

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 COUNTER-MEMORIAL**

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**14 September 2018**

**Arnold & Porter**



## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. THE MEMORIAL FAILS TO ADVANCE A SINGLE COGNIZABLE CLAIM.....	4
A. There Is No Cognizable Claim In Respect Of Bridgestone Americas.....	10
1. Bridgestone Americas Has Failed to Assert a <i>Prima Facie</i> Case for Breach of an Obligation under Section A of TPA Chapter Ten.....	12
2. Bridgestone Americas’ Assertions of Loss Are Entirely Unhinged from Its Investment in Panama.....	20
B. There Is No Cognizable Claim In Respect Of Bridgestone Licensing .....	25
1. Bridgestone Licensing Has Failed to Establish a <i>Prima Facie</i> Case for Breach of Article 10.3 or Article 10.4.....	26
2. Bridgestone Licensing Has Failed to Demonstrate the Requisite Loss.....	26
III. BRIDGESTONE LICENSING’S DENIAL OF JUSTICE CLAIM IS WITHOUT MERIT .....	38
A. The High Standard for Denial of Justice Under International Law .....	40
B. Bridgestone Licensing’s Denial of Justice Claim Fails on its Face.....	48
C. In Any Event, Bridgestone Licensing’s Criticisms Are Based on Mischaracterizations and Are Unfounded .....	59
1. Bridgestone Licensing Failed to Provide an Accurate Account of the Local Proceedings.....	62
a. The Trademark Opposition Proceeding .....	62
b. The Civil Proceeding.....	64
c. The Appeal of the Civil Proceeding .....	89
d. The Cassation Before the Supreme Court of Panama.....	97
e. Bridgestone’s Post-Judgment Efforts.....	122
2. Bridgestone Licensing’s Criticisms of the Judgment Are Baseless .....	128
D. Conclusion .....	134
IV. CLAIMANTS’ DAMAGES CASE FAILS.....	134
A. Deciphering Claimants’ Damages Claims .....	141

	<u>Page</u>
1.	Claimants’ Joint Damages Claim.....142
2.	Bridgestone Licensing’s Claim for Recovery of Damages Paid in the Panamanian Tort Case.....145
B.	Claimants Seek Damages for the Alleged Diminution in Value of their Investments <i>Outside of Panama</i> .....146
C.	Bridgestone Americas’ Damages Claim Fails .....153
D.	Bridgestone Licensing’s Claim for Diminution of Value of the FIRESTONE Trademark Fails.....157
1.	Actual Injury: Bridgestone Licensing Has Failed to Prove Actual Injury.....158
a.	Bridgestone Licensing Has Not Alleged that It Has Incurred Any Actual Injury to Date .....160
b.	Bridgestone Licensing’s Alleged Injury is Hypothetical and Speculative.....162
2.	Causation: Bridgestone Licensing Has Failed to Prove Causation.....168
a.	The Supreme Court Judgment Is Not the Cause-in-Fact of Any Diminution of Value.....173
b.	The Supreme Court Judgment Is Not the Proximate Cause of Any Diminution of Value.....176
3.	Quantum: Bridgestone Licensing Has Failed to Prove Quantum.....180
a.	Bridgestone Licensing’s Quantum Analysis Suffers from Three Fundamental Flaws.....181
b.	The Flaws in the Inputs of Bridgestone Licensing’s Quantum Analysis .....188
E.	Bridgestone Licensing’s Claim for the Recovery in the Tort Case Fails.....205
1.	Bridgestone Licensing Has Failed to Prove It Suffered Actual Injury in Connection With Its Claim .....206
2.	Bridgestone Licensing’s Claim Should Not be Granted in Full .....207
V.	CONCLUSION .....210
VI.	RELIEF REQUESTED .....224

## I. INTRODUCTION

1. In the early 1980s, Bridgestone Corporation — a Japanese tire company with a single-digit share of the global market<sup>1</sup> — set its sights on expanding, to the point of domination.<sup>2</sup> Its executives equated this exercise with war,<sup>3</sup> turning mentors into foes,<sup>4</sup> and annexing a competitor.<sup>5</sup> These maneuvers (and others) made the company ascend, and eventually, it became “the world’s largest manufacturer of tire and rubber products.”<sup>6</sup> But, in the year 2000, a defect in the company’s tires was linked to “numerous crashes, injuries, and fatalities.”<sup>7</sup> This prompted a global backlash,

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<sup>1</sup> See **Ex. R-0019**, R. Rajan *et al.*, *The Eclipse of the U.S. Tire Industry*, January 2000, Table 2.1, p. 57.

<sup>2</sup> See **Ex. R-0020**, “History: 1981–1990,” Bridgestone Corporation Website (last visited 17 August 2018); see also **Ex. R-0021**, *Bridgestone Races Hard to Dominate Tire Trade*, CHICAGO TRIBUNE, 26 November 1989, p. 1.

<sup>3</sup> See **Ex. R-0021**, *Bridgestone Races Hard to Dominate Tire Trade*, CHICAGO TRIBUNE, 26 November 1989, p. 1. (“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>4</sup> See **Ex. R-0021**, *Bridgestone Races Hard to Dominate Tire Trade*, CHICAGO TRIBUNE, 26 November 1989, p. 2 (explaining the relationship and interactions between Bridgestone Corporation and its competitor Goodyear).

<sup>5</sup> See **Ex. R-0021**, *Bridgestone Races Hard to Dominate Tire Trade*, CHICAGO TRIBUNE, 26 November 1989, p. 1 (describing Bridgestone Corporation’s acquisition of its competitor Firestone).

<sup>6</sup> **Request for Arbitration**, ¶ 1.

<sup>7</sup> **Ex. R-0022**, *Engineering Analysis Report and Initial Decision regarding EA-00-023: Firestone Wilderness AT Tires*, U.S. Department

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an unprecedented tire recall,<sup>8</sup> investigations, lawsuits, the loss of consumer trust,<sup>9</sup> the end of a hundred-year client relationship with Ford,<sup>10</sup> and, ultimately, a steep decline in the company's market share.<sup>11</sup>

2. In the years that followed, the company attempted to reconquer ceded ground. As part of this effort, it bullied the competition<sup>12</sup> — and even resorted to bribery<sup>13</sup> — and, eventually,

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of Transportation, National Highway Traffic Safety Administration, October 2001, p. iii.

<sup>8</sup> **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, p. 1 (explaining that 14.4 million tires were recalled).

<sup>9</sup> See **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”).

<sup>10</sup> See generally **Ex. R-0030**, Penelope Patsuris, *Top of the News: Bridgestone Rear-Ends Ford*, FORBES, 1 June 2001.

<sup>11</sup> See **Ex. R-0030**, Penelope Patsuris, *Top of the News: Bridgestone Rear-Ends Ford*, Forbes, 1 June 2001, p. 2 (“Bridgestone meanwhile is hemorrhaging business. Its competitor, Goodyear Tire & Rubber, could take as much as \$75 million in sales straight out of the beleaguered tire company's pocket, says CS First Boston analyst Wendy Needham. The company recently announced that, as a result of the sales drop-off, it will lay off 450 employees and close three of its plants for between two and four weeks.”).

<sup>12</sup> See generally **Ex. C-0013**, Letter from “Bridgestone/Firestone” to L.V. International, 3 November 2004 (“**Warning Letter**”) (“[Y]ou 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

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certain competitors cried foul, asserting a business tort claim in the courts of the Republic of Panama (“**Panama**”). The case made its way to the Panamanian Supreme Court, and the latter rendered a split decision in favor of the competitors.

3. This decision is at the center of the 11 May 2018 Memorial (“**Memorial**”), and as demonstrated further below (in **Section III**), the Memorial mischaracterizes (1) the decision itself, (2) the proceeding that yielded it, and (3) the Panamanian norms on which the decision rests. But, in the end, these problems prove relatively minor, as the Memorial also suffers from a much larger threshold defect: it fails to identify a single cognizable claim.

4. This defect may not have been apparent at first blush, as the Memorial plainly alleges both treaty breach and loss. However, a close review reveals that these allegations are incomplete, rest mainly on bald assertion, and generally ignore the principles of standing. Because of this, as explained in the

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RIVERSTONE for tires. Hence, L.V. International is acting at its own peril if it chooses to use the mark RIVERSTONE in other countries”).

<sup>13</sup> See **Ex. R-0024**, *Bridgestone pays \$28 mln for bribes, bid-rigging*, REUTERS, 15 September 2011 (“Tire and rubber giant Bridgestone Corp. 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”); **Ex. R-0025**, *China Cracks Down on Commercial Bribery in the Private Sector*, MORGAN LEWIS, 31 January 2017 (explaining that the Chinese Government had concluded that certain “incentive” programs of Bridgestone (China) Investment Co., Ltd. had “constituted commercial bribery in violation of Chinese law . . .”).

following section, there ultimately is no basis for the Tribunal to find Panama liable.

## II. THE MEMORIAL FAILS TO ADVANCE A SINGLE COGNIZABLE CLAIM

5. The legal argument in the Memorial begins with the assertion — and appears to part from the premise — that the Tribunal’s jurisdiction is coextensive with Chapter Ten of the Trade Promotion Agreement between the United States and Panama (“TPA”).<sup>14</sup> This assertion is easily refuted by a simple review of the TPA.

6. As Panama has now explained on multiple occasions, an ICSID tribunal derives its jurisdiction from the terms of the parties’ consent to arbitration.<sup>15</sup> For purposes of this proceeding, such terms can be found in a provision of the TPA

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<sup>14</sup> Compare **Memorial**, ¶ 131 (“The TPA grants a tribunal jurisdiction over measures adopted or maintained by a Party relating to investors of the other Party and covered investments”) with **Ex. R-0001**, TPA, Art. 10.1 (“***This Chapter*** applies to measures adopted or maintained by a party relating to: (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 10.9 and 10.11 [neither of which has been invoked in the present proceeding], all investments in the territory of the Party”) (emphasis added).

<sup>15</sup> See **ICSID Convention**, Art. 25(1) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, ***which the parties to the dispute consent in writing to submit to the Centre***”) (emphasis added); **Report of the Executive Directors on the ICSID Convention**, ¶ 23 (“Consent of the parties is the cornerstone of the jurisdiction of the Centre”).

titled “Article 10.17: Consent of Each Party to Arbitration.”<sup>16</sup> In relevant part, Article 10.17 states: “Each Party consents to the *submission of a claim to arbitration* under this Section [*i.e.*, Section B] in accordance with this Agreement [*i.e.*, the TPA].”<sup>17</sup> The words “submission of a claim to arbitration” are the title of Article 10.16 of the TPA,<sup>18</sup> which identifies the several rules that govern the submission of a claim.<sup>19</sup> Three of those rules are especially important here, as they reveal threshold defects in the arguments in the Memorial.

7. **First**, only a “claimant” is permitted to advance a claim. This is plain from the text of Article 10.16, which states in relevant part:

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<sup>16</sup> **Ex. R-0001**, TPA, Art. 10.17.

<sup>17</sup> **Ex. R-0001**, TPA, Art. 10.17.1 (emphasis added).

<sup>18</sup> **Ex. R-0001**, TPA, Art. 10.16 (“Submission of a Claim to Arbitration”).

<sup>19</sup> Because the Articles that comprise Chapter Ten are inter-related and employ a variety of defined terms — and those defined terms, in turn, are defined using *other* defined terms — distilling these rules may require reference to multiple treaty provisions. Panama will quote these provisions to the extent practicable, but may not be able to do so in every instance. Further, it bears noting that Panama’s explanation of the rules will take account of the circumstances present here. (Accordingly, for example, although the TPA authorizes the submission of certain claims in respect of “investment agreements” and “investment authorizations,” the discussion herein will omit this possibility, since there has not been any allegation that an investment agreement or investment authorization exists. The discussion likewise will omit the possibility of submitting claims “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,” as it appears that no such enterprise exists.).

Article 10.16: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) *the claimant*, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A . . .

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach . . . .<sup>20</sup>

8. The term “claimant” is defined as “*an investor of a Party* that is a party to an investment dispute with the other Party,”<sup>21</sup> and an “investor of a Party” is “a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to

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<sup>20</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a); *see also* **Ex. C-0103**, Letter from Claimants to ICSID, 25 October 2016 (asserting that the claims herein were submitted pursuant to Article 10.16.1(a) of the TPA).

<sup>21</sup> **Ex. R-0001**, TPA, Art. 10.29 (original emphasis omitted; new emphasis added).

make, is making, or has made an investment in the territory of the other Party . . . .”<sup>22</sup> In this case, the only potential claimants are Bridgestone Licensing and Bridgestone Americas (“**Claimants**”).<sup>23</sup> Although the Memorial contends that Bridgestone Corporation was mistreated and suffered injury,<sup>24</sup> the latter does not have the nationality required of a “claimant,” and accordingly cannot advance any claims in this proceeding.<sup>25</sup>

9. The *second* rule is that a claimant may not assert a claim on behalf of another entity, or on the basis of another entity’s investment. This, too, is clear from the text of the TPA, which (1) states that “the claimant” may only submit a claim “on its own behalf,”<sup>26</sup> and (2) defines the term “claimant” by reference to a given investment.<sup>27</sup> In practical terms, this means that the

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<sup>22</sup> **Ex. R-0001**, TPA, Art. 10.29 (original emphasis omitted).

<sup>23</sup> See **Decision on Expedited Objections**, ¶ 2.

<sup>24</sup> See, e.g., **Memorial**, ¶¶ 151, 169, 191, 196, 197, 215, 222.

<sup>25</sup> See **Decision on Expedited Objections**, ¶ 221 (“BSJ [*i.e.*, Bridgestone Corporation] . . . has no claim because, being a Japanese company, it falls outside the protection of the TPA”).

<sup>26</sup> See **Ex. R-0001**, TPA, Art. 10.16.1(a) (explaining that “[a] claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached . . . an obligation under Section A; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach”) (emphasis added); see also Ex. C-0103, Letter from Claimants to ICSID, 25 October 2016 (asserting that the claims herein were submitted pursuant to Article 10.16.1(a) of the TPA).

<sup>27</sup> **Ex. R-0001**, TPA, Art. 10.29 (explaining that “claimant means an investor of a Party” — *i.e.*, “an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other

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Memorial’s claims on behalf of the “Bridgestone group”<sup>28</sup> are impermissible, and the Tribunal must examine each Claimant’s claims separately. As the Tribunal has explained, Bridgestone Licensing and Bridgestone Americas are different entities that had different investments in Panama,<sup>29</sup> and these investments have different values,<sup>30</sup> and give rise to different potential claims.<sup>31</sup> Bridgestone *Licensing*, to recall, “is the owner of the FIRESTONE trademark that is registered in Panama.”<sup>32</sup> It obtained this trademark in 2002, via assignment,<sup>33</sup> but is “not involved in using, selling, marketing or manufacturing tires . . . in Panama.”<sup>34</sup> Rather, it is simply “a licensing corporation that licenses the

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Party” — “that is a party to an investment dispute with the other Party”) (emphasis added).

<sup>28</sup> See, e.g., **Memorial**, ¶ 10 (asserting, incorrectly, that “Panama is [in] breach of its obligations under the [TPA] to provide fair and equitable treatment to *Bridgestone* and its intellectual property investments in Panama”) (emphasis added), ¶ 8 (defining the term “Bridgestone” to encompass the entire “Bridgestone group”). The Request for Arbitration likewise used the term “Bridgestone” to refer to the entire “Bridgestone group of companies.” See **Request for Arbitration**, ¶ 1.

<sup>29</sup> See **Decision on Expedited Objections**, ¶¶ 60–61.

<sup>30</sup> See **Decision on Expedited Objections**, ¶ 219.

<sup>31</sup> See **Decision on Expedited Objections**, ¶ 220.

<sup>32</sup> **Decision on Expedited Objections**, ¶ 159.

<sup>33</sup> See **Request for Arbitration**, ¶ 12; **Decision on Expedited Objections**, ¶ 207.

<sup>34</sup> **Claimants’ Response on Expedited Objections**, ¶ 110.

mark”<sup>35</sup> in exchange for royalty payments. By contrast, Bridgestone *Americas* does not own any trademarks (in Panama or elsewhere). Its investment in Panama consists of licensing agreements that enable the use of certain trademarks registered in Panama.<sup>36</sup>

10. The *third* rule is that a claimant may not assert a claim in respect of an alleged investment outside of Panama. This is clear from the fact that (1) only a “claimant” may submit a claim,<sup>37</sup> (2) this claimant may only submit this claim “on its own behalf,”<sup>38</sup> and (3) the TPA’s definition of “claimant” operates around the existence of an investment in Panama.<sup>39</sup> The rule is also confirmed by “Article 10.1: Scope and Coverage,”<sup>40</sup> which provides:

This Chapter [*i.e.*, TPA Chapter Ten] applies to measures adopted or maintained by a Party [in this case, Panama] relating to:

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<sup>35</sup> **Expedited Objections Hearing Transcript (Day 3)**, Tr. 478:08–09 (Mr. Kingsbury).

