford) (“The Tribunal emphasizes that corruption is a serious allegation, especially in the context of the judiciary. The Tribunal notes that both Parties agree that the standard of proof in this respect is a high one. . . . It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to *prove* corruption”); **RLA-0064**, *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20 (Award, 16 May 2012), fn. 8 (Kessler, Berman, Cremades) (“Some claims in international arbitration such as corruption will require a heightened showing of ‘clear and convincing evidence’”); **RLA-0115**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 (Award, 10 December 2014), ¶ 479 (Bernardini, Alexandrov, van den Berg) (“[I]n view of the consequences of corruption on the investor’s ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred”).

<sup>664</sup> **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009), ¶ 221 (Bernardini, Derains, Rovine).

law.<sup>665</sup> As demonstrated below, however, Bridgestone Licensing has not come anywhere close to demonstrating corruption.

(i) **Bridgestone Licensing Has Not Produced “Clear and Convincing” Evidence of Corruption *During the Civil Proceeding***

189. Given the gravity of a claim of corruption within the Panamanian judiciary, Bridgestone Licensing must substantiate its allegation of corruption with “clear and convincing evidence”<sup>666</sup> that “the facts, as alleged, have occurred.”<sup>667</sup> Specifically, as affirmed by Professor Paulsson, Bridgestone Licensing must substantiate any corruption claim with “evidence that demonstrates there was corruption *in the specific case* where the denial of justice

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<sup>665</sup> See, e.g., **RLA-0207**, *Ida Robinson Smith Putnam (USA) v. United Mexican States*, U.S.A/Mexico Claims Commission (Opinions of Commissioners, 15 April 1927), ¶ 5 (foreign court decisions “must be presumed to have been fairly determined”); **RLA-0113**, *Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 115 (“[i]t is not easy for a complainant to overcome the presumption of adequacy and thus to establish international responsibility for denial of procedural justice”).

<sup>666</sup> **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009), ¶ 221 (Bernardini, Derains, Rovine); see also **RLA-0117**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 (Award, 22 August 2017), ¶ 492 (Derains, Edward, Grigera Naón) (“The Tribunal finds that the seriousness of the accusation of corruption in the present case, including the fact that it involves officials at the highest level of the Pakistani Government at the time, requires clear and convincing evidence. There is indeed a large consensus among international tribunals regarding the need for a high standard of proof of corruption.”).

<sup>667</sup> **RLA-0115**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 (Award, 10 December 2014), ¶ 479 (Bernardini, Alexandrov, van den Berg).



[REDACTED]

is alleged.”<sup>668</sup> Yet Bridgestone Licensing has repeatedly acknowledged that it does not have *any* evidence of corruption in the context of the Civil Proceeding. For example, Bridgestone Licensing has conceded as follows:

- a. “[S]pecific acts of corruption in a case like this would be very hard to prove.”<sup>669</sup>
- b. “If something similar happened here, it is unlikely to be traceable.”<sup>670</sup>
- c. “[Claimants] have always been aware that any documents disclosed pursuant to Document Requests 6, 7 and 9 would not relate specifically to the *Muresa* case.”<sup>671</sup>
- d. “To the extent evidence of corruption exists, it is within Panama’s possession . . . .”<sup>672</sup>
- e. “[There is an] obvious difficulty of obtaining direct evidence[.]”<sup>673</sup>

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<sup>668</sup> **First Paulsson Report**, ¶ 79 (emphasis added).

<sup>669</sup> **Memorial**, ¶ 210.

<sup>670</sup> **Memorial**, ¶ 210 (emphasis added).

<sup>671</sup> Letter from Akin Gump to the Tribunal (12 April 2019), p. 4.

<sup>672</sup> **Reply**, ¶ 40.

<sup>673</sup> **Reply**, ¶ 5.

[REDACTED]

[REDACTED]

- f. “[S]pecific acts of corruption are difficult to trace and evidence[.]”<sup>674</sup>

190. Bridgestone Licensing’s only evidence that is remotely related to the Civil Proceeding concerns the March 2015 Meeting with the Panamanian Ambassador. That evidence consists of two brief witness statements submitted by two of Claimants’ agents: Mr. Steven Akey, the Vice President of Bridgestone Americas, Inc.,<sup>675</sup> and Mr. Jeffrey Lightfoot, a consultant hired by Claimants’ counsel.<sup>676</sup> Notably, these two witnesses’ only contribution in this respect is an oral account of the March 2015 Meeting, during which Ambassador Gonzalez-Revilla allegedly said: ““You know what this is, right? It’s corruption.””<sup>677</sup> Thus, the two witnesses upon whom Bridgestone Licensing’s claim rests do not even purport to have direct knowledge of any alleged acts of corruption.

191. Notably, the *Chevron v. Ecuador* tribunal was reluctant to rely on such “unsupported oral testimony” of witnesses over “contemporary written materials”<sup>678</sup> — even in circumstances

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<sup>674</sup> Reply, ¶ 40.

<sup>675</sup> First Akey Statement, ¶ 1.

<sup>676</sup> See First Lightfoot Statement, ¶¶ 1, 5.

<sup>677</sup> First Akey Statement, ¶ 8.

<sup>678</sup> RLA-0182, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23 (Second Partial Award on Track II, 30 August 2018), ¶ 4.7 (Veeder, Naón, Lowe).

[REDACTED]

where (unlike here) the witnesses were officials who actually participated in the underlying litigation.<sup>679</sup> Moreover, as previously discussed, the Bridgestone Licensing agents' accounts of the March 2015 Meeting, comprising five and three paragraphs, respectively, are inconsistent with the description of the meeting set forth in the Request for Arbitration.<sup>680</sup> Given that Mr. Akey is the Vice President of one of the Claimant companies, one would expect for Claimants' initial description of the March 2015 Meeting to accord with Mr. Akey's own account of what he characterized as an "astonish[ing] meeting."<sup>681</sup> In any event, Claimants' agents' allegations are flatly denied by Ambassador Gonzalez-Revilla, who affirmed in his witness statement that (1) he "did *not* assert or

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<sup>679</sup> See [RLA-0182](#), *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23 (Second Partial Award on Track II, 30 August 2018), ¶ 4.8 (Veeder, Naón, Lowe) (discussing the testimony of Judge Zambrano, who "issued procedural orders in the Lago Agrio Litigation") (*i.e.*, the subject of Claimants' denial of justice claim).

<sup>680</sup> Compare [Request for Arbitration](#), ¶ 50 ("[O]n March 13, 2015, Bridgestone met with Panama's Ambassador to the United States, His Excellency Emanuel Gonzalez-Revilla, along with the Deputy Chief of Mission Karla Gonzalez and Commercial Attaché Juan Heilbron. 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") with [First Akey Statement](#), ¶ 8 ("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") and [First Lightfoot Statement](#), ¶ 11 ("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 . . .").

<sup>681</sup> [First Akey Statement](#), ¶ 8.

admit that the Supreme Court [J]udgment . . . was the result of corruption,” and (2) moreover, he would have been unable to do so, as he was not familiar with the specifics of the case or the justices on the panel.<sup>682</sup>

**(ii) Bridgestone Licensing Improperly Relies on Alleged Evidence of Corruption Elsewhere in Panama**

192. Given this glaring absence of evidence, it is perhaps unsurprising that Bridgestone Licensing asserted in the Reply that “a different approach to the evidentiary standard” is called for under these circumstances.<sup>683</sup> According to Bridgestone Licensing, under this “different approach,” the Tribunal could base a finding of corruption on (1) reports prepared by non-governmental organizations giving Panama a low score in *perceived* levels of corruption,<sup>684</sup> and (2) complaints filed against Supreme Court Justices in cases other than the Civil Proceeding.<sup>685</sup> As support for this proposition, Bridgestone Licensing cites the *UFG v. Egypt* and

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<sup>682</sup> **First Gonzalez-Revilla Statement**, ¶ 7 (“Contrary to the allegations made by Messrs. Akey and Lightfoot, I did *not* assert or admit that the Supreme Court judgment of which they complained was the result of corruption. Indeed, it would have been impossible for me to do so — I did not know the specific parties to the litigation or even the names of the Supreme Court judges who adjudicated the case. I simply could not have accused one or more of the judges of corruption”) (emphasis in original).

<sup>683</sup> **Reply**, ¶ 41.

<sup>684</sup> *See, e.g.*, **Reply**, ¶ 7 (citing **Ex. C-0268**, Transparency International Corruption Perception Index 2018; **Ex. C-0216**, Transparency Corruption Perceptions Index 2017); **Memorial**, ¶¶ 116–22; **Supplemental Reply**, ¶ 32.

<sup>685</sup> **Reply**, ¶ 7; *see also* **Supplemental Reply**, ¶¶ 2, 29.

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*Metal-Tech v. Uzbekistan* awards, which state that, in its analysis of a claim, a tribunal may consider “[c]ircumstantial evidence” of corruption.<sup>686</sup>

193. Yet neither of the awards cited by Bridgestone Licensing absolved a party alleging corruption from its duty to provide evidence (circumstantial or otherwise) of corruption ***in the case or situation at hand***. In fact, to the contrary, the *UFG v. Egypt* tribunal made it clear that the party claiming corruption (in that case, the respondent) needed to prove that the contracts at issue were themselves procured through corruption. Thus, in response to the respondent’s reliance on reports of corruption in general, the *UFG* tribunal observed:

The Respondent has the legal burden of proving that the Claimant (or any of its associated companies) was party or privy to acts of corruption by Halliburton and officers of the Respondent ***in regard to the execution or performance of the EPC Contract. Its case cannot succeed without such proof.*** There can be no such guilt inferred from Halliburton’s mere association with SEGAS as the Claimant’s

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<sup>686</sup> See [Reply](#), ¶ 41. Importantly, the claims in *UFG* and *Metal-Tech* were not denial of justice claims — a fact that Bridgestone Licensing fails to mention.

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majority-owned subsidiary under the EPC Contract.<sup>687</sup>

Similarly, in *Metal-Tech v. Uzbekistan*, the tribunal relied on direct evidence of payments totaling USD 4 million to government officials and the brother of the Uzbek Prime Minister's brother<sup>688</sup> designed "to facilitate the establishment of the [c]laimant's investment."<sup>689</sup>

194. The approach adopted by these tribunals is consistent with the requirement that a party asserting corruption must produce "clear and convincing evidence"<sup>690</sup> that "*the facts, as*

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<sup>687</sup> **CLA-0137**, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4 (Award, 31 August 2018), ¶ 7.58 (Veeder, Rowley, Clodfelter) (emphasis added); see also *id.* at ¶¶ 7.62–7.63 ("There is no contemporary evidence that Mr Salem was involved in the negotiations for or the execution or the performance of the SPA; nor that Mr Salem ever met an officer or employee of the Claimant (or any of its associated companies). The only evidence of possible corruption is Mr Salem's statement contained in the press report cited above [in which Mr Salem remarked that he had made deals involving Egypt and Israel]. That statement is obviously disturbing. However, by itself, it does not implicate the Claimant in acts of corruption in the negotiations for and execution or performance of the SPA. The Tribunal decides, on this limited material, that the Respondent has not discharged its legal burden of proof, again on a balance of probabilities, in regard to alleged corruption by Mr Salem").

<sup>688</sup> **CLA-0138**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Award, 4 October 2013), ¶¶ 225–27 (Kaufmann-Kohler, Townsend, von Wobeser).

<sup>689</sup> **CLA-0138**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Award, 4 October 2013), ¶ 325 (Kaufmann-Kohler, Townsend, von Wobeser).

<sup>690</sup> **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009), ¶221 (Bernardini, Derains, Rovine). See also **RLA-0117**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 (Award, 22 August 2017), ¶ 492 (Derains, Edward, Naón) ("The Tribunal finds that the seriousness of the accusation of corruption in the present case, including the fact that it involves officials at the highest level of the Pakistani Government at the time,

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*alleged, have occurred.*”<sup>691</sup> The tribunal in *Vanessa Ventures v. Venezuela* made this explicit:

Allegations of a lack of independence and impartiality are more difficult to deal with . . . 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.*<sup>692</sup>

The Tribunal in *Oostergetel v. Slovakia* had a similar finding:

As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the

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requires clear and convincing evidence. There is indeed a large consensus among international tribunals regarding the need for a high standard of proof of corruption”).

<sup>691</sup> **RLA-0115**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12 (Award, 10 December 2014), ¶ 479 (Bernardini, Alexandrov, van den Berg) (emphasis added).

<sup>692</sup> **RLA-0195**, *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6 (Award, 16 January 2013), ¶ 228 (Lowe, Brower, Stern) (emphasis added).

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Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. *The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.*<sup>693</sup>

195. In direct contradiction to this case law, Bridgestone Licensing has relied on two categories of purported “evidence” unrelated to the Civil Proceeding. *First*, Bridgestone Licensing refers to a number of general reports prepared by non-governmental organizations, assigning corruption “scores.”<sup>694</sup> But, as Bridgestone Licensing fails to mention, the scores assigned to Panama are based on *perceived* levels of corruption.<sup>695</sup> Further, in

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<sup>693</sup> **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 296 (Kaufmann-Kohler, Wladimiroff, Trapl) (emphasis added).

<sup>694</sup> See **Memorial**, ¶¶ 116-122 (citing **Ex. C-0216**, Transparency Corruption Perceptions Index 2017; **Ex. C-0217**, Corruption Perceptions Index 2005; **CLA-0067**, Global Corruption Report 2007, 252; **CLA-0068**, Transparency International, People and Corruption: Latin America and the Caribbean 2017, 19; **Ex. C-0220**, Transparency International and the U4 Anti-Corruption Resource Centre, Panama: Overview of Corruption Risks in the Judiciary and Prosecution Service (2014), 1.); **Reply**, ¶ 7 (citing **Ex. C-0268**, Transparency International Corruption Perception Index 2018 and **Ex. C-0216**, Transparency Corruption Perceptions Index 2017); **Supplemental Reply**, ¶ 32 (citing **Ex. C-0216**, Transparency Corruption Perceptions Index 2017; [REDACTED])

<sup>695</sup> See, e.g., **Ex. C-0216**, Transparency Corruption Perceptions Index 2017 (where the very title indicates the scores are just “perceptions”); **Ex. C-0217**, Corruption Perceptions Index 2005 (where the very title indicates the scores are just “perceptions”); **CLA-0068**, Transparency International, People and Corruption: Latin America and the

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several of the reports,<sup>696</sup> almost every State in Central and South America received a score comparable to that of Panama, which suggests that, under Bridgestone Licensing’s standard,<sup>697</sup> every court proceeding with which they were dissatisfied in the region would amount by definition to a denial of justice, which cannot be right.

196. *Second*, as stated by Professor Paulsson, Bridgestone Licensing’s allegations of corruption “must be evaluated on their own merits and disregarded unless there is a nexus between the allegations of corruption and this specific case.”<sup>698</sup> Yet, Bridgestone Licensing relies on complaints filed

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Caribbean 2017, p. 5 (“About this Research: Latinobarómetro and Market Research Services conducted the surveys on behalf of Transparency International. Between May 2016 and December 2016 these survey organisations spoke to 22,302 people face-to-face in 20 countries across Latin America and the Caribbean about their perceptions and experiences of corruption”).

<sup>696</sup> See [Memorial](#), ¶¶ 116–18; [Reply](#), ¶ 7; [REDACTED]

<sup>697</sup> See [Ex. C-0216, Transparency Corruption Perceptions Index 2017](#) (In a system in which a lower score means that a country is “perceived” as more corrupt, Panama received a score of 37/100. Fourteen of the eighteen Latin American countries listed received scores of 37 or lower); [Ex. C-0217, Corruption Perceptions Index 2005](#) (In a system in which a lower score means that a country is “perceived” as more corrupt, Panama has a score of 3.5/10. Twelve of the eighteen Latin American countries listed received scores of 3.5 or lower); [Ex. C-0268, Transparency International Corruption Perception Index 2018](#) (In a system in which a lower score means that a country is “perceived” as more corrupt, Panama has a score of 44/100. Fifteen of the nineteen Latin American countries listed received scores of 44 or lower).

<sup>698</sup> [First Paulsson Report](#), ¶ 82.



[REDACTED]

(iii) **Bridgestone Licensing’s Attempt to Shift the Burden of Proof Fails**

197. In an effort to bolster its claim, Bridgestone Licensing suggests that Panama bears the burden of proving that the Supreme Court Judgment was *not* the product of corruption. Specifically, Bridgestone Licensing asserts that Panama “says very little about corruption in the Supreme Court” and “has given almost no evidentiary showing” — and then claims that “[t]he Tribunal can and should draw adverse inferences from this silence.”<sup>702</sup> However, these statements should be recognized for what they are: blatant attempts to shift a burden of proof that Bridgestone Licensing has been unable to satisfy. The reality is that there is no legal basis for a shift<sup>703</sup> of the burden of proof to the respondent

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<sup>702</sup> [Reply](#), ¶ 9.

<sup>703</sup> It is well-established that the party alleging a fact has the burden of proving that fact. See [RLA-0073, Victor Pey Casado And Foundation “Presidente Allende” v. The Republic of Chile](#), ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 205 (Berman, Veeder, Mourre); see also [CLA-0028, Saipem S.p.A. v. People’s Republic of Bangladesh](#), ICSID Case No. ARB/05/07 (Award, 30 June 2009), ¶ 113 (Kaufmann-Kohler, Schreuer, Otton) (“It is a well-established rule in international adjudication that the burden of proof lies with the party alleging a fact”); [RLA-0070, Hussein Nuaman Soufraki v. United Arab Emirates](#), ICSID Case No. ARB/02/7 (Award, 7 July 2004), ¶ 58 (Fortier, Schwebel, El Kholly) (“In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts”); [RLA-0071, Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan](#), ICSID Case No. ARB/02/13 (Award, 31 January 2006), ¶¶ 70–71 (Guillaume, Cremades, Sinclair) (“It is a well-established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim – “Actori incumbat probatio” . . . . This principle has been recognized in international law more than one century ago by arbitral tribunals”); [RLA-0072, Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz \(formerly Spence International Investments and others\) v. Republic of Costa Rica](#), ICSID Case No. UNCT/13/2 (Interim Award (Corrected), 30 May 2017), ¶ 29

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State in the absence of any actual proof of corruption. In any event, and for the sake of clarity, Panama emphatically denies that the Supreme Court Judgment was procured through corruption.