<sup>36</sup> **Decision on Expedited Objections**, ¶¶ 61, 186.

<sup>37</sup> **Ex. R-0001**, TPA, Art. 10.16.1.

<sup>38</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a).

<sup>39</sup> **Ex. R-0001**, TPA, Art. 10.29 (explaining that, for purposes of the present case, the term “claimant means an investor of [the United States]” — *i.e.*, “an enterprise of [the United States], ***that attempts to make, is making, or has made an investment in the territory of [Panama]***” — “that is a party to an investment dispute with [Panama]”) (emphasis added).

<sup>40</sup> **Ex. R-0001**, TPA, Art. 10.1.

(a) investors of the other Party [*i.e.*, an “enterprise of [the United States] that attempts to make, is making, or has ***made an investment in the territory of [Panama]***”<sup>41</sup>];

(b) covered investments [*i.e.*, an investment in Panama of an investor of the United States<sup>42</sup>]; and

(c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.<sup>43</sup>

11. As discussed below, when these rules are applied, it is clear that neither Claimant has advanced a cognizable claim.

**A. There Is No Cognizable Claim In Respect Of Bridgestone Americas**

12. During the “expedited objections” phase, “[t]he Tribunal indicated that, at the end of the day, burden of proof was unlikely to prove important.”<sup>44</sup> In their Memorial, Claimants take this statement to heart, ignoring their obligation to substantiate their claims. This strategy is reckless, and ultimately so far

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<sup>41</sup> **Ex. R-0001**, TPA, Art. 10.29.

<sup>42</sup> **Ex. R-0001**, TPA, Art. 2.1 (explaining that “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”) (emphasis added).

<sup>43</sup> **Ex. R-0001**, TPA, Art. 10.1.1 (emphasis added).

<sup>44</sup> **Decision on Expedited Objections**, ¶ 123.

reaching that neither Claimant manages to present all of the required elements of a cognizable claim. The present section addresses this issue as it relates to Bridgestone Americas.

13. In order to state a claim, Bridgestone Americas would need to demonstrate that:<sup>45</sup> (1) a “measure[] adopted or maintained by [Panama]”<sup>46</sup> breached an obligation due to Bridgestone Americas, in its capacity as an investor, or to Bridgestone Americas’ investment in Panama; and (2) that it had incurred loss in connection with its investment in Panama arising out of this breach.<sup>47</sup> These requirements are plain from the text of the TPA, but Bridgestone Americas has largely ignored them. Bridgestone Americas has failed to assert even a *prima facie* case for the breach of an obligation under Section A of Chapter Ten. Further, although Bridgestone Americas claims to have suffered “loss,”<sup>48</sup> its damages case does not bear any relation to its investment in Panama. Each of these defects, which are discussed in turn below, is fatal to any claim by Bridgestone Americas herein.

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<sup>45</sup> See **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 205 (Berman, Veeder, Mourre) (“It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights”).

<sup>46</sup> See **Ex. R-0001**, TPA, Art. 10.1.1.

<sup>47</sup> See **Ex. R-0001**, TPA, Art. 10.16.1(a).

<sup>48</sup> See **Memorial**, ¶ 11.

## 1. **Bridgestone Americas Has Failed to Assert a *Prima Facie* Case for Breach of an Obligation under Section A of TPA Chapter Ten**

14. The claims asserted by Bridgestone Americas suffer from a material threshold defect. Pursuant to Article 10.16 of the TPA, each claimant must prove that “[it] has incurred loss or damage by reason of, or arising out of, [a] breach [by the respondent of an obligation under Section A of TPA Chapter Ten].”<sup>49</sup> In the Memorial, “BSAM claims that the Supreme Court Judgment has had a detrimental effect on the value of its trademark rights.”<sup>50</sup> However, it fails to prove that this judgment — issued not against Bridgestone Americas, but two other, distinct Bridgestone entities — subjected *Bridgestone Americas* to the abrogation of any standard of protection arising out of Bridgestone Americas’ investment in Panama.

15. As the Tribunal may recall, in their Request for Arbitration, Claimants had contended that Panama had violated Articles 10.3, 10.5, and 10.7 of the TPA<sup>51</sup> (on national treatment, the minimum standard of treatment, and expropriation). Then, at the hearing — as part of its explanation of the different types of objection that a respondent may assert — Panama gave a preview

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<sup>49</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a) (emphasis added).

<sup>50</sup> **Memorial**, ¶ 150.

<sup>51</sup> *See Request for Arbitration*, ¶¶ 61–67.

of some of the fatal conceptual flaws underlying Claimants' arguments.<sup>52</sup> In response, Claimants abandoned one of their manifestly unfounded claims (their expropriation claim),<sup>53</sup> but maintained the rest, and even attempted to add a new one. At present, they are alleging violations of "Articles 10.5, 10.3 and 10.4 of the TPA."<sup>54</sup> These treaty provisions, which are quoted in full below, "appl[y] to measures adopted or maintained by a Party relating to: (a) investors of the other Party; and (b) covered investments . . . ."<sup>55</sup>

### **Article 10.3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances,

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<sup>52</sup> See, e.g., **Ex. RD-0001**, Panama's Presentation on Article 10.20.5, Slides 24–25.

<sup>53</sup> Because the Memorial fails to mention Article 10.7 of the TPA at all, it would appear that Claimants have abandoned their expropriation claim. The expropriation claim did not have any prospect of success, given that Claimants continue to own and operate their "investments" in Panama, and their revenues have increased since the date of the Supreme Court judgment of which they complain.

<sup>54</sup> **Memorial**, ¶ 241.

<sup>55</sup> **Ex. R-0001**, TPA, Art. 10.1.1.

to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

**Article 10.4: Most-Favored-Nation Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

## **Article 10.5: Minimum Standard of Treatment**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international

agreement, does not establish that there has been a breach of this Article.

16. As noted above, it is Bridgestone Americas' obligation to establish every element of every claim that it asserts. However, its argument that "Panama is in breach of its obligations under Articles 10.3 and 10.4 of the TPA"<sup>56</sup> is skeletal, and, ultimately, inadequate.

17. To Panama's knowledge, the present case is the first to involve an allegation of a breach of Articles 10.3 and 10.4 of the TPA. However, the language of these provisions is virtually identical to that contained in NAFTA and in DR-CAFTA<sup>57</sup> — both of which have been the subject of multiple prior decisions — and the approach to analyzing a claim under those articles is well settled. As the NAFTA tribunal in *ADM v. United Mexican States* has stated, the analysis involves: "(i) identify[ing] the relevant subjects for comparison; (ii) consider[ing] the treatment each comparator receives; and (iii) consider[ing] any factors that may justify any differential treatment."<sup>58</sup> However, because an

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<sup>56</sup> **Memorial**, § XVI.

<sup>57</sup> The United States has described the national treatment obligation in CAFTA as "functionally identical" to the national treatment obligation in NAFTA and has referred to arbitral awards interpreting NAFTA to clarify the meaning of CAFTA.

<sup>58</sup> **RLA-0069**, *Archer Daniels Midland Company, et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Award, 21 November 2007), ¶ 196 (Cremades, Rovine, Siqueiros).

“Arbitral Tribunal does not need to compare the treatment . . . unless the treatment is being accorded ‘in like circumstances,’ . . . it is necessary to consider the question of ‘like circumstances’ [first].”<sup>59</sup> If a claimant fails to identify a comparator “in like circumstances,” there is not any need to consider the other issues.<sup>60</sup> It is precisely for this reason that Bridgestone Americas’ arguments fail.<sup>61</sup>

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<sup>59</sup> **RLA-0069**, *Archer Daniels Midland Company, et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Award, 21 November 2007), ¶ 196 (Cremades, Rovine, Siqueiros).

<sup>60</sup> See, e.g., **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), ¶ 140 (Manson, Mikva, Mustill) (“What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.”); **RLA-0094**, *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1 (Decision on Responsibility, 15 January 2008), ¶ 116–17 (Greenwood, Serrano de la Vega, Lowenfeld) (“The Tribunal considers, therefore, that it is necessary to start from first principles. The text of Article 1102 suggests that there are three elements which have to be established for a claim under that provision to succeed. . . . Secondly, the foreign investor or investments must be —in like circumstances to an investor or investment of the Respondent State (—the comparator¶).”); **RLA-0095**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (Award, 29 June 2012), ¶ 154–55 (Rigo Sureda, Eizenstat, Crawford) (“As to the expression “other investors”, without further substantiation (which Claimant has failed to provide), it is too vague to state a separate basis of claim. The Tribunal is in no position to determine who these investors are and whether they are in “like circumstances”, nor has the Tribunal been presented with evidence of the identity of these investors. To conclude, the Tribunal finds that the

[FOOTNOTE CONTINUED ON NEXT PAGE]

18. The Memorial does not make any attempt whatsoever to identify a comparator “in like circumstances.” Nor does it endeavor to engage with the other elements. Instead, the Memorial merely states that “[t]he Claimants are not aware of any decisions like the Supreme Court Judgment against any other investor, whether Panamanian or from any other country,”<sup>62</sup> and posits that “the facts of the case involving BSLS, BSJ and Muresa cannot be unique . . . .”<sup>63</sup>

19. This plainly is not sufficient to establish *any* violation at all — let alone a violation in respect of Bridgestone Americas (which, to recall, was not a party to the Panamanian proceeding). In fact, the Memorial fails even to address the elements that Claimants themselves deem relevant to the analysis.<sup>64</sup> Accordingly, there cannot be any question that

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allegation of breach by Respondent of its obligations under Article 10.3 of CAFTA is without merit.”).

<sup>61</sup> The national treatment and most-favored-nation treatment claims by Bridgestone Licensing also fail for this reason.

<sup>62</sup> **Memorial**, ¶ 222. However, in accordance with international law, many countries provide safeguards against abusive enforcement of intellectual property rights. See **First Jacobson Report**, ¶¶ 25–34. Further, both United States and United Kingdom precedent support the conclusion that demand letters such as the one at issue in this case constitute threats. See **First Jacobson Report**, ¶¶ 50–59.

<sup>63</sup> **Memorial**, ¶ 222.

<sup>64</sup> Compare **Memorial**, ¶ 219 (citing the award in *Saluka v. Czech Republic* — which is a case involving a differently-worded standard — for the proposition that “State conduct is discriminatory if (i) similar cases are (ii) treated differently (iii) *and without reasonable*

[FOOTNOTE CONTINUED ON NEXT PAGE]

Bridgestone Americas has failed to articulate a *prima facie* case in support of its “claims” for breach of Articles 10.3 and 10.4 of the TPA.

20. When these “claims” are cleared away, there is one that still remains, relating to Article 10.5 of the TPA. However, this “claim” also fails at the threshold level, for reasons that Panama already has previewed.<sup>65</sup>

21. As the Tribunal will have seen, the gist of the claim is that, “[b]y issuing the Supreme Court Judgment,”<sup>66</sup> following what, allegedly, was “a deeply problematic Supreme Court Process,”<sup>67</sup> Panama supposedly “failed to comport with ‘the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principles of due process embodied in the principal legal systems of the world[,]’ in breach of Article 10.5 of the TPA.”<sup>68</sup>

22. This claim cannot be asserted by Bridgestone Americas. As explained by the tribunal in *Arif v. Moldova*, under international law, a “claim for denial of justice . . . can *only* be

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**justification**)” (emphasis added) with **Memorial**, ¶ 222 (omitting any discussion of the “similar cases” or “reasonable justification” prongs).

<sup>65</sup> See **Ex. RD-0001**, Panama’s Presentation on Article 10.20.5, Slide 25.

<sup>66</sup> **Memorial**, ¶ 157.

<sup>67</sup> **Memorial**, ¶ 157.

<sup>68</sup> **Memorial**, ¶ 157.

successfully pursued by a person that was denied justice through court proceedings *in which it participated as a party.*”<sup>69</sup> In circumstances where, as here, an entity made no effort to participate in a proceeding, the entity cannot possibly have been denied due process.

23. Accordingly, this “claim” likewise fails as a matter of law. Bridgestone Americas thus cannot identify *any* breach of the protections arising out of its investment in Panama. The Tribunal should exercise its discretion pursuant to ICSID Rule 41(2) and dismiss Bridgestone Americas’ claims without further delay.<sup>70</sup>

## **2. Bridgestone Americas’ Assertions of Loss Are Entirely Unhinged from Its Investment in Panama**

24. What is more, Bridgestone Americas fails to identify or quantify any loss associated with its flawed and haphazard claims. As the Tribunal will have seen, Claimants

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<sup>69</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>70</sup> See **ICSID Rule 41(2)** (“The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or ancillary claim before it is within the jurisdiction of the Centre and within its own competence”). While Panama believes it would be appropriate to invoke Article 10.20.4, Panama is going to forego such an objection so in the interest of judicial economy. Should Claimants persist in their submission of frivolous claims, the Tribunal should award all costs and attorneys’ fees to Panama.

contend in the Memorial that “BSAM’s loss”<sup>71</sup> is reflected in the supposedly “diminished values of the BRIDGESTONE and FIRESTONE trademarks,”<sup>72</sup> both “in Panama and in the region (‘the BSCR Region’)”<sup>73</sup> — which the Memorial defines to “include[] Panama, Costa Rica, Puerto Rico [which is a U.S. territory, and not a country, as Claimants’ damages expert contends<sup>74</sup>], Guatemala, and the Dominican Republic.”<sup>75</sup> This contention is problematic for two reasons.

25. *First*, the request for compensation for alleged “loss suffered outside [of] Panama”<sup>76</sup> plainly exceeds the scope of this proceeding. This is so because, as the TPA states:

a. The only type of “claim” that can be submitted to arbitration is “a claim . . . that *the claimant* has incurred loss or damage by reason of,

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<sup>71</sup> **Memorial**, ¶ 236.

<sup>72</sup> **Memorial**, ¶ 236; *see also id.*, ¶ 237 (explaining that Claimants’ damages expert has purported to “calculate . . . the value of the BRIDGESTONE and FIRESTONE trademarks in Panama and in the region (the ‘BSCR Region’) before the Supreme Court Judgment, and then the value of the trademarks in Panama and the BSCR Region after the Supreme Court Judgment”), ¶¶ 238–40 (again referring to “the value of the BRIDGESTONE and FIRESTONE trademarks in Panama and the BSCR Region”).

<sup>73</sup> **Memorial**, ¶ 237.

<sup>74</sup> *See First Daniel Report*, note 41.

<sup>75</sup> **Memorial**, note 519.

<sup>76</sup> *See Memorial*, ¶ 148.

or arising out of, [a] breach [by the respondent of an obligation under Section A of Chapter Ten],”<sup>77</sup> and

b. An entity is a “claimant” if and to the extent that it “attempts to make, is making, or has made an investment in the territory of [Panama].”<sup>78</sup>

26. The Memorial seems to assume that “the BRIDGESTONE and FIRESTONE trademarks in . . . the BSCR Region” form part of an investment that Bridgestone Americas has made in Panama.<sup>79</sup> But, as Claimants’ own intellectual property expert concedes, trademarks are “territorial,” in the sense that they only exist — and create rights — within the boundaries of a given State.<sup>80</sup> As a practical matter, this means that the Costa Rican, Puerto Rican, Guatemalan, and Dominican trademarks (which, incidentally, Bridgestone Americas does not even own) cannot be considered part of Bridgestone Americas’ investment in Panama. The same principle applies to any Bridgestone Americas licenses to use a trademark registered outside of Panama.

27. *Second*, and more importantly, when Claimants utilize the phrase “diminished values of the BRIDGESTONE and

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<sup>77</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a) (emphasis added).

<sup>78</sup> **Ex. R-0001**, TPA, Art. 10.29 (emphasis added).

<sup>79</sup> See **Memorial**, ¶ 238.

<sup>80</sup> See **First Jacobs-Meadway Report**, ¶ 33; see also **Memorial**, ¶ 15 (“Every country has its own system of regulation of trademarks . . .”).

FIRESTONE trademarks,” they are referring to an alleged decrease in the amount of royalties that the trademark owners receive from licensees.<sup>81</sup> Such a decrease could never be a “loss” to Bridgestone Americas, as Bridgestone Americas is a trademark licensee that pays (as opposed to receives) royalties.<sup>82</sup> As noted above, Bridgestone Americas’ investment in Panama consists of trademark licensing agreements, which enable the use of trademarks in exchange for royalty fees. Because Bridgestone Americas *makes* the royalty payments,<sup>83</sup> any decrease in royalty rates would be a “gain,” not a loss. This means that Bridgestone Americas has not shown any loss at all, despite having focused on that issue for two years,<sup>84</sup> and understanding that it was required to “fully particularise [its] claims” in the Memorial.<sup>85</sup>

28. Indeed, it would seem that Bridgestone Americas is *unable* to establish loss. As the Tribunal stated in its Decision on Expedited Objections, when “the owner of a trademark licenses its

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<sup>81</sup> **Memorial**, note 517.

<sup>82</sup> See **Decision on Expedited Objections**, ¶¶ 220–21 (describing Bridgestone Americas as the licensee of the BRIDGESTONE and FIRESTONE trademarks registered in Panama).

<sup>83</sup> See **Decision on Expedited Objections**, ¶ 242.

<sup>84</sup> **Memorial**, ¶ 230 (“Since the date of the Request [7 October 2016], the Claimants have continued to explore how they have been affected by the Supreme Court Judgment,” and have worked to “identif[y] . . . the key area of loss . . .”).

<sup>85</sup> **Memorial**, ¶ 231 (asserting that “Claimants are not required to fully particularise their claims at the stage of the request for arbitration, because it is anticipated that claims will be fully particularised in their Memorial . . .”).

use to a licensee, . . . the value of the license to the licensee will reflect the fruits of the exploitation of the trademark”<sup>86</sup> — *i.e.*, the tire sales revenues “out of which the royalties are paid.”<sup>87</sup> In the Memorial, “BSAM claims that the [Panamanian] Supreme Court Judgment [referenced above] has had a detrimental effect on the value of its trademark rights.”<sup>88</sup> Yet, as the Memorial itself acknowledges, the judgment has “*not* impact[ed] revenues from sales to consumers . . . .”<sup>89</sup> This is confirmed by the expert reports of Claimants’ damage expert and Panama’s damages expert.<sup>90</sup>

29. In the end, however, the Tribunal does not need to analyze whether or not Bridgestone Americas *could* establish the requisite type of loss, as the reality is that Bridgestone Americas has *not* established such loss. Because — in addition to proving that Bridgestone Americas actually suffered a breach — the TPA requires such a showing of loss, the claims by Bridgestone Americas must be rejected at the outset, without further analysis.

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<sup>86</sup> **Decision on Expedited Objections**, ¶ 219.

<sup>87</sup> **Decision on Expedited Objections**, ¶ 219.

<sup>88</sup> **Memorial**, ¶ 150.

<sup>89</sup> **Memorial**, ¶ 234 (emphasis added).

<sup>90</sup> See First Daniel Report, ¶ 93; **First Shopp Report**, ¶ 73.

## **B. There Is No Cognizable Claim In Respect Of Bridgestone Licensing**

30. Like Bridgestone Americas, Bridgestone Licensing must demonstrate that:<sup>91</sup> (1) a “measure[] adopted or maintained by [Panama]”<sup>92</sup> breached an obligation due to Bridgestone Licensing or its investment in Panama; and (2) that Bridgestone Licensing had incurred loss in connection with its investment in Panama arising out of this breach.<sup>93</sup> Like Bridgestone Americas, Bridgestone Licensing has failed to satisfy this burden. As discussed below, Bridgestone Licensing has failed to establish a prima facie case for breach of Articles 10.3 or 10.4, the “National Treatment” and “Most-Favored-Nation Treatment” provisions, leaving Bridgestone Licensing with a single anemic claim on the merits. Additionally, Bridgestone Licensing has failed to demonstrate the requisite loss. For these reasons, Bridgestone Licensing’s claims should be dismissed.

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<sup>91</sup> See **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 205 (Berman, Veeder, Mourre) (“It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights”).

<sup>92</sup> See **Ex. R-0001**, TPA, Art. 10.1.1.

<sup>93</sup> See **Ex. R-0001**, TPA, Art. 10.16.1(a).

## **1. Bridgestone Licensing Has Failed to Establish a *Prima Facie* Case for Breach of Article 10.3 or Article 10.4**

31. Like Bridgestone Americas, Bridgestone Licensing asserts claims for breaches of Articles 10.3 (“National Treatment”), 10.4 (“Most-Favored-Nation Treatment”), and 10.5 (denial of justice) of the TPA. However, it has failed to establish *prima facie* claims under Articles 10.3 and 10.4. As explained above, these provisions require a claimant to: (i) identify a comparator in like circumstances; (ii) compare the treatment received; and (iii) consider any factors that justify any differential treatment.<sup>94</sup> Yet neither Claimant has made *any* effort to satisfy these basic elements of their claims. As a result, Bridgestone Licensing’s only surviving claim is its claim for a breach of Article 10.5, which — for the reasons set forth in Section III — fails on its merits.

## **2. Bridgestone Licensing Has Failed to Demonstrate the Requisite Loss**

32. With respect to its one surviving claim, Bridgestone Licensing has failed to establish any loss in connection with its

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<sup>94</sup> See *supra* Section II.A; RLA-0069, *Archer Daniels Midland Company, et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Award, 21 November 2007), ¶ 196 (Cremades, Rovine, Siqueiros).

investment, as required by the TPA.<sup>95</sup> Bridgestone Licensing identifies its ownership of the FIRESTONE trademark in Panama as its investment.<sup>96</sup> In the Memorial, Bridgestone Licensing asserts two damages claims in connection with this investment: *First*, Bridgestone Licensing claims an unspecified sum for an alleged “uncertainty” (or risk thereof) created by the Supreme Court Judgment — “uncertainty” that Claimants admit has had no impact on Bridgestone Licensing’s actual investment. *Second*, it seeks to recover the amount of the damages award ordered by the Panamanian Supreme Court, without even attempting to prove that it actually suffered the loss associated with paying the award, much less explain why it should recover the full amount of that award.

33. *First*, Bridgestone Licensing asserts a claim for an unspecified amount of damages falling somewhere between \$498,293 and \$12,812,952<sup>97</sup> — an amorphous twelve million dollar range. This damages claim includes a request for damages inside of Panama, as well as for damages in connection with

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<sup>95</sup> See **Ex. R-0001**, TPA, Art. 10.16.1(a).

<sup>96</sup> See **Memorial**, ¶ 135 (“[BSLS]’s Panamanian intellectual property rights (the FIRESTONE trademarks registered in Panama) constitute ‘investments’ as defined by the TPA . . .”).

<sup>97</sup> **Memorial**, ¶ 233.

investments outside of Panama, with respect to both the BRIDGESTONE and the FIRESTONE trademarks.<sup>98</sup>

34. Bridgestone Licensing’s claim for damages in connection with its investments outside of Panama properly falls outside of the jurisdiction of this Tribunal. According to Bridgestone Licensing, it may suffer injury in the form of “uncertainty” that may affect hypothetical buyers seeking to “acquir[e] trademark rights *for the whole Central American region*.”<sup>99</sup> Claimants’ damages expert likewise includes in his calculations the alleged decrease in value of the FIRESTONE trademark *in other countries*.<sup>100</sup> However, the jurisdiction of this Tribunal is limited by the terms of the TPA to claims concerning (and loss suffered in connection with) Claimants’ investments *in Panama*. Bridgestone Licensing’s claim for damages outside of Panama cannot overcome this threshold jurisdictional hurdle and should be dismissed. Elimination of such claims dispenses with damages in the range of USD 6,729,061 to USD 12,821,952.<sup>101</sup>

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<sup>98</sup> See **Memorial**, ¶ 237 (“Mr. Daniel used [certain] methodologies to calculate first the value of the BRIDGESTONE and FIRESTONE trademarks in Panama *and in the region* . . .”) (emphasis added).

<sup>99</sup> **Memorial**, ¶ 151 (emphasis added).

<sup>100</sup> See **First Daniel Report**, ¶ 83.

<sup>101</sup> See **First Daniel Report**, p. 27, Figure 5. This damages estimate produced by Mr. Daniel represents the hypothetical harm to the BRIDGESTONE and FIRESTONE trademarks in the BSCR Region.

35. With respect to its claim of USD 498,293 to USD 985,568 for damages in Panama,<sup>102</sup> Bridgestone Licensing has not even argued that it “has incurred *loss or damage*,”<sup>103</sup> as required by the TPA. Instead, Bridgestone Licensing relies entirely on alleged “uncertainty for a *potential* purchaser” of the FIRESTONE trademark in Panama.<sup>104</sup> In other words, its alleged injury is entirely hypothetical; nowhere does Bridgestone Licensing suggest that such hypothetical purchasers exist — let alone that this alleged uncertainty has affected the value of its investment. To do so, consistent with the Tribunal’s Decision on Expedited Objections, Bridgestone Licensing would need to demonstrate a decrease in the royalties it received for use of the FIRESTONE trademark.<sup>105</sup> Yet Claimants’ damages expert confirms that the royalty rate remained

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<sup>102</sup> See **First Daniel Report**, p. 27, Figure 5. This damages estimate produced by Mr. Daniel represents the hypothetical harm to the BRIDGESTONE and FIRESTONE trademarks in Panama. For reasons discussed below, Bridgestone Licensing cannot claim damages in connection with the BRIDGESTONE trademark.

<sup>103</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a)(ii).

<sup>104</sup> **Memorial**, ¶ 233.

<sup>105</sup> **Decision on Expedited Objections**, ¶ 242 (“[Bridgestone Licensing]’s interest in the trademark was *restricted to the royalties* that it was to receive from [Bridgestone Americas] for the use of the trademark”) (emphasis added). Claimants previously admitted as much. See **Claimants’ Rejoinder on Expedited Objections**, ¶ 42 (“[A]lthough BSLs and BSJ suffer 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 those entities would earn from use of their trademarks*”) (emphasis added); **First Daniel Report**, ¶ 18 (“BSLS’s income derives from royalties received from its licensees”).

the same throughout the relevant period.<sup>106</sup> Bridgestone Licensing also admits that the sales of FIRESTONE-branded tires did not decrease.<sup>107</sup> Bridgestone Licensing’s claim should therefore be dismissed, as it has not alleged or demonstrated actual loss.

36. Finally, Bridgestone Licensing’s claims for damages in connection with its investment in Panama and its investments outside of Panama encompass alleged injury to “trademark rights” that Bridgestone Licensing does not own (*e.g.*, rights relating to the BRIDGESTONE trademark).<sup>108</sup> Such a claim is plainly impermissible under Article 10.16.1 of the TPA.<sup>109</sup> Accordingly, any amount that Bridgestone Licensing can properly claim is reduced to USD 59,311 to USD 111,104 for damages in Panama related to the FIRESTONE trademark, but as explained above, even this amount of damages is speculative and unproven.

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<sup>106</sup> See **Memorial**, ¶ 238(b) (noting the royalty rate used by Claimants’ damages expert, Mr. Brian M. Daniel); **First Daniel Report**, Appendix 12 (showing a flat royalty rate of 1% for the use of the FIRESTONE trademark registered in Panama).

<sup>107</sup> See **Memorial**, ¶ 234 (“Such uncertainty may not impact revenues from sales to consumers, because consumers are unlikely to be aware of the Supreme Court Judgment . . .”). Mr. Daniel’s damages report shows an increase in net sales of FIRESTONE and BRIDGESTONE-branded products in Panama after the Supreme Court Judgment. See **First Daniel Report**, Appendix 4.0.

<sup>108</sup> See **Memorial**, ¶¶ 230, 234.

<sup>109</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a) (“[T]he claimant, *on its own behalf*, may submit to arbitration under this Section a claim . . . that the respondent has breached . . . an obligation under Section A, . . . and that *the claimant* has incurred loss or damage by reason of, or arising out of, that breach”) (emphasis added).

37. For these reasons, Bridgestone Licensing’s first damages claim does not include the basic elements of a claim under the TPA and should be dismissed.

38. *Second*, Bridgestone Licensing asserts a claim for US \$5,431,000 — the amount that Bridgestone Corporation (the Japanese parent company) and Bridgestone Licensing (the American subsidiary) were ordered by the Panamanian Supreme Court to pay to Muresa and Tire Group (their competitors) for their attempts to prevent Muresa from registering the RIVERSTONE trademark.<sup>110</sup>

39. Bridgestone Licensing has not established that it actually incurred the loss it now claims. Under the TPA, a claimant bears the burden of proving that it has “*incurred*” loss,<sup>111</sup> and the Bridgestone Licensing has long been aware of the need to

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<sup>110</sup> See **Memorial**, ¶ 223.

<sup>111</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a)(ii) (emphasis added). A claimant bears the burden of proof. See, e.g., **RLA-0096**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 (Award, 4 April 2016), ¶ 864 (Lévy, Gotanda, Boisson de Chazournes) (“[A]s a general matter, it is clear that it is the Claimant that bears the burden of proof in relation to the fact and the amount of loss”); **RLA-0075**, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24 (Award, 17 December 2015) ¶ 175 (Brower, Paulsson, Williams) (“Before analysing the relevant issues, the Tribunal recalls that the burden of proof falls on the Claimant to show it suffered loss”); **RLA-0073**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (Award, 13 September 2016), ¶ 205 (Berman, Veeder, Murre).

demonstrate such loss.<sup>112</sup> Yet the evidence on the record demonstrates that Bridgestone Licensing acted as no more than a pass-through agent for the payment of the funds to Muresa and Tire Group: (i) Claimants themselves stated that Bridgestone Corporation paid the Judgment “through” Bridgestone Licensing;<sup>113</sup> (ii) Mr. Kingsbury admitted that the specific funds used to pay the Judgment came from a “loan”<sup>114</sup> from Bridgestone Americas; and (iii) Bridgestone Licensing has not demonstrated that this “loan” was or is being repaid. In fact, rather than addressing these issues and demonstrating actual loss, Bridgestone Licensing has done no more than regurgitate the general international law standard for injury<sup>115</sup> and point to a bank

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<sup>112</sup> The Bridgestone group was advised by counsel in the spring of 2016 that Bridgestone Licensing needed to have incurred loss in order to submit a claim. *See Expedited Objections Hearing Transcript (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”); *Expedited Objections Hearing Transcript (Day 3)*, Tr. 484:01–06 (Mr. 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”).

<sup>113</sup> **Request for Arbitration**, ¶ 53.

<sup>114</sup> *Expedited Objections Hearing Transcript (Day 3)*, Tr. 482:15–483:03 (Mr. Kingsbury) (revealing that “there was a loan taken out to pay the judgment” and that the lender was Bridgestone Americas). To date, Claimants have not provided any details as to the terms of that “loan” or of any payments made.

<sup>115</sup> *See Memorial*, ¶¶ 226–28.

statement that simply shows that the Judgment payment passed through Bridgestone Licensing.<sup>116</sup> In this context, the omission of any argument or evidence cannot have been inadvertent, and Bridgestone Licensing’s unsubstantiated claim should not be allowed to slip through yet another phase of this arbitration.

40. Further, and in spite of the Tribunal’s questions on the subject,<sup>117</sup> Bridgestone Licensing has not addressed the impact of Bridgestone Licensing’s joint and several liability with its

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<sup>116</sup> See **Memorial**, ¶ 233 & note 501 (*citing Ex. C-0126*). It is striking that Bridgestone Licensing provides no other proof of payment, besides a letter promising to pay in the future. See **Ex. C-0036**, Letter from Bridgestone Corporation and Bridgestone Licensing to Muresa and Tire Group (19 Aug. 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 . . . ”); see also **Reply on Expedited Objections**, ¶ 86; **Expedited Objections Hearing Transcript (Day 3)**, Tr. 390:18–391:03 (A. Williams) (confirming that the language in brackets (*i.e.*, “will proceed to make”) is the proper translation for the Spanish word used in the original version of the letter (*viz.*, “procederán”).

<sup>117</sup> See, *e.g.*, **Expedited Objections Hearing Transcript (Day 2)**, Tr. 182:05–08 (President Phillips) (“[T]wo parties [are] jointly liable. One party pays the lot. Does that party have a right to claim contribution from the other party?”); **Expedited Objections Hearing Transcript (Day 2)**, Tr. 224:22–225:08 (President Phillips) (“Just take the simple situation, and it’s a common one, of two legal entities being held joint and severally liable in the judgment. Normally, I apprehend if one of them paid the lot it would have a right over to claim contribution from the other. . . . And if it was insured against loss and went to its insurance and said, ‘I want you to pay me the lot,’ the insurer would say, ‘no, you haven’t lost the lot because you have a right to contribution from the other wrongdoer of 50 percent.’”).

parent company. Because either the Japanese parent or the American subsidiary could have satisfied the judgment,<sup>118</sup> both companies had an equal claim to the loss until the judgment was paid. Yet only Bridgestone Licensing — as a company registered in the United States — could bring a claim against Panama under the TPA,<sup>119</sup> and for that reason, the Bridgestone group funneled money to Bridgestone Licensing to pay the Supreme Court’s damages award.<sup>120</sup>

41. As the two companies were equally responsible for the payment of the Judgment, the company that transferred the funds to pay the Judgment cannot necessarily recover for the entirety of the award; in the words of the Tribunal, “It does not follow that the whole of the payment will be recoverable as loss

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<sup>118</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 14; **Decision on Expedited Objections**, ¶ 58.

<sup>119</sup> See **Ex. R-0001**, TPA, Art. 10.1 (limiting the scope of Chapter 10 to “measures adopted or maintained by a Party relating to . . . investors of the other Party”).