**d. Bridgestone Licensing’s Claim Related to the Panamanian Checks and Balances System Fails**

198. Unwilling to part with its hopes of an “insurance” pay-out from the TPA,<sup>704</sup> Bridgestone Licensing also attempts to make one last pitch for liability, by taking aim at Panama’s system for investigating and impeaching Supreme Court Justices.<sup>705</sup> But, assuming that this pitch was intended to constitute to a denial of justice claim, the claim would fail for three reasons. *First*, it falls outside of the scope of the TPA, which does not authorize this Tribunal to sit in judgment of Panama’s system of government in the abstract. *Second*, the claim fails as a result of Bridgestone Licensing’s failure to exhaust local remedies as required by international law. *Third*, and in any event, Bridgestone Licensing’s arguments are utterly without merit. For these reasons, each of

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(Bethlehem, Kantor, Vinuesa) (“[T]he Tribunal considers that the accepted principle in international proceedings, at least at a level of generality, is that the burden rests in the first instance with the party advancing the proposition or adducing the evidence. A claimant ultimately cannot prevail without meeting a minimum standard of proof, even if the burden shifts to the Respondent at some point to establish that its conduct was permitted under the treaty or under international law more generally”).

<sup>704</sup> Reply, ¶ 83.

<sup>705</sup> See Reply, ¶ 7.

[REDACTED]

which is substantiated below, Panama respectfully requests that the Tribunal dismiss Bridgestone Licensing’s denial of justice claim based on Panama’s system of government.

**(i) The Claim Falls Outside of the Scope of the TPA**

199. As Article 10.1.1 of the TPA makes plain, “Chapter [Ten] applies to *measures* adopted or maintained by a Party *relating to*: (a) investors of the other Party; [and] (b) covered investments . . . .”<sup>706</sup> In the absence of such a “measure[],” there can be no breach of an obligation, and hence no viable claim to submit to arbitration.<sup>707</sup> The requirement under the TPA that a claimant identify a “measure[]” related to its investment is consistent with the broader principle recognized by previous investment tribunals that they are not authorized to sit in judgment of a State’s system of government in the abstract.

200. For instance, the *Philip Morris v. Uruguay* tribunal affirmed that “arbitral tribunals should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving

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<sup>706</sup> [Ex. R-0001](#), TPA, Article 10.1.1 (emphasis added).

<sup>707</sup> See [Ex. R-0001](#), TPA, Article 10.16 (“[T]he claimant . . . may submit to arbitration under this Section a claim (i) that the respondent has breached (A) and obligation under Section A . . .”).

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the judicial architecture of the State.”<sup>708</sup> Similarly, the *Oostergetel v. Slovak Republic* tribunal observed that “[a]s regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law.”<sup>709</sup> Indeed, Professor Paulsson has noted that “[i]n none of the investor-state awards touching upon denial of justice has an international tribunal embraced the proposition that complaints about a State’s governmental structure or allocation of responsibilities among institutions give rise to a denial of justice.”<sup>710</sup> And tribunals charged with evaluating fair and equitable treatment claims have consistently held that “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”<sup>711</sup>

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<sup>708</sup> **RLA-0098**, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Award, 8 July 2016), ¶ 528 (Bernardini, Born, Crawford).

<sup>709</sup> **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 296 (Kaufmann-Kohler, Wladimiroff, Trapl).

<sup>710</sup> **First Paulsson Report**, ¶ 47.

<sup>711</sup> **CLA-0073**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/00/2 (Award, 11 October 2002), ¶ 118 (Stephen, Crawford, Schwebel); *see also* **RLA-0072**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2 (Interim Award (Corrected), 30 May 2017), ¶ 283 (Bethlehem, Kantor, Vinuesa); **RLA-0208**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22 (Award, 27 September 2016), ¶ 361 (Heiskanen, Bishop, Cremades); **RLA-0209**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20 (Award,

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201. Yet Bridgestone Licensing has asked this Tribunal for precisely such a judgment. Specifically, Bridgestone Licensing has requested a finding of international responsibility based on the general operation of the system for investigating Supreme Court justices (the “**National Assembly Complaint Mechanism**,” summarized in detail below). Because Bridgestone Licensing did not exercise its right to invoke this mechanism, Bridgestone Licensing is unable to demonstrate that this mechanism somehow failed Bridgestone Licensing. In the absence of such a showing, there is no legal or factual basis for a finding that Panama breached an international obligation.

**(ii) The Claim Fails on the Basis of the  
Exhaustion of Local Remedies Rule**

202. Further, Bridgestone Licensing’s claim should be dismissed on the basis that Bridgestone Licensing failed to exhaust local remedies. As explained above, international law requires that a claimant asserting a denial of justice claim exhaust local remedies.<sup>712</sup> This is so because “the respondent State must be put

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19 December 2016), ¶ 379 (Townsend, Lambrou, Boisson de Chazournes); **First Paulsson Report**, ¶¶ 47–50 (“[E]ach tribunal has focused on the question of whether the legal system as a whole has failed a specific party in a specific case. . . . [An] international tribunal [should not] accept general indictments of a legal system as a substitute for tangible proof of misconduct in a specific case”).

<sup>712</sup> See **RLA-0113**, Jan Paulsson, **DENIAL OF JUSTICE IN INTERNATIONAL LAW 139** (2005) (“[T]he very definition of the delict of denial of justice encompasses the notion of

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in a position to redress the wrongdoings of its judiciary.”<sup>713</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>714</sup> Yet neither Bridgestone Licensing, nor its co-defendant, Bridgestone Corporation, ever even attempted to invoke the National Assembly Complaint Mechanism. Instead, Bridgestone Licensing purports to substantiate this claim with mischaracterizations of three complaints concerning Supreme Court Justices from unrelated proceedings,<sup>715</sup> coupled with unsupported allegations of a “non-aggression pact” between the judiciary and legislative branches of government. Of course, the mere suspicion of the existence of a “non-aggression pact” would be insufficient to excuse a failure to exhaust this available remedy.<sup>716</sup> This amounts to a clear failure to exhaust local remedies, and Bridgestone Licensing’s claim must be dismissed on that basis.

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exhaustion of local remedies. There can be no denial before exhaustion”); **RLA-0063**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 347 (Cremades, Hanotiau, Knieper); **RLA-0210**, *The Panevezys–Salutiskis Railway (Estonia v. Lithuania)*, PCIJ (Judgment, 28 February 1938), Series A/B, No. 76, ¶ 3; **RLA-0211**, *Case of Certain Norwegian Loans (France v. Norway)*, Separate Opinion of Judge Sir Hersch Lauterpacht 1957 ICJ Reports 9, pp. 34–66.

<sup>713</sup> **CLA-0072**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Award, 6 November 2008), ¶ 258.

<sup>714</sup> [REDACTED]

<sup>715</sup> See *infra* **Part A.2.d.**

<sup>716</sup> **First Paulsson Report**, ¶ 51.



**(iii) In Any Event, Bridgestone Licensing’s Claim Is Utterly Without Merit**

203. In any event, even if Bridgestone Licensing’s claim based upon the National Assembly Complaint Mechanism could overcome these obstacles, the claim would fail on its merits. The claim is premised upon: (a) Bridgestone Licensing’s abstract and structural complaints about the checks and balances system,<sup>717</sup> and (b) misrepresentations about the three complaints upon which Bridgestone Licensing has focused its ire. A careful examination of these criticisms reveals them to be unfounded and inaccurate.

**(a) The National Assembly Complaint Mechanism Serves as a Check on the Judiciary**

204. Before analyzing this claim, it is helpful to address the legal basis and operation of the mechanism that Bridgestone Licensing so readily criticizes, without ever clearly describing. In

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<sup>717</sup>

[REDACTED]

[Reply, ¶ 7](#) (“[I]nvestigations into Supreme Court Justices can only be conducted by the National Assembly, and vice versa. In practice, it is generally recognized this means each has a significant incentive never properly to investigate the other, or risk themselves coming under equivalent scrutiny. The very design of the system ensures there is no effective scrutiny”); [Memorial, ¶ 122](#) (“ [T]he National Assembly is the only body empowered to investigate Supreme Court justices, and the Supreme Court is the only body empowered to investigate members of the National Assembly. Consequently, there is something of a ‘non-aggression pact’ between the two, whereby neither ever investigates the other, despite numerous complaints of corruption and criminal behavior”).

his expert reports, former Supreme Court Justice Mr. Lee explains the operation of this checks and balances system.<sup>718</sup> As stated above, the Credentials Committee of the National Assembly has the “authority with jurisdiction to investigate and prosecute” a complaint that a Supreme Court Justice committed a criminal offense.<sup>719</sup>

205. In his second expert report, Mr. Lee explained the National Assembly Complaint Mechanism, which begins when a complaint is presented to the Secretary General of the National Assembly, who refers the complaint to the Credentials Committee.<sup>720</sup> The Credentials Committee must then determine whether or not to admit the complaint.<sup>721</sup> A complaint will not be admissible if it does not provide evidence of criminal conduct<sup>722</sup> by a sitting justice. ■

206. If the complaint is deemed admissible, the Credentials Committee assigns the complaint to a Sub-Committee

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<sup>718</sup> See [First Lee Report](#), ¶¶ 108–09; [Second Lee Report](#), ¶¶ 143–53.

<sup>719</sup> [First Lee Report](#), ¶ 108 (citing the Constitution of the Republic of Panama, Art. 160).

<sup>720</sup> See [Second Lee Report](#), ¶ 145; [Ex. R-0148](#), Criminal Procedural Code of the Republic of Panama, Art. 468.

<sup>721</sup> See [Second Lee Report](#), ¶ 145; [Ex. R-0148](#), Criminal Procedural Code of the Republic of Panama, Art. 468.

<sup>722</sup> See [Second Lee Report](#), ¶ 155; [Third Arjona Report](#), ¶ 22.

<sup>723</sup> ■

on Guaranties, which is composed of three members of the Credentials Committee who assume the role of Guarantee Judge.<sup>724</sup> A plenary session of the National Assembly appoints one of its members to serve as prosecutor. The prosecutor conducts an investigation of the complaint by gathering evidence.<sup>725</sup> At the conclusion of the investigation, if the prosecutor finds sufficient evidence to support the complaint, the prosecutor then submits an indictment to the Sub-Committee on Guarantees.<sup>726</sup> The Sub-Committee on Guarantees reviews the indictment and determines whether there is cause to submit the indictment to the plenary of the Credentials Committee. The Credentials Committee then notifies the accused and schedules a hearing.<sup>727</sup> Following this hearing, the Credentials Committee decides whether to refer the matter to the National Assembly by a majority vote.<sup>728</sup> A plenary session of the National Assembly holds a trial, during which the prosecutor, complainant, and defendant are provided with an opportunity to

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<sup>724</sup> See **Second Lee Report**, ¶ 146; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 468.

<sup>725</sup> See **Second Lee Report**, ¶ 146; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 468.

<sup>726</sup> See **Second Lee Report**, ¶ 148; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 471.

<sup>727</sup> See **Second Lee Report**, ¶ 149; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 472.

<sup>728</sup> See **Second Lee Report**, ¶ 150; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 473.

present orally their arguments and evidence.<sup>729</sup> The outcome is determined by a vote of the National Assembly,<sup>730</sup> two thirds of which must vote in favor of conviction.<sup>731</sup>

207. Despite having failed to consider or address any of the steps set forth above, Bridgestone Licensing proclaims in the Reply that “[t]he very design of th[is] system ensures there is no effective scrutiny.”<sup>732</sup> [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] In essence, Bridgestone Licensing’s structural criticism is explicitly premised on the sweeping generalization that Panama’s accountability mechanisms, like the National Assembly Complaint Mechanism, never work.<sup>734</sup> Yet the reality is that justices are investigated and held accountable for wrongdoing. Two recent examples — both of

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<sup>729</sup> See **Second Lee Report**, ¶ 151; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 473-474.

<sup>730</sup> See **Second Lee Report**, ¶ 152; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 475.

<sup>731</sup> See **Second Lee Report**, ¶ 152; **Ex. R-0148**, Criminal Procedural Code of the Republic of Panama, Art. 475.

<sup>732</sup> **Reply**, ¶ 7.

[REDACTED]  
[REDACTED]  
[REDACTED]

which were conveniently overlooked by Bridgestone Licensing — are instructive.

208. On 29 September 2014, a news report claimed that Justice Moncada Luna had purchased two high-end apartments in Panama.<sup>735</sup> The Panamanian Bar Association and the “*Alianza Ciudadana Pro Justicia*” (Citizens’ Alliance For Justice) subsequently filed a complaint in the National Assembly against Mr. Moncada for illicit enrichment and money laundering.<sup>736</sup> Shortly thereafter, the National Assembly formally opened an investigation of Mr. Moncada Luna for alleged unjust enrichment.<sup>737</sup> A few days later, Mr. Moncada filed multiple petitions attempting to stop the proceedings against him that were being advanced by the National Assembly.<sup>738</sup> The Supreme Court rejected all of them.<sup>739</sup>

209. On 23 February 2015 (approximately five months after the initial news story broke), Mr. Moncada agreed to a plea

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<sup>735</sup> **Ex. R-0114**, There Has Been A Request to Investigate Moncada Luna for Alleged Unjust Enrichment, *La Prensa* (29 September 2014), pp. 1–2.

<sup>736</sup> **Ex. R-0115**, The National Assembly Admits a Complaint Against Alejandro Moncada, *La Prensa* (7 October 2014), p. 1.

<sup>737</sup> **Ex. R-0115**, The National Assembly Admits a Complaint Against Alejandro Moncada, *La Prensa* (7 October 2014), p. 1.

<sup>738</sup> **Ex. R-0113**, The Full Supreme Court Rejects Petitions by Moncada Luna, *La Prensa* (15 October 2014), pp. 1–2.

<sup>739</sup> **Ex. R-0113**, The Full Supreme Court Rejects Petitions by Moncada Luna, *La Prensa* (15 October 2014), pp. 1–2.

agreement with the legislative prosecutor in which he pleaded guilty to two felonies in exchange for a five-year jail sentence and the return of the two-apartments.<sup>740</sup> In early March of 2015, a tribunal composed of three National Assembly Deputies sentenced him to five years in prison.<sup>741</sup>

210. On 21 April 2015, the former body guard of Justice Víctor Benavides, Vicente Caballero, filed a complaint with the Credentials Committee against Justice Víctor Benavides for alleged sex offenses and unjust enrichment.<sup>742</sup> On 6 May 2015, the National Assembly admitted the complaint against Mr. Benavides and opened a formal investigation.<sup>743</sup> Shortly thereafter, Mr. Benavides resigned from the Supreme Court.<sup>744</sup> As a result, Mr. Benavides became a private citizen, and was no longer subject to the jurisdiction of the Credentials Committee. However, as a private citizen, he was and is subject to the jurisdiction of the Public Ministry, which investigates and prosecutes crimes,<sup>745</sup> and

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<sup>740</sup> See **Ex. C-0312**, Ex-Panamanian supreme court chief pleads guilty to corruption, Reuters, (23 February 2015), p. 2.

<sup>741</sup> **Ex. R-0100**, Suspended Judge Gets Five Years in Prison, *La Prensa* (5 March 2015), p. 1

<sup>742</sup> **Ex. R-0097**, Complaint Presented against Víctor Benavides, *La Prensa* (21 April 2015); **Ex. R-0096**, Benavides Resigns from Supreme Court, *La Prensa* (19 June 2015).

<sup>743</sup> **Ex. R-0098**, Deputies Admit Complaint Against Víctor Benavides, *La Prensa* (6 May 2015).

<sup>744</sup> **Ex. R-0096**, Benavides Resigns from Supreme Court, *La Prensa* (19 June 2015).

<sup>745</sup> See **Second Lee Report**, ¶ 171.

[REDACTED]

which opened an investigation into his activities.<sup>746</sup> The Public Ministry's investigation is ongoing.<sup>747</sup>

211. The high-profile investigations, removal, and resignation of these two Supreme Court Justices contradicts Bridgestone Licensing's determined narrative of a government and a system that is unable or unwilling to investigate judges and to identify and penalize corruption.

**(b) Bridgestone Licensing Mischaracterizes  
Three Complaints Submitted to the  
National Assembly Complaint  
Mechanism**

212. In submitting this claim, Bridgestone Licensing also has fixated on three complaints submitted to the National Assembly Investigation Mechanism. Notably, these three complaints — none of which was found to have had merit — were selected by Bridgestone Licensing to support its claim.<sup>748</sup>

213. As the Tribunal will recall, Bridgestone Licensing requested that Panama produce three complaints in its document production requests.<sup>749</sup> Claimants had identified these complaints

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<sup>746</sup> [Second Lee Report](#), ¶ 171.

<sup>747</sup> [Ex. R-0116](#), *The Investigation against Ex-Justice Víctor Benavides is Ongoing*, *La Prensa* (6 July 2018), p. 1.

<sup>748</sup> See Claimants Request for Production of Documents, Request Nos. 6, 7, and 9.

<sup>749</sup> See [Procedural Order No. 7](#), Annex A, pp. 39–51.

[REDACTED]

through press reports.<sup>750</sup> All three complaints concerned justices who were involved in the Civil Proceeding at issue in this arbitration; however, none of the complaints related to this Civil Proceeding. After ensuring that these complaints were subject to proper protections, Panama produced the complaints.<sup>751</sup>

[REDACTED]

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<sup>750</sup> See [Procedural Order No. 7, Annex A](#), pp. 39–51.

<sup>751</sup> See generally [Procedural Order No. 10](#).

[REDACTED]

<sup>754</sup> [Memorial](#), ¶ 122.



[REDACTED]

**(I) The Alvarado Complaint**

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>766</sup> Ex. R-0119, Decision of the Supreme Court, *Ganadera Cerro v. Forrest for Friends* (26 July 2018), p. 12.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The National Assembly has jurisdiction to try Supreme Court Justices, based on evidence, and thus could not admit a complaint that did not contain evidence against Justice Ortega. [REDACTED]

[REDACTED]

## (II) The [REDACTED] and Lehman Complaints

221. The National Assembly correctly identified both the [REDACTED] and Lehman complaints as mere appeals and dismissed [REDACTED]

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<sup>767</sup> Ex. R-0119, Decision of the Supreme Court, *Ganadera Cerro v. Forrest for Friends* (26 July 2018), p. 14.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

d.

(A)

224.

[REDACTED]

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[REDACTED]

[REDACTED]

**(B) The Lehman Complaint**

[REDACTED]

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[REDACTED]

*[FOOTNOTE CONTINUED ON NEXT PAGE]*

[REDACTED]  
[REDACTED]  
[REDACTED]

226. [REDACTED], Claimants cite [REDACTED] affidavit [REDACTED] as evidence of corruption while discussing the Lehman National Assembly Complaint.<sup>780</sup> [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] The [REDACTED] affidavit was filed in a proceeding in the State of Florida in the United States.<sup>782</sup> Thus [REDACTED]

[REDACTED]

[REDACTED] Claimants have chosen to provide the Tribunal with an out-of-context affidavit and appellate brief filed in proceedings in the United States.<sup>783</sup>

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[REDACTED]  
[REDACTED]

<sup>780</sup> See [REDACTED] Ex. C-0274, Affidavit of William Tolbert (25 June 2014).

[REDACTED]

<sup>782</sup> See Reply, ¶ 46 (“First, in one of the related claims filed in the United States by the executor of Mr. Lucom’s estate,120 an affidavit was sworn by William Tolbert[.]”); Ex. C-0274, Affidavit of William Tolbert (25 June 2014).

<sup>783</sup> See Ex. C-0275, Lucom Appellate Brief (18 August 2017).



[REDACTED]

227. It seems useful to note that United States courts have consistently confirmed Mr. Lehman's improper actions in relation to Mr. Lucom's estate. Mr. Lehman has initiated at least three litigations related to Mr. Lucom's estate in the United States.

228. The first proceeding was a probate proceeding in Florida. In that proceeding, the Florida probate court determined that “[a]lthough Lehman attempted to portray himself at trial as a protector of the assets of the overall estate, the credible evidence showed him to be a covetous opportunist using the ancillary estate assets to thwart the Orders of the Panama Court in the domiciliary estate, seeking personal advantage and control of assets in the \$25-\$50 million domiciliary estate . . . Lehman is liable to return this money to the ancillary estate, through the curator, and for other damages to the ancillary estate, including attorney fees and costs caused by his wrongful actions.”<sup>784</sup> In fact, the court stated that “[d]ue to Lehman's commingling of money, the breadth of Lehman's improper activities with that money and poor record keeping, [the court-appointed administrator's] report took thirteen (13) months to prepare.”<sup>785</sup>

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<sup>784</sup> **Ex. R-0207**, Decision of the Florida Probate Court in *In Re Estate of Wilson C. Lucom* (5 March 2009), p. 5–6.

<sup>785</sup> **Ex. R-0207**, Decision of the Florida Probate Court in *In Re Estate of Wilson C. Lucom* (5 March 2009), p. 5.

[REDACTED]

229. The Florida trial court declared that Mr. Lehman's appointment as Florida Ancillary Personal Representative was *void ab initio*; entered judgment against Mr. Lehman for over \$1.4 million; voided all of Mr. Lehman's transfers from the estate; and ordered Mr. Lehman to pay Ms. Lucom and other beneficiaries' attorney's fees.<sup>786</sup> Additionally, the court found that "[a]t all times material to the action before this court, Lehman was not installed or properly serving as the Albacea [executor] of the Panama Estate."<sup>787</sup> On appeal, the appellate court affirmed the trial court's ruling.<sup>788</sup>

230. Thereafter, Mr. Lehman filed another complaint in Florida court, alleging that bribes had been paid to the Justices of the Supreme Court of Panama.<sup>789</sup> [REDACTED]

[REDACTED]

[REDACTED] Still, the trial court dismissed Mr. Lehman's

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<sup>786</sup> [Ex. R-0207](#), Decision of the Florida Probate Court in *In Re Estate of Wilson C. Lucom* (5 March 2009), pp. 9-10.

<sup>787</sup> [Ex. R-0207](#), Decision of the Florida Probate Court in *In Re Estate of Wilson C. Lucom* (5 March 2009), p. 2.

<sup>788</sup> [Ex. R-0108](#), Opinion of the Florida Fourth District Court of Appeal in *Lehman v. Lucom et. al.* (26 October 2011).

<sup>789</sup> [See Ex. C-0275](#), Lucom Appellate Brief, p 8 (stating that Mr. Lehman filed a complaint against various defendants in Florida on 23 December 2014); [see also Reply](#), ¶ 46 (stating that allegations were made in this case "regarding bribes paid to Supreme Court Justices for procuring a certain result in a judgment").

<sup>790</sup> [REDACTED]

complaint, and the appellate court affirmed the trial court's decision.<sup>791</sup>

231. Mr. Lehman also filed at least one case against Justices Ortega, Cigarruista, and Mitchell in the United States District Court for the Southern District of Florida.<sup>792</sup> In that case, Mr. Lehman accused the Justices of extortion, corruption, and bribery in an attempt from Mr. Lehman to become "the only person who was appointed the executor of the estate of" Mr. Lucom."<sup>793</sup> As a threshold matter, this contradicts Mr. Lehman's own argument in the Panamanian proceedings, regurgitated by Claimants,<sup>794</sup> that Mr. Lucom had named three people executors of his estate.

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<sup>791</sup> Ex. R-0107, Opinion of the Florida Fourth District Court of Appeal in *Lehman v. Chue et. al.* (11 January 2018).

<sup>792</sup> Ex. R-0109, Order of the United States District Court Granting Defendants' Motion of Summary Judgement in *Lehman v. Lucom et. al.* (17 May 2012).

<sup>793</sup> Ex. R-0109, Order of the United States District Court Granting Defendants' Motion of Summary Judgement in *Lehman v. Lucom et. al.* (17 May 2012), p. 1.

[REDACTED]

[REDACTED]

232. Additionally, the United States District Court found that “a Florida appellate court found competent, substantial evidence that Lehman acted in bad faith to the interests of the estate and misappropriated estate funds in violation of Florida law. . . . Relatedly, it also appears that the Florida Bar is currently investigating Lehman’s actions.”<sup>795</sup> That complaint was dismissed on statute of limitations grounds.<sup>796</sup>

233. Having now seen a more complete background of the three National Assembly complaints, Panama trusts that this Tribunal will disregard them, not only due to their irrelevance to Bridgestone Licensing’s denial of justice claim, but also due to Claimants’ abject mischaracterizations of the complaints themselves.

### **B. Neither Claimant Can Identify Any Injury Caused By The Supreme Court Judgment**

234. In addition to having failed to establish any breach of the TPA, Claimants also have failed to identify any injury attributable to the Supreme Court Judgment regarding their respective investments in Panama. This omission is inexcusable — especially given that Claimants do not contest their pleading

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<sup>795</sup> [Ex. R-0109](#), Order of the United States District Court Granting Defendants’ Motion of Summary Judgement in *Lehman v. Lucom et. al.* (17 May 2012), fn. 1.

<sup>796</sup> [Ex. R-0109](#), Order of the United States District Court Granting Defendants’ Motion of Summary Judgement in *Lehman v. Lucom et. al.* (17 May 2012).

[REDACTED]

responsibilities.<sup>797</sup> To the contrary, over the course of this case, Claimants (1) have conceded that, in order to even “*submit* a claim to arbitration,” “the Claimants must show both breach by the Respondent *and loss incurred by the Claimant*,”<sup>798</sup> (2) have “accept[ed] that they will only be entitled to recover . . . to the extent that they can prove causation and loss,”<sup>799</sup> and (3) have advised that, accordingly, they have been hunting for injury for years.<sup>800</sup>

235. To be clear, in their pleadings, Claimants certainly demand reparation.<sup>801</sup> But they disregard and/or bungle the

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<sup>797</sup> See **Counter-Memorial, ¶¶ 5–13** (explaining the uncontested rules, derived from the TPA’s plain text, that: (1) only a “claimant” is permitted to advance a claim; (2) that a claimant may not assert a claim on behalf of a non-claimant (*e.g.*, Bridgestone Corporation), or on the basis of another entity’s investment; (3) that a claimant may not assert a claim in respect of an alleged investment outside of Panama; and (4) that, in order to state a cognizable claim, a claimant would need to demonstrate (a) that a “measure[] adopted or maintained by [Panama]” had breached an obligation due to the claimant (in its capacity as an investor), or to the claimant’s investment in Panama; and (b) that, as a result of this breach, the claimant had actually incurred loss in connection with its investment in Panama).

<sup>798</sup> **Rejoinder on Expedited Objections, ¶ 62** (emphasis added); *see also* **Counter-Memorial, ¶¶ 5–10** (explaining, and quoting the TPA provisions that confirm, that the Tribunal’s jurisdiction in the present case is limited to claims asserted by “the claimant, on its own behalf . . . (i) that the respondent has breached..an obligation under Section A [of TPA Chapter Ten] . . . and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach”).

<sup>799</sup> **Rejoinder on Expedited Objections, ¶ 71**.

<sup>800</sup> **Memorial, ¶ 230** (confirming that Claimants have been exploring this issue since before October 2016, by stating that, “[s]ince the date of the Request [for Arbitration, *i.e.*, 7 October 2016], the Claimants have *continued* to explore how they have been affected by the Supreme Court Judgment....”) (emphasis added).

<sup>801</sup> *See* **Reply, ¶ 119**.

essential predicate step of proving compensable injury.<sup>802</sup> For example, Claimants ignore the legal bounds of compensable injury, disregarding the undisputed TPA rule that each claimant may only advance a claim “on its own behalf,”<sup>803</sup> for “loss or damage” that such “claimant has incurred”<sup>804</sup> in connection with its investment in Panama.<sup>805</sup> This behavior manifests in Claimants’ continued improper demand for compensation (i) for an upstream Japanese entity, (ii) in connection with alleged investments outside of Panama,<sup>806</sup> and (iii) on the basis of hypothetical, concededly

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<sup>802</sup> See, e.g., **RLA-0073**, *Victor Pey Casado And Foundation "Presidente Allende" v. The Republic of Chile*, ICSID Case No. ARB/98/2 (Resubmission Award, 13 September 2016), ¶ 200 (Berman, Veeder, Mourre) (explaining that “determin[ing] the nature of the injury or damage caused by the Respondent’s breach, [is an] essential precursor for...determining the kind as well as the extent of the reparation required to remedy the breach”); **RLA-0075**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24 (Award, 17 December 2015), ¶ 238 (Brower, Paulsson, Williams) (“[I]t is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered”); **RLA-0076**, *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, PCA Case No. 2011-09 (Award on the Merits, 2 March 2015), ¶ 388 (Hanotiau, Fortier, Williams) (“Principles of reparation in international law, as set out in *Chorzów Factory*, are clear that a claimant is entitled to compensation for losses it has actually suffered . . . ”); **RLA-0191**, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8 (Award, 4 May 2016), ¶ 356 (Rigo Sureda, Gaillard, Stern) (“Nonetheless, the Claimants have failed to show that they suffered damage as a result of the Respondent’s actions. As a consequence, while the standard in Article 3(1) of the BIT was breached, there is no basis for an award of damages . . . ”).

<sup>803</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a).

<sup>804</sup> **Ex. R-0001**, TPA, Art. 10.16.1(ii).

<sup>805</sup> See **Counter-Memorial**, ¶ 10 (explaining that this part of the rule derives from the fact that the TPA’s definition of “claimant” is tied to an “an investment in the territory of [Panama]”); see also **Ex. R-0001**, TPA, Art. 10.29.

<sup>806</sup> See **Reply**, ¶ 24 (“For these reasons, the Claimants include in their damages analysis not only impairment of rights in Panama, but also impairment of rights in the BSCR Region – a market that includes Panama and that has been treated by BSAM for

[FOOTNOTE CONTINUED ON NEXT PAGE]

“unrealized” loss.<sup>807</sup> In addition, Claimants persist in ignoring all matters of evidence, to the point of knowingly or recklessly providing false information on a material issue. (This incident will be documented in Part 2 of this Section, below.)

236. In the subsections that follow, Panama addresses the two heads of damages that Claimants request. **Part 1** below addresses Bridgestone Licensing’s request for USD 5.431 million. **Part 2** will then address Claimants’ request for an additional award of between USD 557,604 and USD 14,523,541.<sup>808</sup>

### **1. Bridgestone Licensing’s Request for USD 5.431 Million Fails**

237. In the Reply, Bridgestone Licensing continues to request “damages of US \$5,431,000,”<sup>809</sup> which is “the amount . . . for which BSJ and BSLs were jointly and severally liable”<sup>810</sup> under the Supreme Court Judgment. As demonstrated below, however, this request is fatally flawed. This is so for two main reasons.

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

purposes of advertising, promotion and manufacturing under the marks as a consolidated market”); *but see* **First Jacobson Report, ¶ 73** (“Lastly, it is worth noting that the Bridgestone Parties’ assertion that the Supreme Court Decision has impeded their ability to enforce the BRIDGESTONE and FIRESTONE marks is conceptually flawed in that trademarks rights are territorial”).

<sup>807</sup> See *e.g.*, **Reply, ¶ 105** (“[I]t is the Claimants’ case that there is an immediate impact, in the form of unrealized losses”).

<sup>808</sup> **Reply, § VII.**

<sup>809</sup> **Reply, § VII.**

<sup>810</sup> **Request for Arbitration, ¶ 43.**

238. *First*, the request parts from the premise that Bridgestone Licensing incurred a loss of USD 5.431 million simply by virtue of the issuance of the Supreme Court Judgment.<sup>811</sup> But if that premise were true, the corollary would be that — in the words of Claimants themselves — “BSLS *and* BSJ incurred a liability on th[e] date” of the Supreme Court Judgment.<sup>812</sup> This in turn would present a problem because, as Claimants do not contest, one of the implications of the TPA’s rule against representative claims is that a claimant must be able to demonstrate that any relief that it seeks corresponds to a loss that the claimant (and not some other entity) has suffered.<sup>813</sup> Such a showing would be legally impossible in the scenario proposed here; because Bridgestone Corporation and Bridgestone Licensing had been held jointly and severally liable, both of them could lay an equal claim to the right to frame USD 5.431 million as a loss. Absent additional evidence, Bridgestone Licensing could not establish — not even by preponderance — that

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<sup>811</sup> [Reply](#), ¶ 80 (“In any case, loss was not incurred on the date when the judgment was paid, but on 28 May 2014, when the Supreme Court held BSLS and BSJ jointly and severally liable”); *see also* [Rejoinder on Expedited Objections](#), ¶ 15 (“BSLS incurred loss on the day it was held liable to pay by the Supreme Court (i.e., 28 May 2014)”); [Response on Expedited Objections](#), ¶ 134 (“[T]he Supreme Court penalty of US\$5.4 million was made against BSJ and BSLS, who were held jointly and severally liable for the total. BSLS ultimately paid the whole sum. Thus, it is BSLS who has lost that US\$5.4 million and BSLS claims the return of that sum”).

<sup>812</sup> [Rejoinder on Expedited Objections](#), ¶ 62 (emphasis added).

<sup>813</sup> *See* [Counter-Memorial](#), ¶¶ 13–14.



the amount of USD 5.431 million was an existing loss that it alone had incurred.

239. *Second*, although it might have made sense for Claimants to attempt to “break the tie” by focusing on the details of payment, Claimants’ position has been that payment did not cause injury.<sup>814</sup> Indeed, even in their Reply, Claimants continue to argue that “loss was *not* incurred on the date when the judgment [was] paid . . . .”<sup>815</sup> A review of the record reveals why: even if payment technically had been made by Bridgestone Licensing, it cannot be said Bridgestone Licensing has incurred a loss of USD 5.431 million.

240. As the Tribunal may recall, in the Request for Arbitration, Claimants had stated that Bridgestone *Corporation* — the Japanese parent company — had paid the damages award, “through its subsidiary BSLS . . . .”<sup>816</sup> This statement was confirmed by Claimants’ documents, Claimants’ witness, and

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<sup>814</sup> See [Response on Expedited Objections](#), ¶ 169 (“Since the Supreme Court ordered BSLS to pay the damages in its judgment of 28 May 2014, that is the date on which BSLS incurred the loss to BSLS. It does not matter when BSLS paid the damages . . .”).

<sup>815</sup> [Reply](#), ¶ 80 (emphasis added).

<sup>816</sup> See, e.g., [Request for Arbitration](#), ¶ 53 (“Bridgestone, *through* its subsidiary BSLS...paid the damages award to Muresa and TGFL on August 19, 2016”) (emphasis added). Because Bridgestone Corporation is the only entity Claimants have described as a parent of Bridgestone Licensing, the reference here to “Bridgestone” could only mean “Bridgestone Corporation.”

Claimants' counsel.<sup>817</sup> But during the expedited objections phase, Claimants attempted to backtrack — arguing in their Rejoinder on Expedited Objections that “BSLS made the payment.”<sup>818</sup> In that same submission, they insisted (albeit in another context) that “BSLS is not simply an entity through which BSJ passes funds.”<sup>819</sup> And then, a few weeks later, it emerged that *Bridgestone Americas* had loaned USD 6 million to Bridgestone Licensing to enable the latter to pay the damages award.<sup>820</sup> This was curious, as Claimants had earlier stated that “BSAM does not claim the loss of the

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<sup>817</sup> [Ex. C-0036](#), Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 August 2016), p. 1 (“*Bridgestone Corporation and Bridgestone Licensing Services, Inc.*, in compliance with the Judgment of May 28, 2014 . . . [will proceed to make] payment on the indicated amounts . . . through electronic bank transfer . . .”) (emphasis added); [Ex. C-0126](#), JPMorgan Chase Bank Statement (30 July 2016 - 31 August 2016), p. 2 (reflecting a transfer of USD 5.431 million, next to the description: Muresa Intertrade PA Ref: “BSJ and BSLS Loss of Litigation Payment”); [Hearing on Expedited Objections \(Day 2\)](#), Tr. 348: 4-7, 10–13 (Claimants’ counsel) (“Once all domestic routes to overturning the Judgment were exhausted, that’s when *BSLS and BSJ* realized they had no further recourse, so *they paid* — well, BSLS paid”) (emphasis added); [Hearing on Expedited Objections \(Day 3\)](#), Tr. 496:22–497:02 ([Kingsbury](#)) (“Ultimately, yes, you know, Bridgestone is the parent company. They’re the ones who are paying as the parent of Bridgestone Services”)

<sup>818</sup> [Rejoinder on Expedited Objections](#), ¶ 68.