<sup>120</sup> See **Expedited Objections Hearing Transcript (Day 3)**, Tr. 482:15–483:07 (Mr. Kingsbury) (acknowledging that Bridgestone Licensing paid the award using funds loaned from Bridgestone Americas); *id.* at 484:01–06 (Mr. Kingsbury) (“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”). However, there is no other claimant seeking to recover for the amount of this judgment, as Bridgestone Americas was not a party to the proceeding and therefore was not liable for the damages award.

sustained by [Bridgestone Licensing].”<sup>121</sup> Bridgestone Licensing nevertheless seeks to recover the entire amount of the judgment,<sup>122</sup> but it does not adduce any argument or evidence in support of the claim for recovery of the entirety of a judgment for which it was jointly and severally liable.

42. In sum, despite having had ample time to try to cobble together a damages case — and having “explore[d]” this issue “[s]ince the date of the Request [for Arbitration]”<sup>123</sup> — Bridgestone Licensing has not been able to identify any loss in connection with its investment in Panama.

43. Having failed to demonstrate the requisite loss, Bridgestone Licensing’s claims fail.

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<sup>121</sup> **Decision on Expedited Objections**, ¶ 329.

<sup>122</sup> *See Memorial*, ¶ 223.

<sup>123</sup> **Memorial**, ¶ 230.

44. In sum, as demonstrated in the chart below, each of Claimants' causes suffers from fundamental threshold defects. Bridgestone Americas has failed to establish a *prima facie* case for a *single* breach of the TPA, and its claims should therefore be dismissed. Further, Bridgestone Americas also failed to satisfy the jurisdictional requirement of establishing loss. For its part, Bridgestone Licensing has failed to establish a *prima facie* case for the claimed breaches of Articles 10.3 and 10.4. That leaves only its anemic denial of justice claim under Article 10.5, which (for the reasons discussed in the next Section) should be rejected on the merits. However, Bridgestone Licensing has failed to establish that it has "incurred" loss in accordance with the TPA, and its failure to satisfy this threshold jurisdictional requirement demands the dismissal of all of its claims.

	<b>Articles 10.3 and 10.4 Claims (MFN and National Treatment)</b>	<b>Article 10.5 Claim (Denial of Justice)</b>	<b>Damages</b>
<b>Bridgestone Americas</b>	The claim is not one for which an award can be made because BSAM: (i) was not a party to the proceeding that forms the “treatment” at issue; and (ii) did not, and could not, plead the requisite comparator element..	The claim is not one for which an award can be made because BSAM cannot claim a denial of justice on the basis of a proceeding to which it was not a party.	In the absence of viable claims, there is no need to consider the issue of damages. BSAM also failed to allege any damage to its investment ( <i>i.e.</i> , the trademark licenses), and in any event, sales have not decreased, leaving damages unrealized, speculative, and unproven.
<b>Bridgestone Licensing</b>	The claim is not one for which an award can be made because BSLS did not, and could not, plead the basic prerequisites of the claims.	The claim fails on the merits, because BSLS submitted an impermissible appeal.	<p>BSLS failed to prove actual injury in the amount of USD 5,431,000.</p> <p>BSLS has requested between \$1,003,769 and \$1,710,588 for alleged injury to investments outside of Panama, which falls outside of the jurisdiction of the this Tribunal.</p> <p>BSLS has requested between \$59,311 and \$111,104 for hypothetical injury in Panama, which falls outside of the jurisdiction of this Tribunal.</p>

### III. BRIDGESTONE LICENSING’S DENIAL OF JUSTICE CLAIM IS WITHOUT MERIT

45. In sum, neither Claimant has advanced a cognizable claim, either in terms of MFN and National Treatment or Denial of Justice, because both have failed to show the requisite loss. In any event, should the Tribunal nevertheless consider Claimants’ claims on their merits, Claimants’ claims under Articles 10.3 and 10.4 must be dismissed either for failure to establish proper standing (in the case of Bridgestone Americas) or, in the case of both Claimants, failure to plead the requisite elements (namely the differential treatment of an entity in like circumstances), as discussed above.<sup>124</sup> That leaves only one facially cognizable claim: Bridgestone Licensing’s assertion of a breach of Article 10.5.<sup>125</sup> Nevertheless, Bridgestone Licensing’s claim of a breach of Article 10.5 is without merit for the reasons set forth below.

46. Article 10.5 provides as follows:

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<sup>124</sup> See *supra* Sections II.A.1 & II.B.1.

<sup>125</sup> As discussed above, Bridgestone Americas cannot assert a denial of justice claim because it was not a party to the litigation at the heart of this claim. See *supra* Section II.A.1; see also **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 435 (Cremades, Hanotiau, Knieper) (“[A] 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”).

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty . . . ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.<sup>126</sup>

47. According to Bridgestone Licensing, by issuing the Supreme Court Judgment, Panama breached the obligation under Article 10.5 not to deny justice.<sup>127</sup> Unlike Claimants’ claims under Articles 10.3 and 10.4, Bridgestone Licensing devotes a significant portion of the Memorial to the subject of Panama’s alleged denial of justice.<sup>128</sup> However, its exposition on this alleged denial of justice ultimately boils down to a single argument: In the view of Bridgestone Licensing, the Supreme Court Judgment was wrong as a matter of Panamanian law. This denial of justice claim fails because, as demonstrated below a denial of justice entails a high legal standard that requires more than the misapplication of domestic law. For that reason, Bridgestone Licensing’s denial of

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<sup>126</sup> **Ex. R-0001**, TPA, Art. 10.5.

<sup>127</sup> See **Memorial**, ¶ 157.

<sup>128</sup> See **Memorial**, ¶¶ 157–215.

justice claim should be rejected. In any event, Bridgestone Licensing has completely mischaracterized the Supreme Court Judgment.

**A. The High Standard for Denial of Justice Under International Law**

48. There is an extremely high threshold for a finding of a denial of justice under international law.<sup>129</sup> Indeed, as

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<sup>129</sup> **RLA-0097**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Final Award, 12 September 2010), ¶ 280 (Böckstiegel, Steyn, Berman) (“Therefore, in addition to this Tribunal not acting as an appealcourt on the decisions of the Russian courts, this high threshold must be applied in order to conclude that, the conduct of the Russian courts, by itself, would be a breach of the IPPA in the form of a denial of justice”); **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) (“The high standard required for establishing this claim in international law means that it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal”); **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) (“The Tribunal also stresses that the evidentiary threshold to establish a claim of denial of justice is high.”); **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) (“The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law”); **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 291 (Kaufmann-Kohler, Wladimiroff, Trapl) (“This high threshold reflects the demanding nature of a claim for a denial of justice in international law”); **RLA-0113**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 87

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repeatedly held by investment tribunals, a denial of justice entails the failure of the entire domestic legal system.<sup>130</sup> Bridgestone

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(Cambridge University Press, 2005) (“It is not easy for a complainant to overcome the presumption of adequacy and thus to establish international responsibility for denial of procedural justice”).

<sup>130</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) (“The international delict of denial of justice rests upon a specific predicate, namely, the systemic failure of the State’s justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent’s legal system as a whole has failed to accord justice to the claimant”); **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) (“[T]he Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed”); **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) (“[T]he Respondent can only be held liable for denial of justice by the Russian courts if the Claimants are able to prove that the court system fundamentally failed”); **RLA-0103**, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL (Award, 12 January 2011), ¶ 223 (Nariman, Anaya, Crook) (observing that Professor Paulsson “identifies denial of justice in international law as involving the failure of a national judicial system, taken as a whole, to render due process to aliens. The concept therefore involves a duty to ‘create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected’”); **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 225 (Kaufmann-Kohler, Wladimiroff, Trapl) (“[D]enial of justice deals with the failure of a system not of a single court”); **RLA-0104**, *Mr. Franck Charles Arif v. Republic of*

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Licensing bears the burden of meeting this high threshold and demonstrating such a failure.

49. Importantly, 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.<sup>131</sup> In other words, it

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*Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 345 (Cremades, Hanotiau, Knieper) (“In a claim for denial of justice, the conduct of the whole judicial system is relevant”); **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) (“A finding by an International Tribunal such as this one, that national courts violated international law implicates a systemic failure of the national judiciary”); **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) (“[T]he international obligation on states is not to create a perfect system of justice but a system of justice where serious errors are avoided or corrected”).

<sup>131</sup> See **CLA-0071**, *Robert Azinian et al v. the United Mexican States*, ICSID Case No. ARB(AF)/97/2 (Award of 1 November 1999), ¶ 99 (Paulsson, von Wobeser, Civiletti) (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction”); **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) (“Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal”); **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) (“The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law

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is not the role of an international tribunal to determine whether (in

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which may have been committed by the national courts”); **RLA-0097**, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005 (Final Award, 12 September 2010), ¶ 489 (Böckstiegel, Steyn, Berman) (“[T]he Tribunal, having to consider only Respondent’s alleged liability under the IPPA, it is neither an appeal body for the assessments based on Russian tax law nor does it claim to have expert knowledge of that law”); **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) (“[I]nternational tribunals are not courts of appeal”); **RLA-0104**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 441 (Cremades, Hanotiau, Knieper) (“[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts”); **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) (“[I]t has also to be accepted that it is not the role of an international tribunal to sit on appeal against the legal correctness or substantive reasonableness of individual administrative acts or the judgments of a municipal court reviewing them”); *see also* **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) (“The arbitrators are not superior regulators; they do not substitute their judgment for that of national bodies applying national laws. The international tribunal’s sole duty is to consider whether there has been a treaty violation”); **RLA-0109**, *Señor Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6 (Award, 7 July 2011), ¶ 184 (Kessler, Otero, Fernández-Armesto); **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) (“Second, this Tribunal is not an appellate court inserted into the Polish legal system”).

its view) a domestic court misapplied domestic law.<sup>132</sup> This has been confirmed by Professor Jan Paulsson, the author of a book on the subject of the denial of justice obligation — a book upon which Bridgestone Licensing relies heavily in support of its claim.<sup>133</sup> In that book, Professor Paulsson stated that “[t]he mere violation of internal law may never justify an international claim based on denial of justice.”<sup>134</sup> Investment tribunals have echoed this finding. For example, the *Loewen v. United States* Tribunal (upon which Bridgestone Licensing also relies<sup>135</sup>), which adjudicated a claim under NAFTA, held as follows:

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<sup>132</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) (“As to the Claimant’s allegation of denial of justice and denial of effective means, the Tribunal points out that its role is not to correct procedural or substantive errors that might have been committed by the local courts”); **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 87 (Cambridge University Press, 2005) (“The fact that the international tribunal seized of the matter may believe it would have applied national law differently – ‘mere error’ – is in and of itself of no moment.”); **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) (“The high standard required for establishing this claim in international law means that it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal”).

<sup>133</sup> See, e.g., **Memorial**, ¶ 165 (framing their entire argument based on “categories of denial of justice” identified by Professor Paulsson).

<sup>134</sup> **RLA-0113**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 73 (Cambridge University Press, 2005).

<sup>135</sup> See, e.g., **Memorial**, notes 424 & 426.

Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself.<sup>136</sup>

Instead, in order to find a violation of the obligation not to deny justice, a tribunal must find a violation of *international* law,<sup>137</sup> such as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”<sup>138</sup>

50. In the Memorial, Bridgestone Licensing nevertheless suggests that “serious errors in the substance of court judgments” may amount to a denial of justice.<sup>139</sup> Yet Professor

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<sup>136</sup> **CLA-0069**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3 (Award, 26 June 2003), ¶ 242 (Mason, Mikva, Mustill).

<sup>137</sup> See **RLA-0111**, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16 (Award, 6 July 2012), ¶ 264 (Guillaume, Price, Thomas) (“ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice”).

<sup>138</sup> See also **RLA-0112**, *Electronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports, 1989 ICJ 15 (Award, 20 July 1989), ¶ 128; **CLA-0069**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3 (Award, 26 June 2003), ¶ 132 (Mason, Mikva, Mustill).

<sup>139</sup> **Memorial**, ¶ 209.

Paulsson has flatly rejected this conception of denial of justice. He observed:

[I]n modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law. To insist that there is a substantive denial of justice reserved for ‘grossly’ unconvincing determinations is to create an unworkable distinction.<sup>140</sup>

51. Instead, Professor Paulsson clarified that the substance of a judicial decision may be relevant to the extent that it demonstrates a due process violation or malice:

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

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<sup>140</sup> **RLA-0113**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 82 (Cambridge University Press, 2005).

bias or some other violation of the right of  
*due process*.<sup>141</sup>

52. This is consistent with the arbitral awards relied upon by Bridgestone Licensing, which state, *inter alia*, that “the standard [for denial of justice] is indeed of a procedural nature”<sup>142</sup> and that the substance of a decision is only relevant if it demonstrates bad faith.<sup>143</sup> That will only be the case where “a municipal court judgment is one that *no reasonably competent*

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<sup>141</sup> **RLA-0113**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 82, 98 (Cambridge University Press, 2005). 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.” *Id.* (quoting Sir Gerald Fitzmaurice, *The Meaning of the Term “Denial of Justice,”* 13 BR. Y.B. INT’L L. 93 (1932)).

<sup>142</sup> **CLA-0070**, Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16 (Award, 29 July 2008), ¶ 653 (Hanotiau, Lalonde, Boyd); See also **CLA-0073**, Mondev International Ltd v. United States of America, ICSID case ARB(AF)/99/2 (Award, 11 October 2002), ¶ 136 (Stephen, Crawford, Schwebel) (observing that “[q]uestions of fact-finding on appeal are quintessentially matters of local procedural practice,” refusing to assess “the application of local procedural rules about such matters as remand,” and only asking whether the decision revealed a fundamental breach of due process).

<sup>143</sup> **CLA-0070**, Rumeli , Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16 (Award, 29 July 2008), ¶ 653 (Hanotiau, Lalonde, Boyd); See also **CLA-0072**, Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (Award, 6 November 2008), ¶ 209 (Kaufmann-Kohler, Mayer, Stern) (inquiring as to whether the judicial decision was so flawed as to reveal bias or malice).

judge could render.”<sup>144</sup> By contrast, a judgment that “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” will not meet the threshold for a denial of justice claim.<sup>145</sup>

## **B. Bridgestone Licensing’s Denial of Justice Claim Fails on its Face**

53. Bridgestone Licensing’s denial of justice claim is based almost entirely on alleged errors in the application of Panamanian law. Bridgestone Licensing attempts to couch these Panamanian law-based arguments within an international law framework by relying on certain categories of denials of justice identified by Professor Paulsson (namely fundamental breaches of due process, arbitrariness, corruption, and incompetence).<sup>146</sup> However, once one looks beyond Bridgestone Licensing’s four-paragraph discussion of the denial of justice standard and their advocacy-laden sub-headings (*e.g.*, “[f]undamental breaches of due

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<sup>144</sup> **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) (emphasis added).

<sup>145</sup> **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 (Knieper, Banifatemi, Hammond).

<sup>146</sup> See **Memorial**, ¶ 165.

process”<sup>147</sup>), it becomes apparent that these arguments are no more than appeals on the basis of Panamanian law.

54. For example, *all* of Bridgestone Licensing’s purported “due process” claims are arguments about the Court’s alleged misapplication of Panamanian law.<sup>148</sup> In fact, Bridgestone Licensing alleges violations of seven different articles of the Panamanian Judicial Code, but not once in this entire section does Bridgestone Licensing discuss, cite, or apply *international* standards of due process.<sup>149</sup> Similarly, Bridgestone Licensing’s arguments about the alleged “arbitrariness” of the Supreme Court Judgment are based on the meaning of application of Article 781 of the Judicial Code,<sup>150</sup> rather than the international law standard for arbitrariness. Bridgestone Licensing’s arguments concerning the Supreme Court’s “incompetence” are duplicative of the

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<sup>147</sup> See **Memorial**, ¶ 166.

<sup>148</sup> **Memorial**, ¶ 169 (identifying the following — exhaustive — list of problems: “a. The Supreme Court found against BSLs and BSJ for a reason other than that contained in the claim, in violation of Article 991 of the Judicial Code. b. The Supreme Court based its decision on a document issued by a third party in a foreign language and from outside Panama that did not meet any of the requirements for admission into evidence, in violation of Articles 792, 856, 857, 871, 877 and 878 of the Judicial Code and the principle of listening to the other side. c. The Supreme Court based its decision on a document that was not relevant to the proceedings, in violation of Article 783 of the Judicial Code. d. The Supreme Court based its decision on grounds not raised by Muresa in its complaint, which BSLs and BSJ consequently could not respond to, in violation of the fundamental due process principle of consistency”).

<sup>149</sup> See **Memorial**, ¶¶ 166–97.

<sup>150</sup> See **Memorial**, ¶¶ 199–200.

previous categories.<sup>151</sup> These three categories of denial of justice claims therefore all amount to impermissible appeals of the Supreme Court Judgment.

55. Bridgestone Licensing’s overlapping arguments with respect to due process, arbitrariness, and incompetence also bleed into the fourth category of its denial of justice claim: “[c]orruption.”<sup>152</sup> According to Bridgestone Licensing, the alleged “derisory state of the Panamanian courts” and the mere fact that Bridgestone Corporation and Bridgestone Licensing lost the case demonstrate that the Supreme Court Judgment “could only have been procured through corruption.”<sup>153</sup> This serious accusation fails for three reasons.