<sup>819</sup> [Rejoinder on Expedited Objections](#), ¶ 54.

<sup>820</sup> See [Hearing on Expedited Objections \(Day 3\)](#), Tr. 482:08–483:03 ([Kingsbury](#)) (“A. “Ultimately, they [BSLS] ended up borrowing some of the money, but there was also a starting--I mean, just—that’s the income for 2016; right? So, there may have been money in the account prior to 2016, but, without seeing the balance sheet, I don't know what that amount was. Q. Okay. A. But there was a loan taken out to pay the judgment. Q. There was a loan taken out? A. Yes. Q. And what was the amount of the loan? A. I think \$6 million. Q. \$6 million? A. That neighborhood. Q. Right. Okay. And who was the lender in that loan? A. Bridgestone Americas”).

US\$5.4 million”<sup>821</sup> — even though it had not been shy about asserting claims for alleged indirect loss.<sup>822</sup>

241. In their Memorial, Claimants omitted to discuss the issue of the loan used to pay the damages award, but in the Reply, they doubled down on the loan from Bridgestone Americas. Thus, they asserted that “BSJ had no role in the payment of damages to Muresa,”<sup>823</sup> and claimed that “BSLS obtained an inter-company loan [from Bridgestone Americas] in order to make payment . . . .”<sup>824</sup> Claimants also insisted that the loan had been a “genuine”<sup>825</sup> one, that “BSLS has provide[d] evidence . . . of payments of interest made by BSLS to BSAM to service the

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<sup>821</sup> [Response on Expedited Objections](#), ¶ 136.

<sup>822</sup> See [Response on Expedited Objections](#), ¶ 11 (“[T]he Claimants do not assert that BSAM’s claim is for the US\$5.4 million which the Panamanian Supreme Court ordered BSLS and BSJ to pay. Instead, the Claimants assert that BSAM’s loss arises out of the Supreme Court decision, because the decision has made it much more costly for BSAM to maintain its investment in Panama and other countries in the region”); [Rejoinder on Expedited Objections](#), ¶ 9 (“The Claimants explained in their Response that BSAM’s dispute does not relate to the US\$5.4 million, but to loss it has sustained as a result of the Supreme Court’s decision, because the judgment had made it much more costly for BSAM to maintain its investment in Panama and other countries in the region”).

<sup>823</sup> [Reply](#), ¶ 31; see also [Request for Arbitration](#), ¶ 53 (“Bridgestone, *through* its subsidiary BSLS . . . paid the damages award to Muresa and TGFL on August 19, 2016”); [Ex. C-0036](#), Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 August 2016), p. 1 (“*Bridgestone Corporation and Bridgestone Licensing Services, Inc.*, in compliance with the Judgment of May 28, 2014 . . . [will proceed to make] payment on the indicated amounts . . . through electronic bank transfer . . . .”) (emphasis added); [Ex. C-0126](#), JPMorgan Chase Bank Statement (30 July 2016–31 August 2016), p. 2 (“BSJ *and* BSLS loss of litigation payment”) (emphasis added).

<sup>824</sup> [Reply](#), ¶ 31.

<sup>825</sup> [Reply](#), ¶ 31.

loan.”<sup>826</sup> In addition, Claimants argued that “it [wa]s not surprising that as between BSLs and BSJ, . . . it was BSLs that made the payment in full. As the Claimants have explained, In [sic] the Americas, FIRESTONE has historically been the more significant brand.”<sup>827</sup> But these arguments do not withstand scrutiny.

242. For example, the exhibit that supposedly consisted of “payments of interest made by BSLs to BSAM”<sup>828</sup> *actually* shows payments from Bridgestone Americas to Bridgestone Licensing.<sup>829</sup> Further, various documents disclosed during document production indicate that the loan simply rolls over every year.<sup>830</sup> Those same documents suggest that the loan in fact is

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<sup>826</sup> Reply, ¶ 18.

<sup>827</sup> Reply, ¶ 32.

<sup>828</sup> Reply, ¶ 18.

<sup>829</sup> Claimants cited Exhibit C-273 (a partially redacted bank statement) as evidence for the proposition that “[i]nterest payments are made on a quarterly basis by BSLs to BSAM for the loan, which has not yet been prepaid.” Reply, ¶ 31 & fn. 82. However, instead of revealing payments “by *BSLS* to BSAM,” that exhibit appears to show payments by *BSAM* to BSLs. It may be that Claimants had intended to cite to Exhibit C-93, which seems to be unredacted version of one of the bank statements contained in Exhibit C-273. Exhibit C-93 does show some payments from BSLs to BSAM. However, there is nothing in the exhibit to suggest that the sums paid to Bridgestone Americas are interest on a loan. Further, Claimants’ submission of a redacted version of a document that they had already produced in full calls into question the reliability of their redactions. In case other documents were affected by this problem, Panama respectfully requests that Claimants re-review their redactions to determine whether other redactions should be lifted. See **Ex. C-0273**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas Inc. Bank Statements, JPMorgan Chase Bank* (June 2017, June 2018, July 2018).

<sup>830</sup> See, e.g., **Ex. R-0206**, *Bridgestone Licensing 2016 Mid-Term Plan* (21 June 2016), p. 2 (“Borrowed \$6,000,000 from BSAM in July 2016, rolling until June 2021”); **Ex. R-0205**, *Bridgestone Corporation Email Correspondence Regarding Rollover of Bridgestone Licensing Loan* (4 July 2017) (“[W]e have planned a rollover of the \$6M that

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contingent on the outcome of this arbitration — *i.e.*, that Bridgestone Licensing will only be required to repay the loan if Bridgestone Licensing is awarded damages in this arbitration.<sup>831</sup> And, perhaps most importantly, it emphatically is not the case that “[Bridgestone Licensing] made the payment in full” simply because, “[i]n the Americas, FIRESTONE has historically been the more significant brand.”<sup>832</sup> Indeed, as Panama had posited — based on Claimants’ exhibits, unguarded statements, and witness testimony — the funds were funneled through Bridgestone Licensing for reasons that had to do with this ICSID case.<sup>833</sup>

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BSLS borrowed from BSAM in July of last year. (Planned for repayment in 2021 on 17MTP”).

<sup>831</sup> See **Second Versant Report**, ¶ 134 (citing **Ex. VP-0046**, BSLS 2016 Financials, “BSJ & BSAM Loan Plan” Tab (“Loan executed in July 2016 (rolled each year) -- If the payment of the Panamanian damage compensation is delayed, the timing of the loan will also be delayed”).

<sup>832</sup> **Reply**, ¶ 32.

<sup>833</sup> See **Request for Arbitration**, ¶ 53 (asserting that “Bridgestone, through its subsidiary BSLS, which was jointly and severally liable for the judgment, paid the damages award to Muresa and [Tire Group] on August 19, 2016”); see also **Ex. C-0036**, **Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 August 2016)**, p. 1 (“**Bridgestone Corporation and Bridgestone Licensing Services, Inc.**, in compliance with the Judgment of May 28, 2014 . . . [will proceed to make] payment on the indicated amounts . . . through electronic bank transfer . . .”); **Expedited Objections Hearing Transcript (Day 2)**, Tr. 348:10–13 (Claimants’ counsel) (“Once all domestic routes to overturning the Judgment were exhausted, that’s when BSLS and BSJ realized they had no further recourse, so they paid — well, BSLS paid”); **Expedited Objections Hearing (Day 3)**, Tr. 484:01–06 (Kingsbury) (Q. “And did counsel tell you that if Bridgestone Corporation paid this you would have no case to bring under the Free Trade Agreement?” A. “I don’t want to say there was no case to bring because they’re not the only Claimant, but certainly it was a factor, sure”).

243. As the Tribunal will recall, when the present dispute arose, there were certain barriers in place that prevented the assertion of a claim under the TPA for the damages amount awarded in the Supreme Court Judgment. For example, as a Japanese entity, Bridgestone Corporation did not qualify as a “claimant,”<sup>834</sup> and the TPA’s rules barred any claim by, on behalf of, or for loss or damage incurred by, Bridgestone Corporation. Further, neither of the entities that the group intended to use as “claimants” — *viz.*, Bridgestone Americas and Bridgestone Licensing — could plausibly characterize the amount of the damages award as a “loss” that it specifically had already incurred. Of those entities, Bridgestone Licensing was better-positioned, as it at least had been a party to the Supreme Court proceeding. But, as explained above, not even it could make the requisite showing. Accordingly, in the spring of 2016, the Bridgestone group — which had been advised that Bridgestone Licensing would not have a claim if Bridgestone *Corporation* were to pay<sup>835</sup> — devised a plan

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<sup>834</sup> See [Ex. R-0001, TPA, Art. 10.29](#) (explaining that “claimant means an *investor of a Party* that is a party to an investment dispute with the other Party,” that an “investor of a Party” is “a Party or state enterprise thereof, or a national or *enterprise of a Party*, that attempts to make, is making, or has made an investment in the territory of the other Party,” and that “enterprise of a Party means an enterprise *constituted or organized under the law of a Party* . . . .”) (emphasis added); [Request for Arbitration, ¶ 1](#) (explaining that Bridgestone Corporation is a “Japanese incorporated company headquartered in Tokyo, Japan”); [Claimants’ Response on Expedited Objections, ¶¶ 138–39](#) (accepting that Bridgestone Corporation is a “person[] of a non-Party”).

<sup>835</sup> See [Expedited Objections Hearing Transcript \(Day 3\)](#), Tr. 484:01–06 (Kingsbury) (“And did counsel tell you that if Bridgestone Corporation paid this you

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to hurdle these obstacles, which centered on having Bridgestone Licensing pay the entire damages award.<sup>836</sup>

244. This plan could not be justified on commercial grounds, considering that Bridgestone Corporation is the parent, and Bridgestone Licensing is a subsidiary that has historically relied on Bridgestone Corporation for funding.<sup>837</sup> In addition, the plan ran counter to a “2010 Agreement . . . pursuant to which [Bridgestone Licensing] and the Parent [*i.e.*, Bridgestone Corporation] [had] agreed to split 50-50 the cost of all actions taken . . . jointly[] for the purposes of protecting both Bridgestone and Firestone trademarks, including . . . the cost of defending against any counter-actions taken by third parties[.]”<sup>838</sup> But, in its pursuit of using the TPA as an “insurance policy,”<sup>839</sup> the

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would have no case to bring under the Free Trade Agreement? A. I don’t want to say there was no case to bring because they’re not the *only* Claimant, but certainly it was a factor, sure”) (emphasis added).

<sup>836</sup> See [Expedited Objections Hearing Transcript \(Day 3\)](#), Tr. 483:09–22 (Kingsbury).

<sup>837</sup> See, e.g., [Claimants’ Rejoinder on Expedited Objections](#), ¶ 54 (discussing a USD 3.1 million loan from Bridgestone Corporation); [Expedited Objections Hearing Transcript \(Day 3\)](#), Tr. 460:17–461:10 (Kingsbury) (conceding that Bridgestone Licensing purchased trademarks using a USD 31 million loan from Bridgestone Corporation).

<sup>838</sup> See [Ex. R-0095](#), Bridgestone Licensing Services, Inc. Written Consent of the Board of Directors for Action Without a Meeting (20 July 2016), p. 1.

<sup>839</sup> See [Reply](#), ¶ 83 (“Whether this ‘insurance policy’ would cover this joint liability depends on the language of the insurance policy itself (here, the TPA)”). [Ex. R-0204](#), Bridgestone Corporation Email Correspondence Regarding Bridgestone Licensing Loan

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Bridgestone entities proceeded to revise the agreement. As indicated in an internal Bridgestone group email, this decision was made on or around 19 May 2016: “[I]t has been decided that it will be BSLs’s responsibility alone to pay a total of approximately \$8M in Panama-related damage compensation and international arbitration expenses, which *had initially been planned for an even split* between BSJ and BSLs.”<sup>840</sup> The change was also the subject of a subsequent resolution of the board of directors of Bridgestone Licensing, an excerpt from which appears below:

**Figure A: Excerpt from 20 July 2016 Resolution (Ex. R-0095)**

WHEREAS, the Defendants are parties to that certain agreement dated as of January 1, 2010 (the “2010 Agreement”) pursuant to which the Corporation and the Parent agreed to split 50-50 the cost of all actions taken by the Corporation and the Parent jointly, for the purpose of protecting both Bridgestone and Firestone trademarks, including the cost of executing enforcement, opposition and cancellation actions against third parties and the cost of defending against any counter-actions taken by third parties; and

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

245. This evidence is noteworthy for three important reasons. *First*, in its Decision on Expedited Objections, the Tribunal had stated that “[i]t does not follow [from the fact that

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(9 May 2016), p. 1 (“[A] possibility has suddenly emerged for an increase in BSLs’s damage compensation and international arbitration fees”).

<sup>840</sup> [Ex. R-0203, Bridgestone Corporation Email Correspondence Regarding Bridgestone Licensing Loan \(20 May 2016\)](#) (emphasis added).

[REDACTED]



[REDACTED]

Bridgestone Licensing had discharged the entirety of the judgment debt] that the whole of the payment will be recoverable as loss sustained by BSLS.”<sup>841</sup> The Tribunal also advised that “the consequences of BSLS’s payment is an issue that will fall to be resolved if and when quantum comes to be considered.”<sup>842</sup> **Second**, in their Reply, Claimants themselves propose that, when analyzing this issue, the Tribunal “look to any agreement made between the parties as to how they would apportion loss.”<sup>843</sup> Nevertheless, instead of drawing the resolution to the Tribunal’s attention, Claimants falsely advised that “[t]here are *no* documents that remonstrate any formal agreement between BSLS and BSJ” “as to how they would apportion loss.”<sup>844</sup> The gall of this statement is shocking. **Third**, the resolution confirms that the Supreme Court Judgment did not cause Bridgestone Licensing to suffer a loss of USD 5.431 million. Rather, assuming that the sum could even qualify as a “loss” — which is in question, because Bridgestone Licensing did not pay the sum with its own funds — it is one that Bridgestone Licensing brought upon itself. If the prior apportionment was subject to revision, as the resolution confirms, then measures should have been taken to *mitigate* any loss.

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<sup>841</sup> [Decision on Expedited Objections](#), ¶ 329.

<sup>842</sup> [Decision on Expedited Objections](#), ¶ 329.

<sup>843</sup> [Reply](#), ¶ 83.

<sup>844</sup> [Reply](#), ¶ 83.

[REDACTED]

246. As the commentary to the Articles on State Responsibility explains, it is well established that “an injured [party] which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.”<sup>845</sup> Here, Claimant Bridgestone Licensing had an opportunity to mitigate its alleged loss, by renegotiating (down) the previous apportionment. Yet, instead of doing so, it took affirmative steps to incur all of the loss (and more than what it had previously agreed to incur). Claimants then falsely represented that evidence of this maneuvering did not exist.<sup>846</sup> There can surely be no better example of a situation in which a claimant should be held to account for its failure to mitigate damages. Accordingly, if the Tribunal decides to award Bridgestone Licensing any damages associated with the Supreme Court Judgment, the Tribunal should reduce its award by the amount that Bridgestone Licensing could have mitigated.

247. Finally, Panama observes that Claimants’ quantum expert, Mr. Daniel, makes no effort to quantify Bridgestone

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<sup>845</sup> [RLA-0027](#), James Crawford, [THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES](#), Comment 11 to Art. 31 (Cambridge University Press, 2002) (quoting the judgment of the ICJ in the Gabčíkovo-Nagymaros Project case); *see also id.* at Art. 39 (“In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought”).

<sup>846</sup> *See Reply*, ¶ 83.

[REDACTED]

Licensing’s damages in respect of its request for USD 5.431 million.<sup>847</sup> This is further evidence of Bridgestone Licensing’s failure to meet its burden of proving loss and quantifying injury.

## **2. Claimants’ Request for Compensation “In Excess of” USD 5.431 Million Fails**

### **a. Claimants Have Failed to Establish that Either Of Them Has Incurred Any Injury**

248. Claimants also request compensation “in excess of” USD 5.431 million, jointly seeking an award of between USD 557,604 and USD 14,523,541.<sup>848</sup> Again, however, Claimants have failed to complete the threshold step of explaining and establishing injury.

249. As the TPA makes plain, Claimants are required to identify the injury (if any) that *each* Claimant’s investment in Panama suffered as a result of the Supreme Court Judgment.<sup>849</sup> However, any claim of injury faces an insurmountable barrier: no injury can be discerned from a review of Claimants’ financial records. Claimants’ expert Mr. Daniel has not argued the contrary. In fact, he did not even analyze Claimants’ financials statements to

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<sup>847</sup> See generally [First Daniel Report](#); [Second Daniel Report](#).

<sup>848</sup> [Reply](#), ¶ 118.

<sup>849</sup> See [Ex. R-0001](#), TPA, Art. 10.16.1 (“[T]he claimant, *on its own behalf*, may submit to arbitration under this Section a claim . . . that the claimant has incurred loss or damage by reason of, or arising out of, th[e alleged] breach . . .”) (emphasis added).

[REDACTED]

[REDACTED]

ascertain whether or not they recorded any injury. Instead, he conjured a hypothetical injury (contradicted by real-world data), and then offered an academic discussion about how to quantify it. In short, instead of determining whether or not any injury had been incurred, Mr. Daniel simply adopted an assumption that it had.