56. **First**, Bridgestone Licensing’s allegations do not satisfy the high standard of proof for proving corruption in international investment arbitration. “The seriousness of the accusation of corruption,” particularly when it “involves officials at the highest level of the [respondent’s] Government”<sup>154</sup> requires

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<sup>151</sup> See **Memorial**, ¶ 211 (noting the overlap between the various categories of denial of justice relied upon).

<sup>152</sup> See **Memorial**, ¶¶ 208–10.

<sup>153</sup> **Memorial**, ¶ 210.

<sup>154</sup> **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009), ¶ 221 (Bernardini, Derains, Rovine).

that the party alleging corruption<sup>155</sup> provide “clear and convincing evidence” of corruption.<sup>156</sup> In other words, “[i]t is not sufficient to

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<sup>155</sup> See **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); **RLA-0116**, *Wena Hotels Ltd. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award, 8 December 2000), ¶¶ 77, 117 (Leigh, Fadallah, Wallace).

<sup>156</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.”); **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

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present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, [a claimant] ha[s] to prove corruption.”<sup>157</sup>

57. The “evidence” presented by Bridgestone Licensing in support of its feckless claim of corruption is comprised of allegations made by a Bridgestone employee<sup>158</sup> and a hired consultant (who worked in the offices of Claimants’ counsel)<sup>159</sup> about a meeting at the Panamanian Embassy on 13 March 2015. Interestingly, the statements made by these witnesses are not consistent with Claimants’ description of the same meeting in their Request for Arbitration. In their Request, Claimants recounted the meeting as follows:

Additionally, on 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 Attache Juan Heilbron. During this meeting, Bridgestone expressed concern over the Supreme Court decision and inquired as to

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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>157</sup> **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), ¶ 424 (Böckstiegel, Hobér, Crawford).

<sup>158</sup> See **First Akey Statement**, ¶¶ 1–2.

<sup>159</sup> See **First Lightfoot Statement**, ¶ 3.

domestic remedies available in addition to the two post-judgment appeals it had filed. Despite comments from the Ambassador indicating that he did not believe the decision could be changed, he offered to follow up with Bridgestone to discuss other potential domestic remedies. Unfortunately no follow up ever took place.<sup>160</sup>

58. Now, by contrast, Bridgestone Licensing spins a distinctly altered tale about the meeting and accuses the Ambassador of Panama of blaming the unfavorable Supreme Court Judgment on corruption.<sup>161</sup> This shocking accusation is flatly denied by the Panamanian Ambassador, who has submitted a witness statement in order to clarify what actually happened during the brief meeting that he hosted at the Embassy of Panama in March of 2015 with Bridgestone and Akin Gump representatives.

59. The Ambassador recalls that the meeting was “brief and unremarkable”<sup>162</sup> and notes that he “did *not* assert or admit that the Supreme Court judgment of which they complained was the result of corruption.”<sup>163</sup> The Ambassador’s description of the meeting is consistent with the Embassy’s own *ayuda memoria*, prepared immediately after the meeting by Juan Carlos Heibron,

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<sup>160</sup> **Request for Arbitration**, ¶ 50.

<sup>161</sup> *See Memorial*, ¶¶ 8, 210.

<sup>162</sup> **First Gonzalez-Revilla Statement**, ¶ 6.

<sup>163</sup> **First Gonzalez-Revilla Statement**, ¶ 7.

the Embassy's commercial attaché, who attended the meeting.<sup>164</sup> This contemporaneous memorandum contradicts the narrative of the meeting spun by Steven Akey and Jeffrey Lightfoot, whose witness statements were prepared — for the purpose of this arbitration — more than three years after the meeting took place. Interestingly, although Mr. Lightfoot “believe[s]” that he took notes during the meeting, he has “not been able to locate [his] notes.”<sup>165</sup>

60. Apparently aware of the applicable high standard, Bridgestone Licensing appears to drop the claim of corruption as soon as it makes it. For instance, Bridgestone Licensing states that “specific acts of corruption in a case like this would be very hard to prove”<sup>166</sup> and speculates that “[i]f something similar happened here, it is *unlikely to be traceable*.”<sup>167</sup> The claim of corruption thus fails — by Bridgestone's own admission — for want of evidence.

61. *Second*, Bridgestone Licensing's claim of corruption is duplicative of and fails for the same reasons as its

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<sup>164</sup> See **Ex. R-0035**, *Ayuda Memoria* of the Embassy of Panama (13 March 2015), p. 1 (English translation) (“The case was discussed during the meeting. However, the Embassy highlighted that there was little they could do since the decision had been issued by a Judicial body, where the Embassy had no jurisdiction.”).

<sup>165</sup> **First Lightfoot Statement**, ¶ 9.

<sup>166</sup> **Memorial**, ¶ 210.

<sup>167</sup> **Memorial**, ¶ 210 (emphasis added).

arguments under the other categories of denial of justice. Bridgestone Licensing asks the Tribunal to “infer[.]”<sup>168</sup> that the Supreme Court Judgment “could only have been procured through corruption” because the “Judgment is so clearly and manifestly wrong”<sup>169</sup> — *i.e.*, “the Supreme Court’s understanding and application of Panamanian law was wrong.”<sup>170</sup> In other words, the same arguments about the alleged arbitrariness of the Judgment and the alleged incompetence of the Supreme Court also justify a finding of corruption. In light of the established burden of proof, it is wholly inappropriate for a tribunal to infer the existence of corruption in the absence of “clear and convincing evidence.”<sup>171</sup> The manifold problems with this makeshift argument do not bear repeating in detail; suffice it to say that the alleged violations of the Panamanian Judicial Code do not amount to valid international claims, and in any event, such alleged errors would never justify a finding of corruption.

62. **Third**, and in any event, this alleged statement by the Ambassador does not bind the State, as suggested by

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<sup>168</sup> **Memorial**, ¶ 7.

<sup>169</sup> **Memorial**, ¶ 210.

<sup>170</sup> **Memorial**, ¶ 214.

<sup>171</sup> **RLA-0114**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award, 8 October 2009), ¶ 221 (Bernardini, Derains, Rovine).

Bridgestone Licensing.<sup>172</sup> For one, the specific context of the meeting dilutes the potential effect of this alleged statement. Whereas public statements in speeches or diplomatic notes have the potential to bind the State, the meeting during which the alleged statement was made was informal and private.<sup>173</sup> It was plainly not intended to amount to a binding statement on the part of the State.<sup>174</sup> Furthermore, as he affirms in his Witness Statement, when the meeting took place, the Ambassador “did not know the specific parties to the litigation or even the names of the Supreme Court judges who adjudicated the case.”<sup>175</sup> In other words, he was simply unable to admit that this panel of judges was corrupt in this case when he was not aware of either the judges involved or the details of the case; he could not admit what he did not know.<sup>176</sup>

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<sup>172</sup> See **Memorial**, ¶ 8 (“In his capacity as Ambassador to the U.S., he had full representative authority on behalf of Panama . . .”), ¶ 210 (“In light of Panama’s admission of corruption . . .”).

<sup>173</sup> See **RLA-0162**, Eighth Report of the Special Rapporteur, Mr. Victor Rodríguez Cedeño (57th session of the ILC (2005)), ¶ 170.

<sup>174</sup> See **RLA-0130**, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment, 27 June 1986), ¶ 260 (“This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections”).

<sup>175</sup> **First Gonzalez-Revilla Statement**, ¶ 7.

<sup>176</sup> To constitute admissions against interest, a statement must be made by a party that has direct knowledge of the conduct or facts at issue, and the admission must be specific about that conduct or those facts. See **RLA-0130**, *Military and Paramilitary Activities in and*

[FOOTNOTE CONTINUED ON NEXT PAGE]

Finally, in case of doubt as to the effect of declarations by a State official on the sovereign State under international law, the Tribunal is to interpret those declarations restrictively.<sup>177</sup>

63. A careful examination thus reveals that Bridgestone Licensing's four categories of argument all amount to an appeal of an unfavorable decision. Notably, Bridgestone Licensing has been explicit about the nature of these arguments, both in the Memorial as well as in other statements and communications. In fact, the Bridgestone group revealed that its fundamental complaint about the Supreme Court Judgment was the alleged misapplication of domestic law long before Claimants initiated the present proceeding. In his witness statement, Mr. Akey testifies that Bridgestone began exploring options (which included threatening this arbitration) in May of 2014 "to assist Bridgestone in overturning the decision."<sup>178</sup> In an email to the Panamanian Embassy dated 23 December 2014, counsel for Claimants stated that "Bridgestone believes that the Supreme Court's decision is not

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*against Nicaragua (Nicaragua v. United States of America)* (Judgment, 27 June 1986), ¶ 64 ("The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State **represented by the person who made them**") (emphasis added).

<sup>177</sup> See **RLA-0163**, ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, Principle 7.

<sup>178</sup> See **First Akey Statement**, ¶ 4.

proper[] under Panamanian law.”<sup>179</sup> In a background memorandum attached to that email, counsel for Bridgestone noted that Bridgestone “believe[d] that the Supreme Court’s ruling is based on factual mischaracterizations and a misapplication of Panamanian law.”<sup>180</sup> Now, in the Memorial, Bridgestone Licensing asserts that “the Supreme Court’s understanding and application of Panamanian law was wrong”<sup>181</sup> and that the Judgment “is simply wrong in Panamanian law.”<sup>182</sup>

64. In the annulment context, in which appeals are also impermissible, *ad hoc* committees have recognized similar arguments as requests for an appeal.<sup>183</sup> Here, these straightforward arguments should also be taken for what they are: an effort to

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<sup>179</sup> **Ex. R-0032**, Email from Y. McNamara to R. Galan (23 December 2014).

<sup>180</sup> **Ex. R-0033**, Memorandum sent by J. Lightfoot (12 January 2015).

<sup>181</sup> **Memorial**, ¶ 214.

<sup>182</sup> **Memorial**, ¶ 215.

<sup>183</sup> See, e.g., **RLA-0132**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28 (Decision on Annulment, 1 March 2011), ¶ 213 (McLachlan, Hascher, Tomka) (The *ad hoc* committee took note of the respondent’s argument that the Tribunal misapplied domestic law. It stated: “Peru may well disagree with the view that the Tribunal formed as to the correct solution of the issue before it under Peruvian law. But an *ad hoc* committee may not enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law”); **RLA-0133**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Decision of the Ad Hoc Committee, 25 March 2010), ¶ 96 (Schwebel, McLachlan, Silva Romero).

appeal the Judgment under Panamanian law. Bridgestone Licensing is thus attempting to do exactly that which Professor Paulsson and numerous arbitral tribunals have made clear that it cannot. For this reason, Bridgestone Licensing's denial of justice claim should be rejected.

**C. In Any Event, Bridgestone Licensing's Criticisms Are Based on Mischaracterizations and Are Unfounded**

65. In the Memorial, Bridgestone Licensing sets forth an incomplete and inaccurate description of the trademark and civil proceedings in Panama. On the basis of this distorted description, Bridgestone Licensing asserts that the Supreme Court misapplied various provisions of Panamanian law — or, as Bridgestone Licensing puts it, “[T]he Supreme Court’s understanding and application of Panamanian law was wrong.”<sup>184</sup> Importantly, the Tribunal need not consider these issues; even if the Supreme Court had misapplied certain aspects of Panamanian law (which it did not), such issues would *not* amount to a denial of justice. However, Panama considers it important to set the record straight on the subject of its law and the application of that law by the Supreme Court.

66. Bridgestone Licensing has unleashed a series of complaints to show that the Supreme Court was “wrong:”

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<sup>184</sup> **Memorial**, ¶ 214.

a. The Supreme Court applied Articles 217 and 780 of the Judicial Code to Muresa and Tire Group’s claims, even though Muresa and Tire Group did not invoke them in their initial complaint;<sup>185</sup>

b. “The Supreme Court Judgment found BSLS and BSJ liable simply for having exercised their right to claim protection from the courts in relation to the application for registration of a potentially confusing[ly] similar trademark;”<sup>186</sup>

c. The Supreme Court considered the Bridgestone defendants’ conduct in other countries (*i.e.*, the Demand Letter), but the Bridgestone defendants did not have an opportunity to properly respond to this evidence, “because it was not made in Muresa’s [original] complaint;”<sup>187</sup>

d. The Supreme Court ruled in favor of Muresa and Tire Group, despite the fact that the Bridgestone defendants had presented evidence in support of their defense;<sup>188</sup>

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<sup>185</sup> See **Memorial**, ¶¶ 173–75.

<sup>186</sup> **Memorial**, ¶ 197.

<sup>187</sup> **Memorial**, ¶ 196; *see also id.*, ¶ 195.

<sup>188</sup> See **Memorial**, ¶ 203.

e. The Supreme Court relied on the plaintiff's allegations that Muresa and Tire Group had been forced to halt sales of tires, which was inconsistent with the documentary evidence;<sup>189</sup>

f. "The amount of damages was not assessed at all" by the Supreme Court;<sup>190</sup> and

g. According to Bridgestone Licensing, the Supreme Court relied upon the Demand Letter, even though the Letter: (i) was not properly authenticated or verified; (ii) was not sent by Bridgestone Corporation or Bridgestone Licensing; (iii) was submitted in a foreign language; and (iv) was not relevant.<sup>191</sup>

67. By enumerating these alleged flaws — and invoking Articles 991, 792, 856, 857, 871, 877, 878, 781, and 990 of the Judicial Code — Bridgestone Licensing tries to paint a picture of a proceeding replete with due process violations, a Supreme Court determined to rule against Bridgestone Corporation and Bridgestone Licensing, and a Judgment that is an aberration on its face. That fantastical picture does not reflect the reality of the proceeding or the Judgment.

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<sup>189</sup> See **Memorial**, ¶¶ 204, 213.

<sup>190</sup> **Memorial**, ¶ 205.

<sup>191</sup> **Memorial**, ¶ 193.

## 1. **Bridgestone Licensing Failed to Provide an Accurate Account of the Local Proceedings**

68. In order to depict that reality properly, the following section provides a comprehensive summary of the trademark opposition proceeding and the subsequent civil proceeding involving Muresa and Tire Group. This complete and accurate description of the local proceedings demonstrates that the Supreme Court did not misapply Panamanian law — an issue which is not relevant to the claim under Article 10.5.

### a. **The Trademark Opposition Proceeding**

69. The facts underlying this dispute began with a trademark opposition proceeding in Panama (the “**Trademark Opposition Proceeding**”). On 5 April 2005, Bridgestone Corporation and Bridgestone Licensing challenged the registration of the RIVERSTONE trademark by Muresa before the Eighth Court of the Civil Circuit of Panama (the “**Eighth Court**”), alleging that the mark was confusingly similar to the BRIDGESTONE and FIRESTONE trademarks. Bridgestone Americas was not a party to the proceeding.

70. On 21 July 2006, the Eighth Court issued a judgment rejecting the challenge and ordering that Muresa be allowed to register the RIVERSTONE trademark (“**Judgment of**

**the Eighth Court**)<sup>192</sup> The Eighth Court also ordered that the Bridgestone Defendants cover the costs of the proceeding.<sup>193</sup>

71. On 3 August 2006, Bridgestone Corporation and Bridgestone Licensing filed a notice of appeal of the Judgment of the Eighth Court.<sup>194</sup> Shortly thereafter, the Third Superior Court of the First Judicial District of Panama (“**Third Superior Court**”) admitted the notice of appeal and granted Bridgestone Corporation and Bridgestone Licensing five business days to substantiate their appeal.<sup>195</sup> Two weeks later, on 5 September 2006, Bridgestone Corporation and Bridgestone Licensing suddenly withdrew their appeal.<sup>196</sup>

72. Although Claimants assert in their Memorial that the “parties to a trademark opposition proceeding have an automatic right of appeal,”<sup>197</sup> Claimants fail to mention that by exercising that right, a party is automatically subject to the consequences of triggering the challenge mechanism. Accordingly, when the Third Superior Court admitted the withdrawal, it ordered

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<sup>192</sup> See **Ex. R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 23.

<sup>193</sup> See **Ex. R-0040**, Judgment No. 48, Eighth Civil Circuit Court (21 July 2006), p. 23.

<sup>194</sup> See **Ex. C-0151**, Notice of Appeal filed by Bridgestone Corporation and Bridgestone Licensing Services, Inc. (3 August 2006).

<sup>195</sup> See **Ex. R-0041**, Admission of Notice of Appeal (21 August 2006).

<sup>196</sup> See **Ex. C-0152**, Bridgestone withdrawal of appeal (5 September 2006).

<sup>197</sup> **Memorial**, ¶ 43.

Bridgestone Corporation and Bridgestone Licensing to pay the costs incurred by the court during the appeal proceeding.<sup>198</sup>

**b. The Civil Proceeding**

73. The proceeding at the heart of Bridgestone Licensing's denial of justice claim is not the Trademark Opposition Proceeding, but is instead the subsequent *civil* proceeding initiated by Muresa and Tire Group (the "**Civil Proceeding**"), which ultimately produced the Supreme Court Judgment. In light of the parties' manifold submissions, hundreds of pages of documentary and expert evidence, and multiple stages of judicial review, this proceeding was complicated — certainly more complicated than Bridgestone Licensing admits in the Memorial. Whereas Bridgestone Licensing would prefer for the Tribunal to believe that the only rational option would have been for the Supreme Court to rule in its favor, the reality is that there was ample evidence to support Muresa and Tire Group's claims. With this in mind, this section sets forth a detailed account of the various stages of the civil proceeding.

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<sup>198</sup> See **Ex. R-0061**, Order of the Third Superior Court of the Judicial District (8 September 2006).

**(i) The Complaint Filed by  
Muresa and Tire Group**

74. On 12 September 2007, Muresa (in its capacity as owner of the RIVERSTONE trademark) and Tire Group (in its capacity as the representative of Muresa and distributor of RIVERSTONE-branded products) filed a civil torts claim against Bridgestone Corporation and Bridgestone Licensing (the “**Bridgestone Defendants**”) before the Eleventh Circuit Civil Court (“**Eleventh Court**”). Again, Bridgestone Americas was not a party to this proceeding. Muresa and Tire Group (the “**Plaintiffs**”) claimed that as a result of the Trademark Opposition Proceeding, they had to cease selling RIVERSTONE-branded products and requested USD 5 million as compensation for the damages suffered. Muresa and Tire Group invoked certain provisions of the Judicial Code of Panama, as well as articles 1644 and 1644A of the Civil Code of Panama.<sup>199</sup>

75. In their complaint, Muresa and Tire Group alleged that:

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<sup>199</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.

- a. Bridgestone Corporation and Bridgestone Licensing initiated the Trademark Opposition Proceeding;<sup>200</sup>
- b. Years previously, on 27 December 2001, Muresa and Tire Group had executed a representation and distribution agreement for the registration and marketing of the RIVERSTONE-branded products in Europe, Asia, Africa, and any neighboring countries;<sup>201</sup>
- c. On 27 December 2001, Muresa and LV International, Inc. (“**L.V. International**”), had executed a representation and distribution agreement for the registration and marketing of RIVERSTONE-branded products in the Americas;<sup>202</sup>

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<sup>200</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. 6.

<sup>201</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. 7.

<sup>202</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. 7.

d. Muresa is the exclusive owner of the RIVERSTONE trademark;<sup>203</sup>

e. Muresa had authorized Tire Group and L.V. INTERNATIONAL to pursue the registration of the RIVERSTONE trademark abroad;<sup>204</sup> and

f. Muresa and Tire Group were forced to stop selling RIVERSTONE-branded products as a consequence of the Trademark Opposition Proceeding initiated by the Bridgestone Defendants.<sup>205</sup>

76. Muresa and Tire Group requested that Bridgestone Corporation and Bridgestone Licensing be declared jointly and severally liable for the payment of the damages sought.<sup>206</sup> Muresa and Tire Group also asked that the Eleventh Court take all

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<sup>203</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. 7.

<sup>204</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. 7.

<sup>205</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. 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), p. 1–2.

necessary steps to serve notice on Bridgestone Corporation and Bridgestone Licensing, both of which are incorporated abroad.<sup>207</sup>

77. On the same day that the complaint was filed, a notice of the Civil Proceeding was formally published in the newspaper as required by Panamanian law.<sup>208</sup> A few days later, on 18 September 2007, the Eleventh Circuit Civil Court admitted the claim and granted the Bridgestone Defendants 40 business days to file their answer.<sup>209</sup> Contrary to Claimants' statement in their Memorial,<sup>210</sup> the notice of the Civil Proceeding was not formally served within the 40-day period established by the Eleventh Court; that period was extended for almost one year to allow for the international service of process on the Bridgestone Defendants.<sup>211</sup>

78. In their Memorial, Claimants also misrepresent the content of Muresa's and Tire Group's complaint. For example, according to Claimants, Muresa and Tire Group argued that the damages claimed were necessary because Muresa had ceased "manufacturing the products distinguished with the RIVERSTONE

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<sup>207</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. 8.

<sup>208</sup> See **Ex. R-0042**, Advertisement of the Civil Torts Claim in the newspaper (13 September 2006).

<sup>209</sup> See **Ex. R-0043**, Order of the Eleventh admitting the Civil Torts Claim (*Auto No. 1293-07*) (18 September 2007).

<sup>210</sup> **Memorial**, ¶ 47.

<sup>211</sup> See **Ex. R-0044**, Letters rogatory from the Eleventh Court (24 September 2007 through 28 May 2008).

brand at the scale it was producing them prior to the claim . . . and had to abandon all inventories it had in warehouses, consequently limiting the sale of these products, and consequently causing damages and losses . . . as they were unable to fulfill all orders, given the real risk of them being seized.”<sup>212</sup> However, Muresa and Tire Group did not assert that they had ceased manufacturing RIVERSTONE-branded products.<sup>213</sup> Instead, Muresa and Tire Group alleged that sales of RIVERSTONE-branded products had ceased.<sup>214</sup>

**(ii) The Bridgestone Defendants’ Submissions**

79. Claimants also fail to adequately address the nature — and even the very existence of — all of the Bridgestone Defendants’ responses to the complaint. In their Memorial, Claimants incorrectly assert that “BSLS and BSJ filed their Answer to the Complaint of Muresa and Tire Group on 19 August 2009.”<sup>215</sup> In reality, the 19 August 2009 brief was filed on behalf of Bridgestone Corporation *only*. Claimants mysteriously fail to mention that ten months previously, on 13 October 2008,

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<sup>212</sup> Memorial, ¶ 48 .

<sup>213</sup> Memorial, ¶ 48 (citing Ex. C-0016) (emphasis in original).

<sup>214</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. 7.

<sup>215</sup> Memorial, ¶ 50.

Bridgestone Licensing filed its own, individual answer to the complaint.<sup>216</sup>

80. In that four-page answer, Bridgestone Licensing: (i) challenged the amount claimed by Muresa and Tire Group on the grounds that it had not taken any action that could have led to compensable damages of any sort;<sup>217</sup> (ii) invoked a provision of the Judicial Code not invoked by Muresa and Tire Group: Article 217; (iii) argued that pursuant to Article 217 of the Judicial Code of Panama, for defendants to be liable for damages, such defendants must have acted recklessly (*temeridad*) or in bad faith;<sup>218</sup> (iv) insisted that Bridgestone Licensing did not act recklessly, negligently or in bad faith;<sup>219</sup> and (v) affirmatively asserted that it had acted in outstanding good faith and with procedural loyalty during the Opposition Proceeding.<sup>220</sup> Specifically, Bridgestone Licensing alleged that:

*Para que los demandantes sean responsable por los daños y perjuicios secuelas de los procesos*

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<sup>216</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008).

<sup>217</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 1.

<sup>218</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2.

<sup>219</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2.

<sup>220</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 3.

*promovidos, es imprescindible que esos demandantes hayan obrado con temeridad o de mala fe, por mandato expreso y claro del artículo 217 del Código Judicial. En consecuencia, nuestra representada no puede ser condenada a responder por supuestos daños y perjuicios sufridos por las demandantes toda vez que su accionar ni remotamente puede ser considerado temerario o de mala (sic).<sup>221</sup>*

81. In the Memorial, Bridgestone Licensing now characterizes the Supreme Court’s application of Article 217 to the facts of the case as a “fundamental breach[] of due process” and as evidence of “incompetence.”<sup>222</sup> It is surprising that Bridgestone Licensing would attack this aspect of the Supreme Court’s Judgment when the objective evidence shows that it was Bridgestone Licensing that first invoked Article 217 and advocated for its application to Muresa and Tire Group’s claims; how can a court’s decision to apply the very provision raised by a party constitute a fundamental breach of that party’s due process rights?

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<sup>221</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2 (“Pursuant to Article 217 of the Judicial Code, for plaintiffs to be liable for damages resulting from having initiated a lawsuit, it is imperative that those plaintiffs had acted recklessly or in bad faith. Accordingly [Bridgestone Licensing] cannot be held liable for the alleged damages suffered by [Muresa and Tire Group] since its actions cannot be considered as reckless or in bad [faith]”) (informal English translation).

<sup>222</sup> **Memorial**, ¶¶ 165, 211.

It cannot. Perhaps that is the reason why Claimants conveniently failed to mention Bridgestone Licensing's 13 October 2008 submission in the Civil Proceeding.

82. In its 13 October 2008 submission, Bridgestone Licensing also relied upon an opposition proceeding that had been initiated against the RIVERSTONE trademark in the United States. According to Bridgestone Licensing, BFS Brands LLC and Bridgestone/Firestone North America Tire LLC (two other Bridgestone subsidiaries) had filed an opposition proceeding against L.V. International, and L.V. International had acquiesced to all of the Bridgestone subsidiaries' claims.<sup>223</sup> Thus, although Bridgestone Licensing now complains about the fact that the Supreme Court ultimately took the Bridgestone Group's conduct outside of Panama into account,<sup>224</sup> it was Bridgestone Licensing that raised the issue of trademark opposition proceedings abroad.

83. As discussed above, Bridgestone Corporation submitted its own answer almost a year later, on 19 August 2009.<sup>225</sup> In a six-page brief, Bridgestone Corporation requested that the Eleventh Court deny the USD 5 million damages claim as

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<sup>223</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2.

<sup>224</sup> See e.g., **Memorial**, ¶¶ 184–85.

<sup>225</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009).

well as the costs claim submitted by the Plaintiffs.<sup>226</sup> Bridgestone Corporation also denied all of the facts stated by Muresa and Tire Group in their complaint. According to Bridgestone Corporation, the Trademark Opposition Proceeding was a normal procedure, which it had a right to initiate under Panamanian law; the Trademark Opposition Proceeding was therefore not an attack against Muresa.<sup>227</sup> Like Bridgestone Licensing, Bridgestone Corporation: (i) stressed that it had not committed any acts or omissions that could have caused the damages claimed; (ii) denied that its actions were reckless or made in bad faith,<sup>228</sup> and (iii) asserted it had acted with outstanding good faith and with procedural loyalty in protecting its legitimate trademark rights.<sup>229</sup>

84. Bridgestone Corporation also invoked Article 217. According to Bridgestone Corporation, Muresa and Tire Group should have filed their claim under Article 217 of the Judicial Code of Panama, which establishes two requirements for a strict liability claim: (i) reckless or bad faith procedural conduct; and (ii)

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<sup>226</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 1.

<sup>227</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 2.

<sup>228</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 3.

<sup>229</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 4.

damages caused by that conduct.<sup>230</sup> Bridgestone Corporation argued that the first requirement had not been met in this case, because it had not acted recklessly or in bad faith during the Trademark Opposition Proceeding.<sup>231</sup>

85. On the same day that Bridgestone Corporation filed its answer, the Bridgestone Defendants filed a joint motion to dismiss the Civil Proceeding initiated by Muresa and Tire Group (“**Motion to Dismiss**”).<sup>232</sup> The Bridgestone Defendants argued that the court lacked jurisdiction and that the Civil Proceeding violated their due process rights. Their motion relied upon a number of arguments. For example, the Bridgestone Defendants asserted that Article 1644 of the Civil Code of Panama did not apply to the facts at issue and that the correct norm to apply was Article 217 of the Judicial Code.<sup>233</sup> This *directly contradicts* Bridgestone Licensing’s current argument that the Supreme Court improperly applied Article 217. The Bridgestone Defendants also argued that the claim for compensatory damages should have been made before the Eighth Court (while the Opposition Proceeding

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<sup>230</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 4.

<sup>231</sup> See **Ex. C-0019**, Answer of Bridgestone Corporation to the Civil Torts Claim (19 August 2009), p. 5.

<sup>232</sup> See **Ex. R-0062**, Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing (19 August 2009).

<sup>233</sup> See **Ex. R-0062**, Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing (19 August 2009), p. 3.

was still ongoing), instead of filing the tort claim before the Eleventh Court after the Opposition Proceeding had concluded.<sup>234</sup>

**(iii) The Evidence Submitted by the Parties**

86. Although Bridgestone Licensing focuses much of its denial of justice claim on the Supreme Court's approach to and treatment of the evidence — asserting that it either ignored or ascribed too much weight to certain pieces of evidence — Claimants' description of the evidentiary record is woefully inadequate.

87. On 14 September 2009, Muresa and Tire Group responded to the Bridgestone Defendants' Motion to Dismiss. In their Memorial, Claimants correctly note that the Plaintiffs emphasized that their damages claim did not properly belong in the Trademark Opposition Proceeding, but in a separate civil suit,<sup>235</sup> Claimants omit other aspects of the Plaintiffs' response. For example, Muresa and Tire Group acknowledged that trademark owners are entitled to oppose the registration of similar trademarks under Panamanian law, but emphasized that Panamanian law does not shield such trademark owners from liability for reckless or bad faith conduct. Muresa and Tire Group also explained that the

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<sup>234</sup> See **Ex. R-0062**, Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing (19 August 2009), p. 3.

<sup>235</sup> **Claimants' Memorial**, ¶ 52.

distribution agreements that they had concluded with their suppliers could not be enforced during the pendency of the Trademark Opposition Proceeding because those suppliers feared the seizure of the RIVERSTONE-branded products.<sup>236</sup>

88. In their Memorial, Claimants note that Muresa and Tire Group submitted the list of evidence that they wished to submit in support of their claim on 28 September 2009. However, Claimants failed to describe the contents of that list — perhaps because it shows the breadth and depth of the Plaintiff’s evidence to support their tort claim. For example, Muresa and Tire Group’s list included, *inter alia*, the following evidence.<sup>237</sup>

a. Affidavits submitted by Ms. Mirna Moreira, a certified public accountant, providing Muresa’s projection of sales for the fiscal years 2005, 2006, 2007, and 2008;<sup>238</sup>

b. Affidavits submitted by Ms. Mirna Moreira providing Muresa’s effective sales for the fiscal years 2005, 2006, 2007, and 2008, which demonstrated reductions of more than 5 million

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<sup>236</sup> See **Ex. C-0187**, Response of Muresa and Tire Group of Factories to the Motion for Dismissal of Bridgestone Corporation and Bridgestone Licensing (14 September 2009), p. 3.

<sup>237</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009).

<sup>238</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), pp. 1–3.

balboas<sup>239</sup> as a result of the Trademark Opposition Proceeding.<sup>240</sup>

c. An affidavit submitted by Ms. Mirna Moreira providing Tire Group's effective sales for the fiscal year 2005;<sup>241</sup>

d. An affidavit submitted by Ms. Mirna Moreira providing Tire Group's effective sales for the fiscal year 2005, which showed a reduction of more than 2 million balboas as a result of the Trademark Opposition Proceeding;<sup>242</sup> and

e. Copies of the tax returns of Muresa and Tire Group for fiscal years 2005, 2006, 2007, and 2008.<sup>243</sup>

89. Muresa and Tire Group subsequently sought to submit the minutes of the meetings of the board of directors of Muresa, Tire Group, and L.V. International, as well as copies of several of the orders issued by the Eighth Court during the

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<sup>239</sup> 1.00 Balboa = USD 1.00.

<sup>240</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), p. 2.

<sup>241</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), p. 2.

<sup>242</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), p. 2.

<sup>243</sup> See **Ex. C-0189**, List of evidence submitted by Muresa and Tire Group (28 September 2009), pp. 5–6.

Opposition Proceeding.<sup>244</sup> Muresa and Tire Group offered to submit the sworn statements of *seventeen* witnesses.<sup>245</sup> Muresa and Tire Group designated two accounting experts: Ms. Psiques Yirula de León Grael and Mr Antonio Aguilar (both certified public accountants).<sup>246</sup> Muresa and Tire Group also requested that pursuant to Articles 966, 967, 968, and 969 of the Judicial Code of Panama, the Eleventh Court review the accounting books of Muresa and Tire Group in order to establish the projection of sales of both companies for the years 2005, 2006, 2007, and 2008, as well as their effective sales.

90. Claimants also fail to mention in their Memorial that Muresa and Tire Group also submitted a set of questions to the Eleventh Court intended to facilitate the Court’s evaluation of the companies’ actual sales during those years, as well as the reasons for which the expected projections had not been met (“**Line of Questions**”).<sup>247</sup>

91. On 6 October 2009, pursuant to Article 1265 of the Judicial Code of Panama, Bridgestone Corporation and

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<sup>244</sup> See **Ex. C-0190**, Supplemental list of evidence submitted by Muresa and Tire Group (1 October 2009), pp. 1–5.

<sup>245</sup> See **Ex. C-0190**, Supplemental list of evidence submitted by Muresa and Tire Group (1 October 2009), pp. 5–6.

<sup>246</sup> See **Ex. C-0190**, Supplemental list of evidence submitted by Muresa and Tire Group (1 October 2009), pp.7–8.