250. This is important, because if either Claimant’s “investment” had actually incurred any injury, such injury would have been reflected in the Claimants’ financial statements. As Versant explains in its expert report, per mandatory accounting rules, “Claimants do conduct annual impairment testing to determine whether their assets have decreased in value.”<sup>850</sup> Accordingly, when Bridgestone Americas considers that the value of one of its assets has been impaired (whether realized or unrealized) it records an impairment charge in its financial statements.<sup>851</sup> However, from 2014 to 2017, Bridgestone Americas’ financial statements have consistently stated that “**no** impairments were identified” for any intangible assets, including “trade names” and other “intangible assets.”<sup>852</sup> The financial statements also show that BSAM has not recorded any impairment

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<sup>850</sup> [Second Versant Report](#), ¶ 31.

<sup>851</sup> [Second Versant Report](#), ¶¶ 32–34.

<sup>852</sup> See [Second Versant Report](#), ¶ 35; see also *id.* at Figure 1.

[REDACTED]

[REDACTED]

to goodwill from 2014 to 2017.<sup>853</sup> For its part, Bridgestone Licensing likewise conducts annual impairment testing to determine whether its assets have decreased in value.

Nevertheless, as Versant confirms, “BSLS’s financial statements show no impairment to the Trademarks from 2014 to 2017,” and Bridgestone Licensing did not record any impairments to goodwill.<sup>854</sup>

251. Faced with the reality that their own financial records do not support a claim of loss, Claimants have become increasingly creative in crafting a theory of injury. Unfortunately, in developing this theory over time, Claimants have repeatedly contradicted themselves, as shown in the chart below:

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<sup>853</sup> [Second Versant Report, ¶ 35.](#)

<sup>854</sup> [Second Versant Report, ¶ 35.](#)

[REDACTED]

**Table 5: Claimants vs. Themselves**

Claimants	Also Claimants
<p>“[A]lthough BSLS . . . suffer[ed] some loss as a result of the Supreme Court decision (in excess of BSLS’s loss of US\$ 5.4 million), this is limited to the royalties [that it] would earn from the use of [its] trademark[.].”<sup>855</sup></p> <p>“[R]oyalties are dependent on sales . . . .”<sup>856</sup></p>	<p>“BSLS and BSAM do not claim sales have dropped.”<sup>857</sup></p>
<p>Bridgestone Americas’ trademark licenses “are unquestionably valuable, [because they] allow BSAM to use the BRIDGESTONE and FIRESTONE marks to generate revenue through sales of BRIDGESTONE and FIRESTONE branded tires.”<sup>858</sup></p>	<p>“BSLS and BSAM do not claim sales have dropped.”<sup>859</sup></p>

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<sup>855</sup> Claimants’ Rejoinder on Expedited Objections, ¶ 42.

<sup>856</sup> Claimants’ Rejoinder on Expedited Objections, ¶ 42.

<sup>857</sup> Reply, ¶ 21.

<sup>858</sup> Claimants’ Post-Hearing Submission, ¶ 17.

<sup>859</sup> Reply, ¶ 21.

Claimants	Also Claimants
<p>“[T]he risk that similar decisions may be issued in other countries makes it much costlier for Bridgestone to invest not only in Panama, but in other countries in Latin America.”<sup>860</sup></p>	<p>“The Claimants are not claiming loss resulting from competitors filing similar damages claims or future courts granting claims, whether inside Panama or outside Panama.”<sup>861</sup></p>
<p>“BSAM may see a drop in sales and loss of market share as a result” of the Supreme Court Judgment.<sup>862</sup></p>	<p>“It would be surprising if consumers of tires in Panama or elsewhere were aware of, or interested in, the Supreme Court Judgment . . . .”<sup>863</sup></p>
<p>“[I]mpairment to the trademarks must be viewed from the perspective of persons who would find a judicial decision to be economically impactful – specifically, the perspective of a potential acquirer of or investor in the trademark rights. Such acquirer or investor would readily appreciate the economic relevance of the Supreme Court Judgment . . . .”<sup>864</sup></p>	<p>The Bridgestone group does not license its marks to entities outside of the group.<sup>865</sup> The royalty rate for internal Bridgestone license agreements remained the same before and after the Judgment.<sup>866</sup></p>

<sup>860</sup> Request for Arbitration, ¶ 59.

<sup>861</sup> Reply, ¶ 97.

<sup>862</sup> Reply, ¶ 94.

<sup>863</sup> Reply, ¶ 21.

<sup>864</sup> Reply, ¶ 23.

<sup>865</sup> See Hearing on Expedited Objections (Day 3), Tr. 474:03–06 (Kingsbury); see also Decision on Expedited Objections, ¶ 50.

252. Having spun their wheels through multiple submissions, the final result, which is set forth in the Reply, is a theory of “unrealized” — *i.e.*, hypothetical — injury.<sup>867</sup> Indeed, Claimants’ submissions on loss are littered with references to what is “possible,”<sup>868</sup> what “might be,”<sup>869</sup> what “could” happen,<sup>870</sup> what “may” materialize,<sup>871</sup> the “risk” posed,<sup>872</sup> and the “uncertainty” created.<sup>873</sup> Missing among this conjecture is what has *actually* happened. Further, in speculating about their hypothetical, future harm, Claimants have continued to conflate their respective

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<sup>866</sup> See [Ex. C-0049, Trademark Sublicense Agreement between Bridgestone Americas Tire Operations LLC and Bridgestone de Costa Rica, S.A. \(1 January 2015\)](#), ¶ 3.1. Claimants allege that the sublicensing agreement maintained the 1% royalty rate because challenges to the Supreme Court Decision were still pending at the time of execution. See [Reply](#), ¶ 108. However, in light of the transfer pricing rules discussed above, Bridgestone Americas would have been obliged to amend the royalty rate after the Supreme Court Judgment became final if Bridgestone Americas had considered that the BRIDGESTONE trademark had suffered a diminution in value.

<sup>867</sup> [Reply](#), ¶ 29 (“[T]he impact of Panama’s breach may not have an immediately discernible effect and the damage may be as yet unrealized, though no less real”).

<sup>868</sup> [Reply](#), ¶ 91.

<sup>869</sup> [Reply](#), ¶ 90.

<sup>870</sup> [Reply](#), ¶ 93.

<sup>871</sup> [Reply](#), ¶ 95.

<sup>872</sup> [Reply](#), ¶¶ 93, 96.

<sup>873</sup> [Reply](#), ¶ 96.



investments,<sup>874</sup> despite the Tribunal’s determination that each Claimant has a different investment<sup>875</sup> with a different value.<sup>876</sup>

253. In the sections that follow, Panama addresses the nature and value of each of Claimants’ respective investments, and the real-world data that refutes their claims about loss.

**(i) Bridgestone Licensing Has Not Established that It Has Incurred Injury to its Trademark**

254. Bridgestone Licensing owns the FIRESTONE trademark registered in Panama<sup>877</sup> and has asserted that the value of the FIRESTONE trademark in Panama decreased as a result of the Supreme Court Judgment.<sup>878</sup> In order to assess this claim of loss, it is useful to recall the nature and valuation of trademarks.

**(a) The Nature and Value of Trademarks**

255. As stated by the Tribunal in its Decision on Expedited Objections, trademarks “identif[y] the features that a consumer will expect to find in a product that bears the mark.”<sup>879</sup> In other words, as affirmed by trademark expert Nadine Jacobson,

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<sup>874</sup> Reply, ¶ 22 (“BSLS and BSAM’s investment in Panama is their trademark rights”).

<sup>875</sup> Decision on Expedited Objections, ¶¶ 60–61.

<sup>876</sup> See Decision on Expedited Objections, ¶ 219.

<sup>877</sup> See Decision on Expedited Objections, ¶ 220.

<sup>878</sup> See Reply, ¶ 85.

<sup>879</sup> Decision on Expedited Objections, ¶ 167.

“a trademark is an indicator of source.”<sup>880</sup> A trademark “communicates to consumers a message about the nature of the goods such that when consumers see the goods in the marketplace, they expect the goods bearing that mark to have a consistent level of quality.”<sup>881</sup> The consumers’ trust in that quality and the resulting attractiveness and strength of the mark combine to form the goodwill in the trademark.<sup>882</sup> As stated by the Tribunal, the trademark owner can build goodwill by “designing, manufacturing and selling products that contain the desirable features”<sup>883</sup> and “promoting the brand by advertising and other means.”<sup>884</sup> As will be discussed below, a trademark owner can delegate these tasks to another entity by licensing the trademark.<sup>885</sup> However, because the trademark owner ultimately controls the quality upon which consumers rely, the *goodwill* in the trademark belongs to the

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<sup>880</sup> [Second Jacobson Report, ¶ 7.](#)

<sup>881</sup> [Second Jacobson Report, ¶ 7.](#)

<sup>882</sup> [Second Jacobson Report, ¶ 10](#) (“The term ‘goodwill’ has a specific meaning in the trademark context. Specifically, ‘goodwill’ is understood in trademark law to refer to the trademark’s strength, inherent distinctiveness, and the enhanced distinctiveness and attractiveness acquired through use”); *see also* [Decision on Expedited Objections, ¶ 167](#) (“A trademark identifies the features that a consumer will expect to find in a product that bears the mark. Where consumers consider those features to be desirable, the trademark enables the seller to profit from the goodwill that attaches to products that bear the trademark”).

<sup>883</sup> [Decision on Expedited Objections, ¶ 167.](#)

<sup>884</sup> [Decision on Expedited Objections, ¶ 168.](#)

<sup>885</sup> *See* [Decision on Expedited Objections, ¶ 173.](#)

trademark owner alone.<sup>886</sup> Indeed, for this very reason, many trademark licenses<sup>887</sup> — including those submitted by Claimants in this case — explicitly provide that the “LICENSOR owns the Marks and all the goodwill associated therewith.”<sup>888</sup>

256. A trademark thus is somewhat unique in that it is a “symbol[] of goodwill.”<sup>889</sup> Yet as a commercial asset like any other, the value of the trademark must be quantifiable for business

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<sup>886</sup> [Second Jacobson Report, ¶ 7](#) (“As an indicator of source, a trademark communicates to consumers a message about the nature of the goods such that when consumers see the goods in the marketplace, they expect the goods bearing that mark to have a consistent level of quality. For this reason, as trademark law developed in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the licensing of trademarks was initially not permitted; it was viewed as deceptive, as the entity applying the mark to the goods (the licensee) was not the trademark owner (the source indicated by the trademark). However, trademark law eventually evolved to permit trademark licensing on the basis of the understanding that the trademark owner would control the quality of the goods bearing the mark”).

<sup>887</sup> *See* [Second Jacobson Report, ¶ 11](#) (“Consistent with the principle that a trademark is an indicator of source, most trademark licenses typically provide: (1) the trademark owner with the ability to exercise quality control, (2) that the licensee’s use of the mark will inure to the benefit of the trademark owner, and (3) that the licensee shall acquire no ownership interest in the mark as a result of its licensed use. This is certainly the case for virtually all of the trademark licenses that I have encountered in my nearly 30 years of practice in this field”).

<sup>888</sup> [Ex. C-0048, Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. \(1 December 2001\)](#), § 11 (emphasis added); *see also* [Ex. C-0052, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC \(1 December 2001\)](#), § 6-1 (“BFNT acknowledges that BSJ Trademarks are part of the goodwill of BSJ’s respective business and that BFNT shall not at any time do or suffer to be done any act or thing which will in any way impair BSJ’s proprietary rights in and to BSJ Trademarks. It is understood that, except for the right to use BSJ Trademarks to identify Tire Products, BFNT shall not acquire and shall not claim, whether by reason of this Agreement, by use or otherwise, any right, title or interest, direct or indirect, in BSJ Trademarks”).

<sup>889</sup> [RLA-0223, Gordon V. Smith, TRADEMARK VALUATION: A TOOL FOR BRAND MANAGEMENT 45 \(2nd ed. 2013\)](#).

[REDACTED]

purposes (*e.g.*, accounting, acquisitions, sales). The value also must be quantifiable for the purpose of litigating claims. Where, as here, a claimant claims that an alleged breach of a treaty obligation caused quantifiable injury to its trademark, the question that arises is: what is the financial value of that trademark?<sup>890</sup> Mr. Gabe Fried, who has spent the past 20 years selling and acquiring trademark rights for U.S. and international companies, affirms that he “value[s] trademarks in a well-established, standardized manner, principally based on relief from royalty, a form of discounted cash flow.”<sup>891</sup> Specifically, Mr. Fried “analyze[s] the financial information of the trademark holder including: (i) the historic and forecasted sales of trademarked products, (ii) the margin associated with those sales, and (iii) the growth forecast of the trademarked products in each respective category and market.”<sup>892</sup>

257. In other words, one can quantify the value of the trademark — *i.e.*, the goodwill in the trademark — by measuring the income generated for the trademark owner by the trademark. In this case, the only trademark to be valued is the FIRESTONE

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<sup>890</sup> See [Reply](#), ¶ 22 (“The question is whether the Supreme Court Judgment has impaired the value of the trademark rights”).

<sup>891</sup> [First Fried Report](#), ¶ 4.

<sup>892</sup> [First Fried Report](#), ¶ 4.

[REDACTED]

trademark, which is owned by Bridgestone Licensing.<sup>893</sup> Because Bridgestone Licensing does no more than license the FIRESTONE trademark, the value of the FIRESTONE trademark is based upon the royalties that Bridgestone Licensing receives.<sup>894</sup> The Tribunal made this determination in its Decision on Expedited Objections, and ultimately reached the conclusion that “[i]f the [trademark] owner does no more than grant a license of the trademark, in consideration of the payment of royalties by the licensee, the value of the trademark to the owner will reflect the amount of royalties received.”<sup>895</sup>

258. Notably, this approach is endorsed in the treatise on “Trademark Valuation”<sup>896</sup> relied upon by Claimants’ own damages expert.<sup>897</sup> Specifically, the text states that:

To the *licensor* the value of a trademark licensing transaction is represented by the present value of the compensation to be

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<sup>893</sup> See [Request for Arbitration](#), ¶ 6. The other Claimant, Bridgestone Americas, does not own any trademarks. Bridgestone Americas’ trademarks licenses are the subject of its claims. *See id.*

<sup>894</sup> See [Decision on Expedited Objections](#), ¶ 219 (“If the [trademark] owner does no more than grant a license of the trademark, in consideration of the payment of royalties by the licensee, the value of the trademark to the owner will reflect the amount of royalties received”).

<sup>895</sup> [Decision on Expedited Objections](#), ¶ 219.

<sup>896</sup> See generally [CLA-0142](#), Smith, Gordon V. and Richey, Susan M., [TRADEMARK VALUATION: A TOOL FOR BRAND MANAGEMENT](#) (Second Edition, John Wiley & Sons, 2013).

<sup>897</sup> See, e.g., [Second Daniel Report](#), fns. 14, 16, 17, 21, 25.

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received (typically cash payments) less the present value of the costs to be incurred to administer the agreement, cover potential indemnifications, or income foregone by not exploiting the trademark internally.<sup>898</sup>

This approach is likewise affirmed by Versant, which has stated that it is appropriate to measure a trademark by reference to the royalty stream it would generate from a licensing agreement.<sup>899</sup>

259. The weight of authority thus confirms that the value of the FIRESTONE trademark — the only trademark that is owned by a Claimant in this proceeding (Bridgestone Licensing)<sup>900</sup> — is based solely upon the profits from the royalties that Bridgestone Licensing receives.<sup>901</sup> That value, and not some other, nebulous or unsubstantiated amount, should be used when assessing Bridgestone Licensing's damages claims.

**(b) Bridgestone Licensing Has Failed to Demonstrate Any Loss in the Value of Its Trademark**

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<sup>898</sup> **CLA-0142**, Smith, Gordon V. and Richey, Susan M., **TRADEMARK VALUATION: A TOOL FOR BRAND MANAGEMENT** 191 (Second Edition, John Wiley & Sons, 2013).

<sup>899</sup> See **First Versant Report**, ¶¶ 44, 47.

<sup>900</sup> See **Request for Arbitration**, ¶ 6.

<sup>901</sup> See **Decision on Expedited Objections**, ¶ 219 (“If the [trademark] owner does no more than grant a license of the trademark, in consideration of the payment of royalties by the licensee, the value of the trademark to the owner will reflect the amount of royalties received”).

[REDACTED]

[REDACTED]

260. Bridgestone Licensing relies on licensees to market and sell products bearing the FIRESTONE trademark that is registered in Panama. The value of the FIRESTONE trademark to Bridgestone Licensing accordingly is based on the royalties received by Bridgestone Licensing from its licensees for the use of the FIRESTONE trademark. Bridgestone Licensing receives royalties as a percentage of the sales of its trademarked products. Its royalties therefore may decrease if the royalty rate that it charges to licensees decreases, or if sales of trademarked products decrease. In order to establish a loss in value (*i.e.*, the alleged injury), Bridgestone Licensing therefore must demonstrate a decrease in its royalty rate or in sales of trademarked products, as a result of the Supreme Court Judgment. However, Claimants cannot show a decrease in royalty rates or sales.

261. The evidence demonstrates that Bridgestone Licensing has not experienced a decrease in its royalty rate. Before the Supreme Court Judgment, Bridgestone Licensing used a 1% royalty rate in its license agreements,<sup>902</sup> including in inter-company

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<sup>902</sup> **First Daniel Report**, ¶ 84 (“In order to determine the appropriate royalty rate, I reviewed documents and information regarding six historical license agreements involving the Subject Trademarks. . . . In particular, pursuant to the FIRESTONE Trademark License, BSLs charged a predecessor of BSAM a royalty rate of 1 percent; and pursuant to the BRIDGESTONE Trademark License, BSJ charged a predecessor to BATO a royalty rate of 1 percent”); *see also id.* at ¶ 77 (“In the present instance, there are existing license agreements between Bridgestone affiliates that establish the royalty rates to be charged on products bearing the Subject Trademarks. Therefore, given the nature

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agreements that were required by law to reflect arms-length transactions.<sup>903</sup> This 1% royalty rate charged by Bridgestone Licensing did not change after the issuance of the Supreme Court Judgment. In fact, Claimants' damages expert Mr. Daniel confirms that "BSAM currently pays its licensor BSLs a royalty rate of 1.0 percent of revenue earned on products that utilize the FIRESTONE trademark."<sup>904</sup> Mr. Daniel also conceded that the 1% rate was an appropriate one.<sup>905</sup> Yet U.S. transfer pricing rules require "periodic adjustments to the royalty rate if economic circumstances change."<sup>906</sup> For that reason, if Bridgestone Licensing considered that the FIRESTONE Trademark had suffered a diminution of value, it would have been required to adjust the applicable royalty rate downward.<sup>907</sup>

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and use of the Subject Trademarks, the availability of financial data . . . and licensing terms (including royalty rates), a valuation framework that quantifies licensing cash flows using these inputs is appropriate").