<sup>247</sup> See **Ex. C-0190**, Supplemental list of evidence submitted by Muresa and Tire Group (1 October 2009), pp. 6–7.

Bridgestone Licensing submitted their own list of evidence.<sup>248</sup> In their submission, Bridgestone Licensing and Bridgestone Corporation provided documentary evidence intended to rebut the evidence submitted by Muresa and Tire Group, including Ms. Mirna Moreira's affidavits regarding the sales projections and actual sales of Tire Group for the years 2005, 2006, 2007, and 2008,<sup>249</sup> as well as the designation of the witnesses by Muresa and Tire Group. Bridgestone Licensing and Bridgestone Corporation offered as evidence the witness statements of some of the witnesses designated by the Plaintiffs that had been filed during the Opposition Proceeding.<sup>250</sup> Bridgestone Licensing and Bridgestone Corporation also designated Mr. Manuel Ochoa, a certified public accountant, as their accounting expert.<sup>251</sup>

92. Three days later, on 9 October 2009, Bridgestone Licensing and Bridgestone Corporation filed objections to the admission of the evidence listed by Muresa and Tire Group.<sup>252</sup> Specifically, Bridgestone Corporation and Bridgestone Licensing

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<sup>248</sup> See **Ex. C-0191**, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing (6 October 2009), p. 5.

<sup>249</sup> See **Ex. C-0191**, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing (6 October 2009), pp. 2–3.

<sup>250</sup> See **Ex. C-0191**, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing (6 October 2009), pp. 3–4.

<sup>251</sup> See **Ex. C-0191**, List of counter-evidence of Bridgestone Corporation and Bridgestone Licensing (6 October 2009), p. 4.

<sup>252</sup> See **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Muresa and Tire Group (9 October 2009).

asserted that the certifications of Ms. Mirna Moreira did not refer specifically to RIVERSTONE-branded products,<sup>253</sup> challenged the authenticity of the tax returns filed by Muresa and Tire Group,<sup>254</sup> and argued that the tax returns were not appropriate evidence to demonstrate the damages claimed.<sup>255</sup> Bridgestone Corporation and Bridgestone Licensing also challenged the statements of all the witnesses offered by Muresa and Tire Group and argued that the accounting books offered by Muresa and Tire Group did not prove the existence of any damage caused by their conduct.<sup>256</sup> However, Bridgestone Licensing and Bridgestone Corporation did not object to the Line of Questions that Muresa and Tire Group had submitted. Bridgestone Corporation and Bridgestone Licensing further argued that the Eleventh Court should admit the opinion of

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<sup>253</sup> See **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Mures and Tire Group (9 October 2009), pp. 1–2.

<sup>254</sup> See **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Mures and Tire Group (9 October 2009), p. 2.

<sup>255</sup> See **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Mures and Tire Group 9 October 200, p. 2.

<sup>256</sup> See **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Muresa and Tire Group (9 October 2009), p. 7.

their accounting expert, Mr. Manuel Ochoa, if it admitted the plaintiff's accounting books as evidence.<sup>257</sup>

93. A few months later, on 26 January 2010, the Eleventh Court issued Decision No. 107-10 on the admissibility of the evidence listed by Muresa and Tire Group<sup>258</sup> and Decision No. 114-10 on the admissibility of the evidence listed by Bridgestone Corporation and Bridgestone Licensing.<sup>259</sup> In Decision No. 107-10, the Eleventh Court admitted the documentary evidence submitted by Muresa and Tire Group as well as their witness statements and scheduled their oral testimony.<sup>260</sup> The Eleventh Court also confirmed Ms. Piquies Yirula de León Grael and Mr. Antonio Aguilar as the experts designated by Muresa and Tire Group, as well as Mr. Manuel Ochoa as an expert designated by Bridgestone Corporation and Bridgestone Licensing. The court appointed Ms. Vera Lindo de Gutiérrez as the accounting expert of

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<sup>257</sup> See **Ex. C-0192**, Objections of Bridgestone Corporation and Bridgestone Licensing to the evidence submitted by Muresa and Tire Group (9 October 2009), p. 6.

<sup>258</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).

<sup>259</sup> See **Ex. R-0064**, Decision No. 114-10 of the Eleventh Court on admissibility of the evidence submitted by Bridgestone Corporation and Bridgestone Licensing (26 January 2010).

<sup>260</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), pp. 1–3.

the Eleventh Court.<sup>261</sup> In its Decision No. 114-10, the Eleventh Court admitted the documentary counter-evidence submitted by Bridgestone Corporation and Bridgestone Licensing, but did not admit the accounting expert evidence that they had submitted on 6 October 2009 (namely the accounting books, financial statements and tax returns of Muresa and Tire Group from 2005 to 2008).<sup>262</sup>

94. The three accounting experts were asked to perform the following tasks: (1) determine the projected sales by Muresa and Tire Group for 2005 and 2006;<sup>263</sup> (2) determine the actual sales of the two companies in 2005 and 2006;<sup>264</sup> (3) establish the reason that the companies did not reach the projected sales for 2005 and 2006;<sup>265</sup> (4) establish the reason for limiting or restricting the imports of the RIVERSTONE tires into the Colon Free Trade Zone;<sup>266</sup> (5) establish the reason for not making direct sales from the Colon Free Trade Zone to some of the countries in Central and

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<sup>261</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. 6.

<sup>262</sup> See **Ex. R-0064**, Decision No. 114-10 of the Eleventh Court on admissibility of the evidence submitted by Bridgestone Corporation and Bridgestone Licensing (26 January 2010).

<sup>263</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 1, 5.

<sup>264</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 1 and 5.

<sup>265</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 2, 5.

<sup>266</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 3, 6.

South America;<sup>267</sup> (6) determine the reason for any of their customers' concerns about purchasing the RIVERSTONE products;<sup>268</sup> (7) evaluate the damages caused to Muresa and Tire Group as a consequence of not being able to sell the RIVERSTONE tires;<sup>269</sup> (8) determine the projected sales of Muresa and Tire Group for 2007 and 2008;<sup>270</sup> (9) establish the actual sales of the companies in 2007 and 2008;<sup>271</sup> and (10) establish the reason that the companies did not reach the projected sales for 2007 and 2008.<sup>272</sup>

95. On 24 May 2010, Mr. Antonio Aguilar and Ms. Piques De León submitted their expert opinions on behalf of Muresa and Tire Group.<sup>273</sup> That same day, Ms. Vera Lindo de

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<sup>267</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010), pp. 3, 6.

<sup>268</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010), pp. 3, 6.

<sup>269</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010), pp. 3, 6.

<sup>270</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010), pp. 4, 7.

<sup>271</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010), pp. 4, 7.

<sup>272</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010), pp. 4, 7.

<sup>273</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Piques De León (24 May 2010).

Gutiérrez (the court-appointed expert) and Mr. Manuel Ochoa (the Bridgestone Defendants' expert) also filed their reports.<sup>274</sup>

96. Mr. Aguilar and Ms. León based their report on the Plaintiffs' accounting books, financial statements, tax returns, and related documents for Fiscal Years 2005 through 2008.<sup>275</sup> Along with their reports, Mr. Aguilar and Ms. De León submitted a copy of a letter dated 3 November 2004 that had been sent by Foley & Lardner LLP telling L.V. International to refrain from using the RIVERSTONE trademark in the United States and in any other country (the "**Demand Letter**").<sup>276</sup>

97. Based on the evidence, Mr. Aguilar and Ms. De León concluded that:

- a. In 2005 and 2006, the sales of RIVERSTONE tires represented 35% of Muresa's projected sales;<sup>277</sup>
- b. In 2005 and 2006, Muresa and Tire Group did not meet their sales projections because their

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<sup>274</sup> See **Ex. C-0163**, Accounting expert report of Ms. Vera Lindo de Gutiérrez (24 May 2010); see also **Ex. C-0020**, Expert report of Manuel Ochoa (24 May 2010).

<sup>275</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010).

<sup>276</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.

<sup>277</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 1.

primary product, the RIVERSTONE tires, were the subject of the Opposition Proceeding;<sup>278</sup>

c. Sales of RIVERSTONE tires represented 32% of Muresa's total sales for 2005, 23% of its total sales for 2006 and 2007, and 27% of its total sales for 2008. From 2005 to 2008, there was an overall reduction of 9% in Muresa's sales of the *Riverstone* tires;<sup>279</sup>

d. Sales of RIVERSTONE tires represented 56% of Tire Group's sales for 2005, 33% of its sales for 2006, 35% of its sales for 2007, and 25% of its sales for 2008. Tire Group's sales of RIVERSTONE tires decreased from 2006 to 2008;<sup>280</sup> and

e. Imports of the RIVERSTONE tires into the Colon Free Trade Zone were restricted as a result of the Trademark Opposition Proceeding.<sup>281</sup>

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<sup>278</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), pp. 1, 4.

<sup>279</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.

<sup>280</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 5.

<sup>281</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), p. 3.

98. The evidentiary hearing took place over several weeks during the summer of 2010, and each party had the opportunity to examine and cross-examine the witnesses and experts.<sup>282</sup> Muresa and Tire Group filed their closing arguments on 4 June 2010.<sup>283</sup>

99. In their Memorial, Claimants note that Muresa argued at the hearing that it had to stop selling RIVERSTONE tires because of fear of seizure by Bridgestone, but Claimants alleged that “no evidence was adduced to show the basis of any fears than the other testimony of Muresa, T[ire Group,] and LV International employees who referred to oral warnings on unspecified occasions by unidentified officials.”<sup>284</sup>

100. This is not accurate. In fact, Muresa and Tire Group referenced the Demand Letter in support of their legitimate fear of seizure; during their closing arguments, Muresa and Tire Group asserted that their fear was based on the “threats made by [Bridgestone Corporation and Bridgestone Licensing] from their offices in the United States of America whose letter [(the Demand Letter)] has been transcribed.”<sup>285</sup>

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<sup>282</sup> **Claimants’ Memorial**, ¶ 57.

<sup>283</sup> See **Ex. C-0164**, Closing arguments of Muresa and Tire Group (4 June 2010).

<sup>284</sup> **Claimants’ Memorial**, ¶ 68.

<sup>285</sup> **Ex. C-0164**, Closing arguments of Muresa and Tire Group (4 June 2010), p. 5.

101. Thereafter, Bridgestone Corporation and Bridgestone Licensing submitted their closing statements in which, *inter alia*, they: (i) challenged Tire Group’s standing as a party to the proceeding on the basis that it had intervened in the Opposition Proceeding as a non-disputing party<sup>286</sup> and (ii) accused Muresa of violating the principles of due process and procedural consistency because it had acted recklessly, inconsistently, and in bad faith. According to Bridgestone Corporation and Bridgestone Licensing, Muresa had modified the initial damages claim derived from the Trademark Opposition Proceeding for a claim of reduction of sales for the fears of a seizure of merchandise.<sup>287</sup> The Bridgestone Defendants also raised certain *res judicata* arguments, claiming that in the Trademark Opposition Proceeding, the Eighth Court had found that the Bridgestone Defendants has acted in “good faith.”

102. On 6 December 2010, the Eleventh Court rejected the Bridgestone Defendants’ Motion to Dismiss.<sup>288</sup> On 17 December 2010, the Eleventh Court issued Judgment No. 70.<sup>289</sup> In its judgment, the Eleventh Court addressed Bridgestone

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<sup>286</sup> See **Ex. C-0200**, Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010).

<sup>287</sup> See **Ex. C-0200**, Closing arguments of Bridgestone Corporation and Bridgestone Licensing (11 June 2010), p. 4.

<sup>288</sup> See **Ex. R-0065**, Decision No. 1859 of the Eleventh Circuit Court (6 December 2010).

<sup>289</sup> See **Ex. R-0036**, Judgment No. 70 of the Eleventh Circuit Court (17 December 2010).

Corporation and Bridgestone objections as to (i) *res judicata* and (ii) Tire Group's lack of legal standing.

103. Regarding the *res judicata* allegation, the Eleventh Court decided that:

In such proceeding, see pp. 11-36, there is no identity of parties. They are not, totally, the same parties involved in the present proceeding, neither is there identity of property or object, or claim, since in that proceeding the present Defendants wanted to prevent the registration of the RIVERSTONE brand, whereas in this proceeding there is a compensation claim for alleged damages resulting from the trademark registration opposition. As stated, 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. Thus, this objection is denied.<sup>290</sup>

104. The Eleventh Court also determined that Tire Group lacked legal standing, as it had participated as a non-disputing party in the Trademark Opposition Proceeding (an interpleader). The Eleventh Court decided that if Tire Group suffered any damages as a result of the Trademark Opposition Proceeding,

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<sup>290</sup> Ex. R-0036, Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 7-8.

Muresa should answer for such damages due to the agreement between those parties.<sup>291</sup>

105. Lastly, the Eleventh Court dismissed Muresa and Tire Group’s claim. The court considered that Muresa and Tire Group had failed to prove damages as a result of the Trademark Opposition Proceeding.<sup>292</sup>

**c. The Appeal of the Civil Proceeding**

**(i) Muresa and Tire Group’s Appeal Request**

106. On 5 January 2011, Muresa and Tire Group filed an appeal against the Eleventh Circuit Court’s decision (the “**Appeal Request**”) before the First Superior Court of the First Judicial District (“**First Superior Court**”).<sup>293</sup>

107. In their Appeal, Muresa and Tire Group alleged that the Eleventh Circuit Court committed various errors. They argued, *inter alia*, that:

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<sup>291</sup> See **Ex. R-0036**, Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), pp. 11–13.

<sup>292</sup> See **Ex. R-0036**, Judgment No. 70 of the Eleventh Circuit Court (17 December 2010), p. 14.

<sup>293</sup> **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011).

a. Tire Group had standing as a plaintiff in the case.<sup>294</sup> Moreover, since Muresa and Tire Group had executed a distribution agreement for RIVERSTONE tires, Tire Group also suffered damages because it had economic expectations that had been frustrated;<sup>295</sup>

b. Muresa and Tire Group had suffered damages of USD 5,775,793.84 as a result of the decrease in sales, as calculated by their experts;<sup>296</sup>

c. The Eleventh Circuit Court had only considered the opinion of the court-appointed expert, who stated that she lacked documentation to complete her report;<sup>297</sup>

d. Bridgestone Corporation and Bridgestone Licensing had acted negligently in sending L.V. International the Demand Letter that the Plaintiffs

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<sup>294</sup> See **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011).

<sup>295</sup> See **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011), pp. 6–9.

<sup>296</sup> See **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011), pp. 11, 18–19, 27.

<sup>297</sup> See **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011), pp. 9–13.

had submitted as evidence, which caused “clear and significant damages;”<sup>298</sup>

e. As a result of the Trademark Opposition Proceeding, Tire Group suspended the manufacturing of RIVERSTONE-branded tires, and in turn, Muresa had not been able to market the brand properly;<sup>299</sup> and

f. The Bridgestone Defendants’ actions were intended to eliminate the competition created by RIVERSTONE products, which constituted unfair competition as well as unlawful and negligent conduct.<sup>300</sup>

**(ii) Bridgestone’s Opposition to the Appeal**

108. On 14 January 2011, Bridgestone Corporation and Bridgestone Licensing filed their opposition to the Appeal,<sup>301</sup> making, *inter alia*, the following assertions:

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<sup>298</sup> **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011), pp. 13–16

<sup>299</sup> *See* **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011), pp. 16–0.

<sup>300</sup> *See* **Ex. C-0022**, Muresa and TFGL Appeal to Judgment No. 70 (5 January 2011), p. 21.

<sup>301</sup> **Ex. C-0023**, BSJ and BSLS Opposition to Muresa Appeal (14 January 2011).

- a. The Eighth Circuit Court had correctly determined that Bridgestone Corporation and Bridgestone Licensing had acted in good faith;<sup>302</sup>
- b. Bridgestone Corporation and Bridgestone Licensing could not have impeded the sale of RIVERSTONE tires because provisional measures are not available in opposition actions in Panama;<sup>303</sup>
- c. Muresa and Tire Group's witnesses provided false testimony;<sup>304</sup>
- d. Muresa and Tire Group's experts did not act in an impartial manner because instead of responding directly to Muresa and Tire Group's claim that tire sales had ceased, the experts argued that there had been a diminution in sales;<sup>305</sup>
- e. Muresa and Tire Group's experts improperly attached the Demand Letter to their report in

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<sup>302</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), p. 3.

<sup>303</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), p. 5; *but see* **First Lasso de la Vega Ferrari Report**, ¶¶ 18, 61 (noting that in Panama, provisional measures are available in opposition actions).

<sup>304</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 6–11.

<sup>305</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 11–15.

violation of evidentiary rules,<sup>306</sup> which made the Demand Letter inadmissible;<sup>307</sup>

f. Muresa and Tire Group presented no evidence proving that they had been threatened or intimidated by Bridgestone Corporation or Bridgestone Licensing;<sup>308</sup>

g. Tire Group lacked standing to be a plaintiff in the action;<sup>309</sup>

h. There was no documentary evidence in the record of any international opposition proceedings other than the proceeding in the United States.<sup>310</sup> This meant that, according to the Bridgestone defendants, Muresa and Tire Group could not prove that it was suffering from an attack from Bridgestone on a global scale;<sup>311</sup> and

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<sup>306</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 15–18.