<sup>903</sup> **First Daniel Report**, ¶ 57 fn. 28 ("This royalty rate must be arm's length to comply with legal obligations and transfer pricing rules"); *see also id.* at ¶ 84 ("[A]lthough these are intercompany royalty rates, worldwide taxing authorities require that intercompany royalty rates are consistent with arm's-length rates charged to unrelated, third parties in order to comply with transfer pricing rules").

<sup>904</sup> **Second Daniel Report**, ¶¶ 32, 34.

<sup>905</sup> **First Daniel Report**, ¶ 57 ("I identified the royalty rates from the FIRESTONE Trademark License and BRIDGESTONE Trademark License, both of which are related-party licenses for use of the Subject Trademarks in relevant geographies, and used that rate as an input . . .").

<sup>906</sup> **Second Versant Report**, ¶ 39.

<sup>907</sup> *See* **Second Versant Report**, ¶ 39; *see also id.* at ¶ 85.



262. Notably, Claimants have alleged that the Supreme Court Judgment affected both the BRIDGESTONE and FIRESTONE trademarks equally.<sup>908</sup> It is worth noting here that the BRIDGESTONE trademark royalty rate is irrelevant to this proceeding, as no Claimant in this proceeding owns the BRIDGESTONE trademark. That said, if the royalty rate for the BRIDGESTONE trademark were relevant to this proceeding (which it is not), it also was unaffected by the Supreme Court Judgment.<sup>909</sup> Specifically, after the Supreme Court Decision, Bridgestone Americas sublicensed the use of the BRIDGESTONE trademark in Panama to Bridgestone Costa Rica.<sup>910</sup> This sublicensing agreement maintained the pre-existing 1% royalty rate.<sup>911</sup>

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<sup>908</sup> See [Reply](#), ¶ 89 (“The special dimension of trademarks represented by the generation of goodwill [ ] is shared equally and indivisibly by the trademark owner and any number of licensees and sublicensees . . . . In other words, the trademark owner and its licensees and sublicensees each have an undivided interest in the mark’s goodwill”).

<sup>909</sup> See [First Versant Report](#), fn. 46 (“Because the Supreme Court Decision has the same implications for the Bridgestone and Firestone Trademarks, the fact that the Bridgestone Trademark royalty rate was not changed means that the Firestone Trademark royalty rate also would not change”).

<sup>910</sup> See generally [Ex. C-0049, Trademark Sublicense Agreement between Bridgestone Americas Tire Operations LLC and Bridgestone de Costa Rica, S.A. \(1 January 2015\)](#).

See [Ex. C-0049, Trademark Sublicense Agreement between Bridgestone Americas Tire Operations LLC and Bridgestone de Costa Rica, S.A. \(1 January 2015\)](#), § 3.1. Claimants allege that the sublicensing agreement maintained the 1% royalty rate because challenges to the Supreme Court Decision were still pending at the time of execution. See [Reply](#), ¶ 108. However, in light of the transfer pricing rules discussed above, Bridgestone Americas would have been obliged to amend the royalty rate after the Supreme Court

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263. In the absence of a decrease in the royalty rate, Bridgestone Licensing must show that sales of the trademarked products dropped as a result of the Supreme Court Judgment. Yet there is no evidence that sales revenues have decreased. In fact, the evidence shows that sales revenues have increased.<sup>912</sup> Further, Claimants have confirmed that they expect a growth rate of between 3% and 5% in revenue from tire sales in Panama going forward.<sup>913</sup> Mr. Daniel takes the middle road between these two figures, and projects a 4% annual growth rate of tire sales revenue for Claimants.<sup>914</sup>

**(ii) Bridgestone Americas Has Not Established that It Has Incurred Injury to its Trademark Licenses**

264. According to Claimants, “BSAM’s investment in Panama is its intellectual property rights”<sup>915</sup> — by which Claimants mean “two key licens[ing]”<sup>916</sup> agreements, which “allow BSAM to use the BRIDGESTONE and FIRESTONE marks to generate

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Judgment became final if Bridgestone Americas had considered that the BRIDGESTONE trademark had suffered a diminution in value.

<sup>912</sup> See [Second Versant Report](#), Table 3, Table 4; see also [Second Daniel Report](#), Appendix 18.

<sup>913</sup> See [Third Kingsbury Statement](#), ¶ 3.

<sup>914</sup> See [Second Daniel Report](#), Appendix 18.

<sup>915</sup> [Claimants’ Rejoinder on Expedited Objections](#), ¶ 7.

<sup>916</sup> [Claimants’ Response on Expedited Objections](#), ¶ 111; see also [Claimants’ Post-Hearing Submission](#), ¶ 3(c)(i).

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revenue through sales of BRIDGESTONE and FIRESTONE branded tires.”<sup>917</sup> Bridgestone Licensing has asserted that the value of these licensing agreements has decreased as a result of the Supreme Court Judgment. In order to assess the validity of *this* claim, it is useful to consider the nature and value of these license agreements.

### (a) The Nature and Value of Trademark Licenses

265. As discussed above, a trademark owner may exploit a registered trademark by licensing the use of the trademark to another party.<sup>918</sup> The resulting franchise or license agreement grants a licensee the *contractual* right to use the trademark.<sup>919</sup> That contractual right does not, however, vest the licensee with any ownership or property interest in the trademark itself. The license agreements submitted by Claimants make this explicit:

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<sup>917</sup> **Claimants’ Post-Hearing Submission**, ¶ 17 (emphasis added).

<sup>918</sup> See **Decision on Expedited Objections**, ¶ 173; **CLA-0142**, Smith, Gordon V. and Richey, Susan M., **TRADEMARK VALUATION: A TOOL FOR BRAND MANAGEMENT 189** (Second Edition, John Wiley & Sons, 2013) (“[L]icensing provides an additional method for brand exploitation”).

<sup>919</sup> See **Decision on Expedited Objections**, ¶ 186 (“While the FIRESTONE Trademark License made it clear that BSAM was not granted any interest in the FIRESTONE mark itself, BSAM was granted the contractual right to *use* the mark”); **Second Jacobson Report**, ¶ 9 (“[I]t is useful to recall that a trademark license is simply a contract that creates contractual rights. A trademark licensee has a contractual right to use a trademark, in the same way that a tenant has a contractual right to occupy particular premises”).

“LICENSOR shall retain all right, title and interest in and to the Marks . . . .”<sup>920</sup>

266. Nor does the right to use the trademark vest the licensee with ownership of the trademark’s goodwill.<sup>921</sup> As stated above, a trademark is an indicator of source.<sup>922</sup> For that reason, in order for a trademarked product to be “genuine,” the trademark owner must establish and implement quality controls if and when it licenses the use of that trademark to other entities.<sup>923</sup> If it fails to do so, the trademark owner can lose its trademark rights.<sup>924</sup> The goodwill that is generated from the quality and attractiveness of the

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<sup>920</sup> [Ex. C-0048](#), Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. (1 December 2001), § 11; *see also* [Ex. C-0052](#), Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001), § 6-1 (“BFNT shall not at any time do or suffer to be done any act or thing which will in any way impair BSJ’s proprietary rights in and to BSJ Trademarks. It is understood that, except for the right to use BSJ Trademarks to identify Tire Products, **BFNT shall not acquire and shall not claim, whether by reason of this Agreement, by use or otherwise, any right, title or interest, direct or indirect, in BSJ Trademarks**”) (emphasis added).

<sup>921</sup> [Second Jacobson Report](#), ¶ 10.

<sup>922</sup> [Second Jacobson Report](#), ¶ 7.

<sup>923</sup> [CLA-0143](#), J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th Ed. 2016), § 18:38, p. 18-94; *see also* [Second Jacobson Report](#), fn. 9 (“A trademark carries with it a message that the trademark owner is controlling the nature and quality of the goods or services sold under the mark. Without quality control, this message is false because without control of quality, the goods or services are not truly “genuine.”) (quoting McCarthy on Trademarks and Unfair Competition).

<sup>924</sup> *See* [Second Jacobson Report](#), ¶ 8 (“A ‘naked’ trademark license, in which the trademark owner exercises no control over the quality of the goods, is deemed to result in an abandonment of the trademark owner’s rights”); [CLA-0143](#), J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th Ed. 2016), § 18:38, p. 18-4.

[REDACTED]

products thus belongs to the trademark owner alone. Again, this is made explicit in the licensing agreements submitted by Claimants:

LICENSEE agrees that *LICENSOR owns of the Marks and all the goodwill* associated therewith. *LICENSOR shall retain all right, title and interest in and to the Marks, the goodwill associated therewith,* and all registrations granted thereon. Any and all uses of the Marks by LICENSEE shall inure to the benefit of LICENSOR.<sup>925</sup>

As a result, and contrary to Claimants' unsupported assertion, the licensor and licensee do not have "an undivided interest in the mark's goodwill."<sup>926</sup> Instead, the licensor owns the goodwill, and the licensee has a contractual right to use the trademark.

267. As with any other contractual right, the value of the licensee's contractual right to trademark use is assessed based on the income generated by that right. In its Decision on Expedited

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<sup>925</sup> [Ex. C-0048, Agreement to License Trademarks between Bridgestone Licensing Services, Inc. and Bridgestone/Firestone Americas Holding, Inc. \(1 December 2001\)](#), § 11 (emphasis added); *see also*

[Ex. C-0052, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC \(1 December 2001\)](#), § 6-1 ("BFNT acknowledges that BSJ Trademarks are part of the goodwill of BSJ's respective business and that BFNT shall not at any time do or suffer to be done any act or thing which will in any way impair BSJ's proprietary rights in and to BSJ Trademarks. It is understood that, except for the right to use BSJ Trademarks to identify Tire Products, BFNT shall not acquire and shall not claim, whether by reason of this Agreement, by use or otherwise, any right, title or interest, direct or indirect, in BSJ Trademarks").

<sup>926</sup> [Reply](#), ¶ 89.

[REDACTED]

[REDACTED]

Objections, the Tribunal thus determined that “the value of the license to the licensee will reflect the fruits of the exploitation of the trademark.”<sup>927</sup> Similarly, Claimants’ own legal authority affirmed that the value of a trademark licensing agreement to a licensee “is the present value of the future economic benefits of exploiting the licensed trademark rights less the present value of the costs of doing so.”<sup>928</sup>

**(b) Bridgestone Americas Has Failed to Demonstrate Any Loss in the Value of its Trademark Licenses**

268. In order to demonstrate a loss in value of its trademark licenses, Bridgestone Americas must demonstrate a decrease in sales of the trademarked products. However, the exhibits cited by Claimants’ own damages expert confirm that sales of trademark-branded tires in Panama have increased from 56,661 units in 2014 to 280,500 in 2017,<sup>929</sup> and that revenues derived from these sales have increased from \$6,254,503 in 2014 to \$19,596,412 in 2017.<sup>930</sup> In the future, Mr. Daniel projects that revenues derived

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<sup>927</sup> [Decision on Expedited Objections](#), ¶ 219.

<sup>928</sup> [CLA-0142](#), Smith, Gordon V. and Richey, Susan M., [TRADEMARK VALUATION: A TOOL FOR BRAND MANAGEMENT](#) 181 (Second Edition, John Wiley & Sons, 2013).

<sup>929</sup> See [Second Daniel Report](#), Appendix 18.

<sup>930</sup> See [Second Daniel Report](#), Appendix 18.

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from sales will continue to increase, reaching USD 22,925,030 in 2021.<sup>931</sup>

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269. In sum, Claimants have failed to demonstrate that they “incurred loss or damage by reason of, or arising out of,” the alleged breach, as required by the TPA.<sup>932</sup> Bridgestone Licensing has failed to prove that it suffered an economic loss in making the payment associated with the Supreme Court Judgment; indeed, the evidence that it has submitted undermines its request for USD 5.431 million. Further, Claimants’ evolving theory of loss in excess of USD 5.431 (1) is not reflected in their own financial records, (2) ignores the nature of each Claimant’s investment and the established means of valuing such investment, and (3) runs counter to the real-world data showing that neither of their investments has suffered a diminution in value. Moreover, Claimants continue to request damages for loss incurred outside of Panama, even though such alleged injury is hypothetical,<sup>933</sup> and this type of claim has been acknowledged by the Tribunal to fall outside of the jurisdiction of the TPA.<sup>934</sup> For all of these reasons,

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<sup>931</sup> See **Second Daniel Report**, Appendix 18.

<sup>932</sup> **Ex. R-0001**, TPA, Art. 10.16.1.

<sup>933</sup> See **Counter-Memorial**, ¶¶ 178–85.

<sup>934</sup> See **Decision on Expedited Objections**, ¶¶ 354–55; **Counter-Memorial**, ¶ 175.

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Claimants' claims can and should be dismissed, without proceeding to the subject of quantum.

**b. Even If Claimants *Had* Presented Some Conceptually Viable Theory Of Injury “In Excess Of” USD 5.431 Million, Their Specific Request for Relief Stands Wholly Unsupported**

270. As explained by the resubmission tribunal in *Pey Casado v. Chile*, “the assessment of the reparation due under international law for the breach of an international obligation consists of three steps — the establishment of the breach, followed by the ascertainment of the injury caused by the breach, followed by the determination of the appropriate compensation for that injury.”<sup>935</sup> The claimant bears the burden of proof on all three of these steps.<sup>936</sup> Accordingly, assuming that Claimants had established that the TPA had been breached (which they have not), the question would become “whether, and to what extent, the

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<sup>935</sup> [RLA-0073](#), *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 217 (Berman, Murre, Veeder).

<sup>936</sup> [RLA-0073](#), *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 231 (Berman, Murre, Veeder); *see also* [RLA-0082](#), *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award, 6 May 2013), ¶ 190 (Berman, Donovan, Lalonde) (“To the extent . . . that a claimant chooses to put its claim (as in the present Arbitration) in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms”); [RLA-0081](#), *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial Award, 13 November 2000), ¶ 316 (Hunter, Schwartz, Chiasson) (“[T]he burden is on [the Claimant] to prove the quantum of the losses in respect of which it puts forward its claims”).



Claimants have met th[e] burden of proving what injury was caused to either or both of them by the Respondent’s breach of the [TPA], and then of establishing the corresponding assessable damage in financial terms.”<sup>937</sup>

271. As noted, Claimants have failed to prove that either of them has incurred any injury at all. “The Tribunal cannot therefore, on principle, make any award of damages.”<sup>938</sup> Yet even if it could, there would still be another barrier to Claimants’ request for an award of USD 557,604 to USD 14,523,541 — namely, that this request stands entirely unsupported. It is true, of course, that Claimants have furnished two expert reports on quantum. But “[e]xpert valuations of damage are . . . secondary, or derivative”<sup>939</sup> — and therefore are not even germane unless they “measure the right thing.”<sup>940</sup> In this case, as any other, the valuation must be tied

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<sup>937</sup> **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 231 (Berman, Mourre, Veeder); see also **RLA-0082**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award, 6 May 2013), ¶ 190 (Berman, Donovan, Lalonde); **RLA-0081**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial Award, 13 November 2000), ¶ 316 (Hunter, Schwartz, Chiasson).

<sup>938</sup> **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 234 (Berman, Mourre, Veeder).

<sup>939</sup> **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 240 (Berman, Mourre, Veeder).

<sup>940</sup> **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 240 (Berman, Mourre, Veeder); see also **RLA-0082**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No.

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to the injury alleged; yet, as discussed below, there is a fundamental disconnect between (1) Claimants’ theory of injury, and (2) the reports of their damages expert, Mr. Daniel.

272. To the extent that Claimants could be said to have any theory of injury at all, it appears to be that the Supreme Court Judgment “impos[ed] legal and economic risk on [trademark] enforcement,”<sup>941</sup> diminishing “[t]he inherent right of the trademark holder . . . to exclude others from use and registration of a confusingly similar trademark, through such tools as opposition proceedings and litigation.”<sup>942</sup> Accordingly — the Reply states — “Claimants . . . [we]re seeking to capture the diminution in value of the trademark rights caused by the uncertainty of how broadly these trademark rights are enforceable in the future.”<sup>943</sup> But, in this regard, Mr. Daniel’s reports do not assist; as Mr. Daniel himself explains, his “relief-from-royalty” approach<sup>944</sup> does not even

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ARB/06/3 (Award, 6 May 2013), ¶ 287 (Berman, Donovan, Lalonde) (“The test is: what does the method set out to measure, and does it do so with sufficient accuracy and reliability?”).

<sup>941</sup> Reply, ¶ 93.

<sup>942</sup> Reply, ¶ 96.

<sup>943</sup> Reply, ¶ 97.

<sup>944</sup> **First Daniel Report**, ¶ 77 (“I utilized the Relief-from Royalty Approach to determine the indicated fair market value of the Subject Trademarks before and after the Supreme Court decision as of 28 May 2014”). As discussed below, although Mr. Daniel had made this point in his first report, his second report did not reflect any new calculations; instead, Mr. Daniel simply took the sums that his first-round calculations had yielded, and plugged them into his second report (double-counting on some occasions).

*purport* to account for the type of injury that Claimants allege: “Some of the benefits *not* accounted for by the Relief-from-Royalty Approach in these instances include, but are not limited to: the right to assert the subject intellectual property against infringers . . . .”<sup>945</sup> This alone is sufficient reason to put Mr. Daniel’s reports to the side. Yet as the table below illustrates, there are additional fundamental disconnects between Claimants and Mr. Daniel:

**Table 6: Claimants’ Arguments vs. Mr. Daniel’s Assessments**

Claimants	Mr. Daniel
Claim injury in the form of an “increase [in] the riskiness of trademark enforcement with respect to the BRIDGESTONE and FIRESTONE marks . . . .” <sup>946</sup>	Advises that, among “the benefits not accounted for by [his] Relief-from-Royalty Approach” are “the right to assert the subject intellectual property against infringers . . . .” <sup>947</sup>

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<sup>945</sup> **First Daniel Report**, ¶ 76.

<sup>946</sup> **Reply**, ¶ 102; *but see id.* at ¶¶ 102 (conceding that “the Eighth Civil Circuit decision [in the opposition proceeding had] decided that RIVERSTONE was not confusingly similar to BRIDGESTONE or FIRESTONE,” and that “[t]he fact that Muresa [accordingly] obtained its trademark registration for RIVERSTONE in Panama means that tires with the RIVERSTONE mark may be sold in Panama alongside BRIDGESTONE and FIRESTONE tires, and that the Bridgestone group cannot prevent this”), <sup>97</sup> (advising that “Claimants are *not* claiming loss resulting from competitors filing similar damages claims or future courts granting claims, whether inside Panama or outside Panama”) (emphasis added).

<sup>947</sup> **First Daniel Report**, ¶ 76 (emphasis added).

Claimants	Mr. Daniel
Allege that “[t]he impairment is real, and the most apposite way to conceive of it is by considering a potential acquirer or licensee of or investor in the trademark or trademark licenses.” <sup>948</sup>	Advises that, among “the benefits not accounted for by the Relief-from-Royalty Approach” are “the right to cross-or sub-license the subject intellectual property to others . . . [and] the right to sell the subject intellectual property . . . .” <sup>949</sup>
Indicate that their theory of injury is <i>not</i> a matter of whether ““another company gains [a license] to sell the same branded product . . . .” <sup>950</sup>	Describes the scenario in which ““other parties also were granted licenses,’ . . . [a]s <i>the literal, exact effect my analysis captures[.]</i> ” <sup>951</sup>
Claim that Panama had been “incorrect” when it had “accuse[d] Mr. Daniel of including the losses incurred by BSJ in his analysis.” <sup>952</sup>	Concedes that “[t]he damages amounts calculated in [his] Initial Report for the BRIDGESTONE Trademark” <sup>953</sup> had “ <i>focused solely on BSJ’s</i> lost royalty income . . . .” <sup>954</sup>
Insist that “[t]he loss suffered by <i>each</i> Claimant was included in Mr. Daniel’s First Report . . . .” <sup>955</sup>	Admits that, as Panama and Versant had flagged, <sup>956</sup> his first report had not assessed damages for Bridgestone Americas. <sup>957</sup>

<sup>948</sup> Reply, ¶ 33.

<sup>949</sup> First Daniel Report, ¶ 76.

<sup>950</sup> Reply, ¶ 115 (quoting and contesting a passage of the First Versant Report which had been discussing exclusive vs. non-exclusive trademark licenses; *see* First Versant Report, ¶¶ 142–44).

<sup>951</sup> Second Daniel Report, ¶ 53 (emphasis added).

<sup>952</sup> Reply, ¶ 104.

<sup>953</sup> Second Daniel Report, ¶ 27.

<sup>954</sup> Second Daniel Report, fn. 28.

<sup>955</sup> Reply, ¶ 88 (emphasis added).

273. In light of the foregoing, the only option available to the Tribunal is to enter an award of zero damages. This conclusion has been confirmed by past annulment committees — which have warned that it would be an annulable offense for a tribunal to ignore or invert the claimant’s burden of proof;<sup>958</sup> to devise its own theory of damages;<sup>959</sup> and/or to issue an award *ex aequo et bono*.<sup>960</sup>

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<sup>956</sup> **Counter-Memorial**, ¶ 229; *see also* **First Versant Report**, ¶ 57 (“A fundamental flaw in Mr. Daniel’s damages analysis is that he does not evaluate damages associated with Claimants’ actual investments. Instead, he calculates the purported diminution in value of the Firestone Trademark (which is BSL’s investment) and the Bridgestone Trademark (which is owned by non-Claimant BSJ)”).

<sup>957</sup> *See* **Second Daniel Report**, ¶ 18 (asserting that his second report “includes damages amounts for...BSAM (the BRIDGESTONE and FIRESTONE licensee, *not previously quantified in my Initial Report*”) (emphasis added); *see also id.* at ¶¶ 13 (explaining that “[t]he damages amount in my Initial Report *focused solely on the licensors’ lost royalty income* attributable to the BRIDGESTONE and FIRESTONE trademarks”) (emphasis added), 28, 33 (and accompanying footnotes) (confirming that such “licensors” had been Bridgestone Licensing and Bridgestone Corporation).

<sup>958</sup> *See* **RLA-0194, Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey**, ICSID Case No. ARB/11/28 (Decision on Annulment, 30 December 2015), ¶ 84 (Tomka, Booth, Schreuer) (“A clear violation of a rule of evidence, such as the reversal of the burden of proof, may amount to a serious violation of a fundamental rule of procedure”); *see also* **RLA-0193, Total S.A. v. Argentine Republic**, ICSID Case No. ARB/04/01 (Decision on Annulment, 1 February 2016), ¶ 314 (Zuleta, Cheng, Castellanos) (“[T]he fundamental rules of procedure include: . . . (iv) the treatment of evidence and burden of proof”).

<sup>959</sup> *See* **RLA-0197, Víctor Pey Casado and President Allende Foundation v. Chile**, ICSID Case No. ARB/98/2 (Decision on Annulment, 18 December 2012), ¶ 266 (Fortier, Bernardini, El-Kosheri) (annulling the tribunal’s award because “[e]ven though the Tribunal did use objective elements for the valuation of damages (the data provided and discussed by the parties), at no time did it refer to arguments pleaded by either party, [and instead] adopted another standard,” different from the one proposed by the claimants and without allowing the parties to comment on that standard”).

<sup>960</sup> *See* **RLA-0065, Azurix Corp. v. Argentine Republic**, ICSID Case No. ARB/01/12 (Decision on the Application for Annulment of the Argentine Republic, 1 September 2009), ¶ 136 (Griffith, Ajibola, Hwang) (“Grounds for annulment under Article 52(1)(b)

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Consistent with this wisdom, numerous past tribunals have identified a treaty violation and then awarded no compensation.<sup>961</sup>

274. For example, in *Biwater Gauff v. Tanzania*, the tribunal concluded that the respondent had violated numerous BIT provisions when it terminated a water and sewerage services contract with the claimant's project company and seized that company's assets, deported its senior management, and installed new management.<sup>962</sup> The award stated that, in principle,<sup>963</sup> the

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will exist where the tribunal fails to apply any law at all in determining the dispute, for instance, where the tribunal decides the dispute *ex aequo et bono* despite not being authorised to do so”).

<sup>961</sup> See, e.g., **RLA-0073**, *Víctor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 234 (Berman, Mourre, Veeder) (“The Tribunal has therefore no option but to find that the Claimants have failed to prove any material injury caused to either of them as the sufficiently direct result of the Respondent’s breach of Article 4 of the BIT. The Tribunal cannot therefore, on principle, make any award of damages”); see also **RLA-0191**, *MNSS B.V. and Recuperó Crédito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8 (Award, 4 May 2016), ¶ 356 (Rigo Sureda, Gaillard, Stern) (“[T]he Claimants have failed to show that they suffered damage as a result of the Respondent’s actions. As a consequence, while the standard in Article 3(1) of the BIT was breached, there is no basis for an award of damages in relation to the behavior of the police during the two strikes at the end of the year 2010”); **RLA-0089**, *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008) (Final Award, 8 June 2010), ¶ 96 and § E (Hertzfeld, Happ, Zykin); **RLA-0082**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award, 6 May 2013), ¶¶ 288, 299(d) (Berman, Donovan, Lalonde); **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶¶ 805–06 (Hanotiau, Born, Landau).

<sup>962</sup> **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶¶ 15, 485, 605, 622–28, 696, 731 (Hanotiau, Born, Landau).

<sup>963</sup> See **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), § VI.C.1. (Hanotiau, Born, Landau).

respondent State was obliged to provide reparation.<sup>964</sup> However, the tribunal declined to award damages,<sup>965</sup> because the claimant, BGT, “ha[d] failed to demonstrate compensable monetary damages or loss.”<sup>966</sup> The same outcome — zero damages — obtained in *Romp petrol v. Romania*.<sup>967</sup> In that case, the tribunal concluded that it could not award compensation because the claimant’s proposed damages methodology had been unsuitable for purposes of evaluating the injury alleged.<sup>968</sup> Similarly, in *Al-Bahloul v. Tajikistan*, the tribunal declined to award damages on the basis that the sole damages calculation that the claimant had presented had been predicated upon “too many unsubstantiated assumptions.”<sup>969</sup> Notably, in *Al-Bahloul*, the respondent had declined entirely to participate in the *quantum* phase,<sup>970</sup> which confirms that a

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<sup>964</sup> See **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 774 (Hanotiau, Born, Landau).

<sup>965</sup> **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 814(e) (Hanotiau, Born, Landau).

<sup>966</sup> **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 806 (Hanotiau, Born, Landau).

<sup>967</sup> **RLA-0082**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award, 6 May 2013), ¶ 299(d) (Berman, Donovan, Lalonde).

<sup>968</sup> **RLA-0082**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Award, 6 May 2013), ¶ 288 (Berman, Donovan, Lalonde).

<sup>969</sup> **RLA-0089**, *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008) (Final Award, 8 June 2010), ¶ 96 (Hertzfeld, Happ, Zykin).

<sup>970</sup> See **RLA-0089**, *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008) (Final Award, 8 June 2010), ¶ 103 (Hertzfeld, Happ, Zykin).

respondent is not under any obligation whatsoever to put forward an alternative calculation of damages.<sup>971</sup>

275. Accordingly, there is no need for the Tribunal to wade into the mechanics of Mr. Daniel’s analysis. As discussed below, however, such analysis is flawed in any event.

**c. Mr. Daniel’s Inapposite Analysis Is Flawed In Any Event**

276. As noted above, in his first report, Mr. Daniel had adopted a methodology that he called the “Relief-from-Royalties Approach.”<sup>972</sup> This approach involved determining — in both “but-for” and “actual” scenarios — the royalty income associated with the BRIDGESTONE and FIRESTONE trademarks.<sup>973</sup> To ascertain such income in each scenario, Mr. Daniel:

- a. multiplied the “royalty base” — *i.e.*, the revenues from licensed sales of BRIDGESTONE and

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<sup>971</sup> See [RLA-0089, Mohammad Ammar Al-Bahloul v. Tajikistan](#), SCC Case No. V (064/2008) (Final Award, 8 June 2010), ¶ 37 (Hertzfeld, Happ, Zykin) (“Respondent’s non-appearance in this arbitration does not relieve Claimant from the burden of proving his factual allegations”); [RLA-0073, Víctor Pey Casado and President Allende Foundation v. Chile](#), ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 233 (Berman, Mourre, Veeder) (“The Tribunal finds much merit in the Respondent’s submissions. It is not, however, required to pronounce formally on them; given the Claimants’ failure to address their own burden of proof, there is no *prima facie* case for the Respondent, as the opposing party, to rebut”).

<sup>972</sup> [First Daniel Report](#), ¶ 77.

<sup>973</sup> See [First Daniel Report](#), ¶¶ 81–106.



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FIRESTONE-branded tires<sup>974</sup> — by a particular royalty rate,<sup>975</sup>

- b. deducted taxes from the resulting figure;<sup>976</sup> and
- c. applied a discount rate.<sup>977</sup>

In Mr. Daniel’s own words, this approach yielded “damages amounts [that] . . . focused solely on the licensors’ lost royalty income attributable to the BRIDGESTONE and FIRESTONE trademarks.”<sup>978</sup> Importantly, Mr. Daniel did *not* assess damages for Bridgestone Americas<sup>979</sup> — which is not a licensor but rather a licensee.<sup>980</sup> Instead, he “focused solely on BSJ’s lost royalty income attributable to the BRIDGESTONE trademark,”<sup>981</sup> and “on BSLS’s lost royalty income attributable to the FIRESTONE

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<sup>974</sup> [First Daniel Report](#), ¶¶ 81–83.

<sup>975</sup> [First Daniel Report](#), ¶¶ 84–86.

<sup>976</sup> [First Daniel Report](#), ¶ 87.

<sup>977</sup> [First Daniel Report](#), ¶¶ 88–91.

<sup>978</sup> [Second Daniel Report](#), ¶ 13 (emphasis added); *see also id.* at ¶ 24 (referring above the line to “the damages amounts presented in my Initial Report,” and then explaining in the accompanying footnote (note 27) that “those damages amounts focused solely on the licensors’ lost royalty income attributable to the BRIDGESTONE and FIRESTONE trademarks”); ¶ 33 (referring to above the line to “[t]he damages amounts calculated in my Initial Report for the FIRESTONE trademark,” and then explaining in the accompanying footnote (note 30) that “those damages amounts focused solely on BSLS’s lost royalty income attributable to the FIRESTONE trademark”).

<sup>979</sup> *See* [Second Daniel Report](#), ¶ 18 (admitting that the damages for “BSAM (the BRIDGESTONE and FIRESTONE licensee, [were] *not previously quantified in my Initial Report* )”) (emphasis added).

<sup>980</sup> *See* [Decision on Expedited Objections](#), ¶ 218.

<sup>981</sup> [Second Daniel Report](#), fn. 28.

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trademark.”<sup>982</sup> This history is relevant, because in his second report, Mr. Daniel does not purport to conduct new calculations.

277. Instead, Mr. Daniel first took the first-report figures that, by his own admission, had “focused solely on [non-claimant] *BSJ*’s lost royalty income,”<sup>983</sup> and then re-labeled them as damages figures for *BSAM* — even though, as a licensee, *BSAM* is not entitled to royalty income. This step is illustrated in the figure below:

**Step 1: The Re-labeling Exercise**

	First Daniel Report	Second Daniel Report
Bridgestone Corporation (Japan)	\$438,982 – \$11,102,364 <sup>984</sup>	—
Bridgestone Americas	—	\$438,982 – \$11,102,364 <sup>985</sup>

Next, Mr. Daniel turned to the damages figures from his first report which — again by his own admission — had “focused solely on *BLSL*’s lost royalty income.”<sup>986</sup> He then doubled the figures while

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<sup>982</sup> [Second Daniel Report](#), fn. 30.

<sup>983</sup> [Second Daniel Report](#), fn. 28.

<sup>984</sup> [First Daniel Report](#), Figure 1.

<sup>985</sup> [Second Daniel Report](#), Figure 1.

<sup>986</sup> [Second Daniel Report](#), fn. 30.

claiming to be splitting them in half.<sup>987</sup> Once this mathematical mitosis was complete, Mr. Daniel labeled the duplicate figure as applicable to Bridgestone Americas (again ignoring the fact that Bridgestone Americas does not have any royalty income):

**Step 2: Mitosis**

Entity	First Daniel Report	Second Daniel Report
Bridgestone Licensing	\$59,311 – \$1,1710,588 <sup>988</sup>	\$59,311 – \$1,1710,588 <sup>989</sup>
Bridgestone Americas	—	\$59,311 – \$1,1710,588 <sup>990</sup>

278. If the Tribunal were somehow to conclude that Mr. Daniel’s reports were germane,<sup>991</sup> it would need to make the following corrections and adjustments.

279. *First*, any figures that Mr. Daniel’s second report has labeled as corresponding to Bridgestone Americas would need to be excluded. As noted, such figures actually reflect “licensors’

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<sup>987</sup> See **Second Daniel Report**, fn. 69 (claiming that the damages “amounts are conservative because they are based on an equal split of the income attributable to the Subject Trademarks between licensors BLS and BSJ (although damages attributable to BSJ are excluded) and licensee BSAM”).

<sup>988</sup> **First Daniel Report**, Figure 1.

<sup>989</sup> **Second Daniel Report**, Figure 1.

<sup>990</sup> **Second Daniel Report**, Figure 1.

<sup>991</sup> See **Section 2.b**, above.

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[alleged] lost royalty income,”<sup>992</sup> and Bridgestone Americas is not a licensor, and does not have any royalty income. Accordingly, it would not be appropriate to award these sums to Bridgestone Americas. In practical terms, this results in a reduction of Mr. Daniel’s proposed damages amounts to USD 59,311 – USD 1,1710,588 (*i.e.*, Bridgestone Licensing’s alleged lost royalty income).<sup>993</sup>

280. **Second**, when calculating Bridgestone Licensing’s royalty income, the Tribunal would need to limit the royalty base to revenues from FIRESTONE tire sales in Panama. In the words of Claimants themselves, “the appropriate analysis is . . . whether the sales of tires take place *in Panama* . . . .”<sup>994</sup> Sales in the “BSCR Region” do not qualify as sales in Panama, nor do sales that take place within the Colón Free Trade Zone. Indeed, Panamanian law explicitly distinguishes between sales that take place within the Colon Free Trade Zone and sales within Panama. For example, under Panamanian law, sales within the Colon Free Trade Zone

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<sup>992</sup> **Second Daniel Report**, ¶ 13 (emphasis added); *see also id.* at ¶ 24 (referring above the line to “the damages amounts presented in my Initial Report,” and then explaining in the accompanying footnote (note 27) that “those damages amounts focused solely on the licensors’ lost royalty income attributable to the BRIDGESTONE and FIRESTONE trademarks”); ¶ 33 (referring to above the line to “[t]he damages amounts calculated in my Initial Report for the FIRESTONE trademark,” and then explaining in the accompanying footnote (note 30) that “those damages amounts focused solely on BSLS’s lost royalty income attributable to the FIRESTONE trademark”).

<sup>993</sup> **First Daniel Report**, Figure 1.

<sup>994</sup> **Reply**, ¶ 112.

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(and for export) are exempt from taxes,<sup>995</sup> while sales from the Colon Free Trade Zone into the “Fiscal Territory of the Republic” are subject to import duties and regulations.<sup>996</sup> Accordingly, the royalty base should be reduced USD 15.6 million.<sup>997</sup>

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<sup>995</sup> See [Ex. R-0128](#), Law No. 8 (Reorganizing the Colon Free Trade Zone), Legislative Assembly (4 April 2016), Art. 48 (official translation: “In the case of [sales or transfers that are not for their introduction in the Tax Territory of the Republic] departure of such goods, equipment, and other products in general shall be free of tax, duty, or any withholding.”) (Spanish original: “*En los casos de [ventas o traspasos que no son para su introducción en el Territorio Fiscal de la República] la salida de tales mercancías, productos, equipos y demás bienes en general estará libre del pago de todo impuesto, gravámenes y demás contribuciones fiscales*”).

<sup>996</sup> See [Ex. R-0128](#), Law No. 8 (Reorganizing the Colon Free Trade Zone), Legislative Assembly (4 April 2016), Art. 48.6 ((official translation: stating that goods introduced to the Colon Free Trade Zone can exit the zone for the purpose of, *inter alia*, “**the sale or transfer of ownership with a view to introducing the goods into the Republic’s Tax Territory, following the payment of any import tax and/or duty, personal property transfer tax and relevant service provision - which shall all be included in a relevant sales invoice following a customs declaration filed by a duly authorized customs agent**”) (emphasis added) (Spanish original: “La venta o traspaso en propiedad para su introducción en el Territorio Fiscal de la República, previa inclusión y pago, por parte de estos, de todos los impuestos y/o derechos que se causen por la importación y el impuesto de transferencia de bienes corporales muebles y la prestación de servicios correspondiente, que deberán estar consignados en la factura de venta correspondiente, previa declaración de aduanas efectuada por un agente de aduanas debidamente autorizado”); see also *id.* at Art. 48 (official translation: In the case [of sales or transfers that are for their introduction in the Tax Territory of the Republic], importing into the National Tax Territory shall be done after complying with all the Panamanian legal import requirements”) (Spanish original: “*En el caso [de ventas o traspasos que son para su introducción en el Territorio Fiscal de la República], la importación al Territorio Fiscal Nacional deberá ser hecha previo cumplimiento de todos los requisitos que señalen las leyes de Panamá en cuanto a la importación*”).

<sup>997</sup> [Second Versant Report, Table 3](#) (determining that the corrected sales revenues for FIRESTONE tires in Panama is USD 15.6 million). Additionally, while Panama reaffirms its position that it would be inappropriate to consider purported damages outside of Panama, if the Tribunal intends to calculate these damages, it would similarly need to limit the royalty base to sales revenues from tire sales in the BSCR region. For example, intercompany sales to other Bridgestone entities in the United States and Canada make up half of Claimants’ purported BSCR Region sales. Excluding these sales reduces BSCR Region sales of FIRESTONE-branded tires from USD 1,065.1 million to USD 255.6

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281. *Third*, the Tribunal would then need to multiply the above figure by the proper royalty rate. In his reports, Mr. Daniel has argued that the Supreme Court Judgment caused a reduction of the FIRESTONE royalty rate from 1% of revenues (before the Judgment) to 0.5% – 0.6%.<sup>998</sup> However, as explained above, Claimants’ own documents confirm that the royalty rate for the FIRESTONE trademark has held steady at 1%.<sup>999</sup> Further, the royalty rate reduction that Mr. Daniel has proposed is predicated on a theory of injury that Claimants themselves disclaim.<sup>1000</sup> As

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million. See **Second Versant Report**, Table 4. Claimants’ sales records distinguish between sales made to non-BSCR destination countries and sales made in the BSCR Region. See **Second Versant Report**, ¶ 86.

<sup>998</sup> See **First Daniel Report**, ¶ 101.

<sup>999</sup> See, e.g., **Ex. C-0049**, Agreement to Sublicense Trademarks between Bridgestone Americas Tire Operations, LLC and Bridgestone Costa Rica, S.A. (1 January 2015) Art. 3.1; see also **Second Versant Report**, fn. 15 (“Because, if Claimants considered that the value of the Bridgestone Trademark had changed since the Supreme Court Decision (e.g., if the value had decreased due to a “loss of exclusivity” or other factors), the new sublicensing agreement would be required under transfer pricing rules to reflect the lower value. Furthermore, because the Supreme Court Decision has the same implications for the Bridgestone and Firestone Trademarks, the fact that the Bridgestone Trademark royalty rate was not changed means that the Firestone Trademark royalty rate also would not change”).

<sup>1000</sup> Compare **First Daniel Report**, ¶¶ 94–102 (citing as the basis of his proposed royalty rate reduction various studies comparing exclusive to non-exclusive trademark licenses) with **Reply**, ¶ 115 (asserting that a “definition of exclusivity [stating that the term means] ‘when another company gains the right to sell the same branded product’ is not right”).

Versant explains, if the royalty rate were to be reduced at all (*quod non*), the resulting rate should not be less than 0.75%.<sup>1001</sup>

282. **Fourth**, the Tribunal would then need to correct the discount rates that Mr. Daniel has applied in the but-for and actual scenarios. As Versant has explained, Mr. Daniel has suggested two alternative discount rates: a discount rate based on the weighted average cost of capital (“WACC”) and another based on the cost of equity.<sup>1002</sup> However, the former — by its nature — “underestimates the discount rate for a company’s intellectual property assets.”<sup>1003</sup> Accordingly, a cost of equity rate should be used.<sup>1004</sup> Further, when determining the precise rate in the actual scenario, the Tribunal will need to remove the double counting of risk that is reflected in Mr. Daniel’s proposed figure. As Versant explains, Mr. Daniel has accounted for the very same risk twice — first by modifying the royalty rate,<sup>1005</sup> and then again in the discount rate.<sup>1006</sup> This double counting inappropriately inflates Mr. Daniel’s damages figures because the allegedly higher risk would

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<sup>1001</sup> See [Second Versant Report, ¶¶ 96–99](#) (explaining that the appropriate discount rate would be, at most, 25%).

<sup>1002</sup> [Second Versant Report, ¶ 107](#).

<sup>1003</sup> [Second Versant Report, ¶ 108](#) (explaining that the “WACC is the rate of return required on a company’s average asset,” and “intellectual property assets are riskier than a company’s average asset . . .”).

<sup>1004</sup> [Second Versant Report, ¶¶ 108–11](#).

<sup>1005</sup> [Second Versant Report, ¶¶ 113–18](#); see also [Second Daniel Report, ¶ 53](#).

<sup>1006</sup> [Second Versant Report, ¶¶ 113–18](#); see also [Second Daniel Report, ¶ 53](#).

already be reflected in a decreased royalty rate (as Mr. Daniel’s own sources affirm),<sup>1007</sup> there should be not be any increase in the discount rate in Mr. Daniel’s actual scenario.<sup>1008</sup>

283. *Fifth*, and finally, the Tribunal would need to take into account that Claimants’ theory is that there is an “increas[ed] risk” — *not certainty* — that decreased excludability is “*likely* in due course” to result in decreased profits.<sup>1009</sup> Accordingly, instead of treating Bridgestone Licensing’s decreased royalty income as a certainty, it instead should “be estimated using a probability factor ranging from 0% to 100%.”<sup>1010</sup> As Versant has explained, given that real-world data demonstrate that the Supreme Court Judgment has not had any adverse effect on Claimants’ investments to

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<sup>1007</sup> See [CLA-0055, Smith, Gordon V. and Parr, Russell, VALUATION OF INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS \(3<sup>rd</sup> Edition 2000\)](#), p. 5.

<sup>1008</sup> Further, even if it were appropriate to double count the impact of higher risk (*quod non*), the Tribunal could not rely on Mr. Daniel’s *ad hoc* method of calculating the increased discount rate in the Actual Scenario. As Mr. Shopp details, Mr. Daniel’s *ad hoc* method is severely flawed because it is based on a study that: (a) is 25 years old and relies on data from 1992 – 1995; (b) measures the decline in sales revenues due to counterfeit apparel, which is neither a comparable product category to tires nor an appropriate basis for calculating decreased royalty income for Bridgestone Licensing; and (c) does not study Panama or any BSCR Region country, thus requiring Mr. Daniel to blend intellectual property ratings from other sources and somehow equate these ratings to the countries that were considered in the study. As a result, Mr. Daniel’s assumption that the Supreme Court Judgment caused Claimants’ intellectual property rights in Panama and the BSCR Region to become equivalent to the world’s highest risk country (*i.e.*, Pakistan) is completely unfounded and unreliable. See [Second Versant Report](#), ¶¶ 119–22.

<sup>1009</sup> [Reply](#), ¶ 29.

<sup>1010</sup> [Second Versant Report](#), ¶ 103.



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date,<sup>1011</sup> the most realistic probability of Bridgestone Licensing suffering decreased future royalty income is 0%.<sup>1012</sup> In practical terms, “[t]his leads to a result of zero damages.”<sup>1013</sup> However, even if one were first somehow able to overcome the material obstacle of Claimants’ failure to prove any suffered injury, and then assume a 100% probability of future losses by Bridgestone Licensing, once the above-referenced corrections have been made, Mr. Daniel’s damages figure would drop to a mere USD 26,383.00.

#### IV. CONCLUSION AND REQUEST FOR RELIEF

284. In reflecting on the history of this case, an outside observer could not help but conclude that Panama has confronted frivolous treaty claims built on the canard that the State’s courts had found Bridgestone Licensing and its Japanese parent company, Bridgestone Corporation, liable in tort for merely pursuing a routine trademark opposition proceeding. Claimants have not contested that Bridgestone Licensing continues to own and license the FIRESTONE trademark in Panama.<sup>1014</sup> Nor do they contest that Bridgestone Americas continues to hold a license for the

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<sup>1011</sup> [Second Versant Report](#), ¶¶ 40–52, 101–04.

<sup>1012</sup> [Second Versant Report](#), ¶ 104 (“We consider that 0% is the most realistic probability of future royalties decreasing as a result of the Supreme Court Decision, given the absence of any impact whatsoever over the past five years”).

<sup>1013</sup> [Second Versant Report](#), ¶ 104.

<sup>1014</sup> Bridgestone Licensing’s parent company, Bridgestone Corporation, continues to own and license the BRIDGESTONE trademark in Panama.

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FIRESTONE and BRIDGESTONE trademarks in Panama — a license which it exploits to sell trademarked tires in Panama. Both Bridgestone Licensing and Bridgestone Americas pursue their business in Panama unimpeded and continue to bring successful trademark opposition proceedings there.

285. And yet, Bridgestone Licensing and Bridgestone Americas filed suit under the TPA, claimed expropriation, only to drop the claim three years into the case.<sup>1015</sup> Bridgestone Licensing and Bridgestone Americas also pursued national treatment and most favored nation claims, only to drop them three years into the case as well.<sup>1016</sup> Bridgestone Americas now doggedly pursues its only remaining claim: a hopeless denial of justice claim for which it has no standing under the governing customary international law standard. Bridgestone Licensing 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.

286. Moreover, both Claimants assert loss when their financial statements clearly show none. Faced with this reality, Claimants conjured a new damages theory in their Reply, which

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<sup>1015</sup> See [Request for Arbitration](#), ¶¶ 3, 63, 66.

<sup>1016</sup> See [Reply](#), ¶ 75.

required Panama to retain an additional damages expert.<sup>1017</sup> As for their request for compensation in the amount of the Supreme Court Judgment: Bridgestone Licensing, Bridgestone Americas, and their Japanese parent, Bridgestone Corporation, intentionally arranged for Bridgestone Licensing to pay make the full payment, and then proceeded to hide this fact from the Tribunal in order to seek 100 percent recovery.

287. This is to say nothing of the contempt shown for Panama, its institutions, and senior officials throughout the case. Panama provided a detailed description of such conduct in its Counter-Memorial.<sup>1018</sup> That conduct has since continued. Indeed, in the intervening nine months, *inter alia*:

- a. In response to Panama’s request for sales records for the BSCR region, Claimants: (1) refused to produce documents of those sales records, despite the relevance of the records to their claims;<sup>1019</sup> (2) following weeks of

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<sup>1017</sup> See generally [First Fried Report](#).

<sup>1018</sup> See [Counter-Memorial](#), ¶¶ 287–99.

<sup>1019</sup> See [Ex. R-0198](#), [Email from Akin Gump to Arnold & Porter, 20 November 2018](#), p. 1 (indicating that counsel would not produce relevant documents due to the “huge quantity of documents responsive to Request 6 . . . [and that] the Claimants estimate that it would take another 200 hours to gather the responsive documents”); see also [Ex. R-0199](#), [Email from Akin Gump to Arnold & Porter, 11 January 2019](#), p. 1 (arriving approximately 1,240 hours after Claimants’ email on 20 November 2018, and

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correspondence, eventually produced “a small sample of invoices and their spreadsheet entries” that omitted important details (such as the identity of the customers and number of tires sold);<sup>1020</sup> and (3) provided information about their internal searches only after Panama had raised the issue with the Tribunal.<sup>1021</sup>

- b. Claimants dropped their claims under the most-favored nation and national treatment provisions of the TPA, in light of the admitted absence of *any* basis to support those claims. Claimants persisted for three years with the prosecution of these claims — in the face of objective evidence and repeated warnings regarding the meritless

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restating that “the requested disclosure would be extremely onerous and time-consuming to provide”).

<sup>1020</sup> [Ex. R-0200, Email from Akin Gump to Arnold & Porter, 19 December 2018, p. 1.](#)

<sup>1021</sup> Email from Akin Gump to the Tribunal and Parties, 15 January 2019, p. 1 (explaining that “Claimants have identified 86,143 documents that respond to this request...for a total of 2,871 hours [] of work [to produce]” only to finally produce an updated sample and invoice three days later); *see also* [Ex. R-0201, Email from Akin Gump to Arnold & Porter, 18 January 2019.](#)

[REDACTED]

[REDACTED]

nature of these claims — before abandoning them.<sup>1022</sup>

- c. Claimants attempted unsuccessfully to disqualify former Supreme Court Justice Jorge Lee as an expert, based on spurious claims that Mr. Lee had a conflict of interest because counsel for Claimants had allegedly disclosed confidential information to him<sup>1023</sup> — claims for which the Tribunal awarded costs in Panama’s favor.<sup>1024</sup>
- d. Claimants accused the Chief Justice of the Supreme Court of Panama of concealing evidence in violation of this Tribunal’s orders,<sup>1025</sup> without any evidence to support their grave accusation other than Claimants’ own dogged belief that the documents that they hoped would justify their claims existed.

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<sup>1022</sup> **Reply, ¶ 75** (“[T]he Claimants’ extensive research to date has been unable to identify other instances where a like company or investment has faced similar egregious treatment sufficient to advance a claim of discrimination”).

<sup>1023</sup> *See Claimants’ Application to Remove the Respondent’s Expert Witness as to Panamanian Law*, 29 October 2018.

<sup>1024</sup> **Tribunal’s Decision on Claimants’ Application to Remove the Respondent’s Expert Witness as to Panamanian Law**, 13 December 2018, p. 9.

<sup>1025</sup> *See Letter from Claimants to the Tribunal and the Parties*, 17 April 2019.

[REDACTED]

e. In response to multiple letters from the Chief Justice Supreme Court of Panama assuring this Tribunal that the documents invented by Claimants did not exist,<sup>1026</sup> Claimants requested that the Tribunal order counsel for Panama to conduct physical searches of the records of the Supreme Court, as well as searches of the personal email accounts of Supreme Court Justices<sup>1027</sup> — a request that plainly falls outside of the jurisdiction of this Tribunal.<sup>1028</sup>

f. [REDACTED]

g. And, despite having been notified in September 2018 that Ambassador Gonzalez-Revilla would not be available to testify in person at the upcoming hearing, Claimants responded with

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<sup>1026</sup> See Letter from Panama to Tribunal and the Parties, 18 April 2019.

<sup>1027</sup> See Letter from Claimants to the Tribunal and the Parties, 17 April 2019.

<sup>1028</sup> [Procedural Order No. 10, 23 April 2019, ¶ 7.](#)

<sup>1029</sup> See *supra* Section III.A.4.

[REDACTED]

indignance when Panama reminded them of his schedule, and made a series of inappropriate remarks about his credibility and character.<sup>1030</sup>

288. The ICSID Convention authorizes tribunals to award costs<sup>1031</sup> and legal fees<sup>1032</sup> against abusive or unsuccessful claimants. If ever there was a case for the award of full costs, this is it. For all of the above-listed reasons, for those set forth in Panama's Counter-Memorial,<sup>1033</sup> and for those to be included in any future costs submissions,<sup>1034</sup> Panama requests that the Tribunal

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<sup>1030</sup> See Claimants' Letter to the Tribunal and the Parties, 8 May 2019, p. 3; see also **First González-Revilla Statement**, ¶ 9 ("I hereby offer to work with the Tribunal and counsel for Claimants to identify a mutually convenient date to testify in advance of the scheduled hearing").

<sup>1031</sup> See ICSID Convention, Art. 61(2) ("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"); ICSID Arbitration Rules, Rule 28(1) ("Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide: (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre; (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties").

<sup>1032</sup> See, e.g., **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 (Garro, Lowenfeld, Cremades) (ordering the claimant to pay the respondent's legal fees and expenses, in addition to the costs of the arbitration).

<sup>1033</sup> See **Counter-Memorial**, ¶¶ 287–99.

<sup>1034</sup> Panama hereby reserves its right to expand upon the legal and factual arguments contained herein in any future costs submission(s) requested by the Tribunal.

[REDACTED]

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order Claimants to pay the costs and legal fees incurred by Panama in connection with this proceeding.

289. For all of the foregoing reasons, the Republic of Panama respectfully requests that the Tribunal:

- a. Dismiss Bridgestone Americas' 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 Bridgestone Licensing's claim under Article 10.5 of the TPA for lack of merit;
- c. In any event, reject (1) Bridgestone Licensing's claim to recover the USD 5.431 million in damages awarded to Muresa and Tire Group; and (2) Claimants' claim for compensation in excess of USD 5.431 million; and

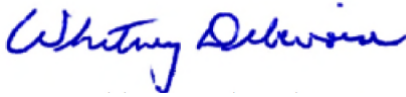
290. Award to Panama, with interest, all costs of the arbitration, including all attorneys' fees, and costs and expenses of Panama.

[REDACTED]



[REDACTED]

Respectfully submitted,



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[REDACTED]