<sup>307</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 31–32.

<sup>308</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 22–23.

<sup>309</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), p. 18.

<sup>310</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 29–30.

<sup>311</sup> **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), p. 29.

i. Muresa and Tire Group did not establish a causal link between the alleged breaches and damages.<sup>312</sup>

109. Yet again, the Bridgestone Defendants affirmatively invoked Article 217. Yet, as discussed above, Bridgestone Licensing now bases its denial of justice claim on the assertion that the Supreme Court should not have ruled based on Article 217 of the Judicial Code because Muresa and Tire Group had based their claim on Article 1644 of the Civil Code and did not mention Article 217 in their original complaint.<sup>313</sup> However, Claimants fail to explain anywhere in their Memorial that the Bridgestone Defendants did not just argue that Muresa and Tire Group had relied on the wrong law; instead, the Bridgestone Defendants *specifically requested that Superior Court apply Article 217 of the Judicial Code* to the dispute.<sup>314</sup> After asking the Superior

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<sup>312</sup> See **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), pp. 32–36.

<sup>313</sup> See **Claimants’ Memorial**, ¶¶ 171–77.

<sup>314</sup> **Ex. C-0023**, BSJ and BSLs 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); see also *id.* at p. 20 (“[t]he illegal act alleged by the claimant in these proceedings is not a general illegal act, but rather a qualified illegal act, and for this reason these proceedings should be analyzed and applied from the point of view of Article 217 of

[FOOTNOTE CONTINUED ON NEXT PAGE]

Court to apply Article 217 of the Judicial Code, the Bridgestone Defendants asserted that none of the three acts on which Muresa and Tire Group based their claim — the United States’ opposition proceedings, the opposition proceedings in Panama, and the Demand Letter — were sufficient to meet the recklessness or bad faith standard imposed by Article 217 of the Judicial Code.<sup>315</sup> Claimants thus fail to explain how the application of Article 217, which entails a higher threshold of liability, and which the Bridgestone Defendants *explicitly asked the Court to apply*, amounts to a denial of justice.

### (iii) The Appellate Decision

110. The First Superior Court issued its decision on 23 May 2013.<sup>316</sup> The First Superior Court affirmed the Eleventh Circuit Court’s decision on the merits. In a single paragraph, the First Superior Court noted that it had examined the record, and it held that Muresa and Tire Group had failed to meet their burden of proving that the Bridgestone Defendants had acted negligently or recklessly.<sup>317</sup>

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

the Judicial Code as they involve damages and losses arising from proceedings”); *see also* **First Lasso de La Vega Ferrari Report**, ¶ 47.

<sup>315</sup> *See* **Ex. C-0023**, BSJ and BSLs Opposition to Muresa Appeal (14 January 2011), p. 30.

<sup>316</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013).

<sup>317</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), p. 20 (“From an exam of the record, this Court deems that the Plaintiffs

[FOOTNOTE CONTINUED ON NEXT PAGE]

111. Claimants described this aspect of the appellate decision in their Memorial,<sup>318</sup> but Claimants failed to mention other important aspects of the decision. For example, the First Superior Court also rejected the Bridgestone Defendants' arguments about Tire Group's standing and overturned the Eleventh Circuit Court's holding that Tire Group lacked standing.<sup>319</sup> In other words, the First Superior Court did not agree with all of the Bridgestone Group's arguments on appeal, which demonstrates that there was room for legitimate disagreement about the validity of the parties' respective claims.

112. Further, the First Superior Court held as follows:

“With regard to the Respondents' position, when stating that a non-contractual civil liability claim is unacceptable because their actions were not reckless or in bad faith . . . . this Court deems that the Plaintiffs did not comply with the burden to prove the factual

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*[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]*

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. The Plaintiffs did not prove that the Respondents had incurred excesses beyond the exercise of a right that the law itself allows in this type of business”).

<sup>318</sup> **Memorial**, ¶ 76.

<sup>319</sup> See **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), pp. 18–19. The determination on standing had important implications for the calculation of damages in the case.

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>320</sup>

113. The First Superior Court thus agreed with the Bridgestone Defendants that Muresa and Tire Group had not met their burden of proof and based its ruling on both Article 1644 of the Civil Code *and Article 217 of the Judicial Code*.

**d. The Cassation Before the Supreme Court of Panama**

114. Bridgestone Licensing's denial of justice claim is based on the Supreme Court Judgment in favor of Muresa and Tire Group. The evidence discussed above demonstrates that the Supreme Court had a robust record and significant documentary and expert evidence supporting its Judgment. And, as discussed below, Claimants mischaracterize and omit key aspects of the Judgment in their Memorial.

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<sup>320</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), p. 20.

**(i) Muresa and Tire Group’s  
Request for Cassation**

115. On 1 July 2013, Muresa and Tire Group filed a cassation recourse before the Supreme Court (“**Cassation Request**”) on two grounds. They argued that: (1) the First Superior Court ignored existing evidence that — if it had been considered — would have affected the outcome, and (2) the decision in favor of Bridgestone Corporation and Bridgestone Licensing on the merits was contrary to the evidence and violated Panamanian law.<sup>321</sup>

116. In support of their first argument, Muresa and Tire Group noted that the First Superior Tribunal ignored six types of evidence, namely:

- a. The Demand Letter, which demonstrated recklessness;
- b. The certifications of tire sales issued by the companies’ Certified Public Accountant, demonstrating that the companies had suffered a decrease in sales;
- c. The withdrawal by Bridgestone Corporation and Bridgestone Licensing of their appeal in the

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<sup>321</sup> See **Ex. R-0046**, Muresa and Tire Group’s Cassation Recourse to Supreme Court (1 July 2013).

trademark opposition action, which showed bad faith;

d. Witness testimony establishing that the damage to Muresa and Tire Group was caused by the threats and opposition action initiated by Bridgestone Corporation and Bridgestone Licensing;

e. Witness statements establishing that Muresa and Tire Group felt threatened by the Demand Letter and the seizures undertaken by Bridgestone companies in the Dominican Republic, China, and other countries; and

f. Muresa and Tire Group's expert report, which demonstrated a decrease in sales of RIVERSTONE branded tires.<sup>322</sup>

117. Muresa and Tire Group argued that the First Superior Court's failure to take this evidence into account violated Panamanian law. Specifically, they contended that by ignoring the aforementioned evidence, the First Superior Court violated Article 780 of the Judicial Code, which specifies the types of information

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<sup>322</sup> See **Ex. R-0046**, Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 2-4.

that may serve as evidence.<sup>323</sup> Muresa and Tire Group also argued that by ignoring the certifications, the First Superior Court had infringed Article 1 of Law No. 57 of September 1, 1978, which recognizes that certified public accountants can attest to the veracity of economic transactions.<sup>324</sup> Finally, they argued that the First Superior Court erred by not finding Bridgestone Corporation and Bridgestone Licensing liable under Article 1644 of the Civil Code *and Article 217 of the Judicial Code*, in spite of the objective evidence.<sup>325</sup>

118. Muresa and Tire Group's second basis for the Cassation Recourse was that the First Superior Court had directly

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<sup>323</sup> See **Ex. R-0046**, Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 4–6; **Ex. R-0067**, Judicial Code of the Republic of Panama, Article 780 ("Documents, admissions, sworn evidence, statements of the parties, statements by witnesses, judicial inspections, expert opinions, reports, clues, scientific means, and any other rational means which serve to mold the opinion of the judge serve as evidence, provided that they are not expressly prohibited by law, do not violate human rights, or are not contrary to morality or public policy. Copies, reproductions, and photographs of objects, documents, and places may also be used. In order to establish whether a fact may or may not take place in a certain manner, a reconstruction of the same is permitted. If the judge considers it necessary, a photographic or electromagnetic recording of it may take place. If appropriate as evidence, radiographs, radiosopes, hematological and bacteriological analyses, and any other scientific verification procedure may also be obtained or used").

<sup>324</sup> See **Ex. R-0046**, Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 6–7.

<sup>325</sup> See **Ex. R-0046**, Muresa and Tire Group's Cassation Recourse to Supreme Court (1 July 2013), pp. 7–10.

violated substantive Panamanian law by failing to find Bridgestone Corporation and Bridgestone Licensing liable under Article 1644 of the Civil Code *and Article 217 of the Judicial Code*.<sup>326</sup>

**(ii) Bridgestone’s Objections to the Admissibility of the Cassation Request**

119. On 16 September 2013, Bridgestone Corporation and Bridgestone Licensing filed an opposition to the Cassation Request, in which they objected to its admissibility (“**Objection to Admissibility**”).<sup>327</sup> In their Memorial, Claimants fail to even mention the Objection to Admissibility. This brief provided the Bridgestone Defendants with yet another opportunity to present and substantiate their arguments.

120. In their Objection to Admissibility, the Bridgestone Defendants rejected all of Muresa and Tire Group’s arguments. For example, the Bridgestone Defendants alleged that the First Superior Court had not ignored any evidence because the court had stated that it had in fact examined the evidence.<sup>328</sup> The sections of

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<sup>326</sup> See **Ex. R-0046**, Muresa and Tire Group’s Cassation Recourse to Supreme Court (1 July 2013), pp. 10–12.

<sup>327</sup> See **Ex. R-0047** Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013).

<sup>328</sup> See **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 2.

the First Superior Court opinion cited by Bridgestone Corporation and Bridgestone Licensing read as follows:

[Muresa]'s disagreement inevitably leads us to exhaustively examine the body of evidence that is the basis of the claim, in accordance, of course, with the requirements to establish non-contractual liability.

In that sense, one must seek to DETERMINE THE DAMAGES. As a first precondition of civil liability, we must examine the body of evidence in the file, and the Plaintiff's legal standing to claim the aforementioned damages. . . .<sup>329</sup>

From an exam 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.<sup>330</sup>

Thus, while Claimants' argue in the present arbitration that the Supreme Court Judgment did not adequately examine all the evidence,<sup>331</sup> the Bridgestone Defendants actively defended the

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<sup>329</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), p. 17.

<sup>330</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), p. 20.

<sup>331</sup> See **Claimants' Memorial**, ¶¶ 202–03.

*single-paragraph* analysis of the evidence by the First Superior Court.<sup>332</sup>

121. Bridgestone Corporation and Bridgestone Licensing also submitted arguments about the six categories of evidence discussed in Muresa and Tire Group’s Cassation Request. For instance, the Bridgestone defendants argued that the Demand Letter had not been properly admitted as evidence and that even if it had been considered, the Demand Letter would not have changed the First Superior Court’s decision.<sup>333</sup> With respect to the witness testimony, Bridgestone Corporation and Bridgestone Licensing alleged that “the depositions of the employees of the plaintiff companies about the alleged factors that led to the supposed cessation **or** decrease in the commercialization of a product[] do not constitute proof of damage against the defendants.”<sup>334</sup>

122. Additionally, Bridgestone Corporation and Bridgestone Licensing defended the decision of the First Superior Court on the following basis:

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<sup>332</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), p. 20.

<sup>333</sup> See **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 4.

<sup>334</sup> See **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 6 (emphasis added).

[W]e see that [Appellants] 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 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.**<sup>335</sup>

Bridgestone Corporation and Bridgestone Licensing thus supported the appellate decision on the basis that the First Superior Court had applied Article 217 of the Judicial Code *as they had requested*. This stands in stark contrast to Claimants’ argument in their Memorial that the Supreme Court erred by applying Article 217 of the Judicial Code.<sup>336</sup>

123. Bridgestone Corporation and Bridgestone Licensing also objected to the admissibility of the second basis for Muresa

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<sup>335</sup> **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 8 (emphasis added).

<sup>336</sup> See **Claimants’ Memorial**, ¶¶ 171–77.

and Tire Group’s Cassation Request (*i.e.*, the substantive violation of Articles 1644 and 217). According to the Bridgestone Defendants, the second ground was duplicative of the first ground, and Muresa and Tire Group were inappropriately attempting to bait the Supreme Court into reviewing the First Superior Tribunal’s determination of the probative value of evidence.<sup>337</sup> Bridgestone Corporation and Bridgestone Licensing also reasserted their argument that — contrary to Muresa and Tire Group’s claim — the First Superior Court had appropriately based its decision on Articles 1644 of the Civil Code and 217 of the Judicial Code.<sup>338</sup>

### (iii) Muresa and Tire Group’s Response

124. On 19 September 2013, Muresa and Tire Group filed a response to Bridgestone Corporation and Bridgestone Licensing’s Objection to Admissibility.<sup>339</sup> For some reason, Claimants characterize this submission as a request for “permission to appeal,”<sup>340</sup> when in reality it was a response to the Bridgestone

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<sup>337</sup> See **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), pp. 9–10.

<sup>338</sup> See **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 10.

<sup>339</sup> **Ex. R-0049**, Muresa and Tire Group’s Pleading in Support of the Admission of the Cassation Recourse (19 September 2013).

<sup>340</sup> **Claimants’ Memorial**, ¶ 83.

Defendants' admissibility objections and a brief in support of Muresa and Tire Group's previously-filed Cassation Request.

125. The response contained the following submissions:

a. Muresa and Tire Group demonstrated that they had met the procedural requirements for the submission of a cassation request;<sup>341</sup>

b. They emphasized that there had been errors of law and fact and failures to examine the evidence that demanded a cassation review;<sup>342</sup>

c. Muresa and Tire Group noted that they had been denied compensation for the losses they had incurred as a result of the defendants' actions and threats, including the Demand Letter, which were direct and forceful.<sup>343</sup> Muresa and Tire Group contended that the "series of elements . . . together show the recklessness and damage;"<sup>344</sup>

d. Muresa and Tire Group argued that Bridgestone Corporation and Bridgestone Licensing

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<sup>341</sup> See **Ex. R-0049**, Muresa and Tire Group's Pleading in Support of the Admission of the Cassation Recourse (19 September 2013), pp. 1–2.

<sup>342</sup> See **Ex. R-0049**, Muresa and Tire Group's Pleading in Support of the Admission of the Cassation Recourse (19 September 2013), p. 2.

<sup>343</sup> See **Ex. R-0049**, Muresa and Tire Group's Pleading in Support of the Admission of the Cassation Recourse (19 September 2013), pp. 2–3.

<sup>344</sup> See **Ex. R-0049**, Muresa and Tire Group's Pleading in Support of the Admission of the Cassation Recourse (19 September 2013), p. 6.

had engaged in similar behavior in other countries around the world and did not “skimp in order to push their competitors off the market as a market expansion policy and use their lawyers so that competitors feel the seriousness of their threats;”<sup>345</sup> and

e. Muresa and Tire Group argued that the Supreme Court should review the appellate decision because they had been negatively affected by Bridgestone Corporation and Bridgestone Licensing’s actions, including their refusal to pay the costs of the Opposition Proceeding (as ordered by the Eighth Civil Circuit Court).<sup>346</sup>

#### **(iv) The Supreme Court’s Decision on Admissibility**

126. On 4 December 2013, the Supreme Court admitted the first ground of the Cassation Recourse,<sup>347</sup> but dismissed the second ground.<sup>348</sup>

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<sup>345</sup> See **Ex. R-0049**, Muresa and Tire Group’s Pleading in Support of the Admission of the Cassation Recourse (19 September 2013), pp. 3–4.

<sup>346</sup> See **Ex. R-0049**, Muresa and Tire Group’s Pleading in Support of the Admission of the Cassation Recourse (19 September 2013), p. 4.

<sup>347</sup> **Ex. R-0050**, Decision by the Supreme Court on the Admission of the Cassation Recourse (4 December 2013), pp. 2–4.

<sup>348</sup> **Ex. R-0050**, Decision by the Supreme Court on the Admission of the Cassation Recourse (4 December 2013), p. 4.

127. Claimants mention this dismissal in passing.<sup>349</sup> However, because they omitted any mention of their Objection to Admissibility, they fail to inform the Tribunal that the reason the Supreme Court dismissed the second objection was because it was persuaded by the Bridgestone Defendants' arguments.<sup>350</sup> This directly contradicts Bridgestone Licensing's arguments about the "malice" of the Supreme Court, and even its inference of corruption; why would a Court determined to rule against the Bridgestone Defendants dismiss one of Muresa and Tire Group's two bases for cassation? Further, a denial of justice claim requires an examination of the entire proceeding and not merely a single component.<sup>351</sup>

#### (v) The Parties' Submissions

128. On 3 January 2014, Muresa and Tire Group filed a statement in support of the remaining basis for their Cassation

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<sup>349</sup> See **Memorial**, ¶ 84.

<sup>350</sup> **Ex. R-0050**, Decision by the Supreme Court on the Admission of the Cassation Recourse (4 December 2013), p. 3.

<sup>351</sup> See **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) ("The international delict of denial of justice rests upon a specific predicate, namely, the systemic failure of the State's justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent's legal system as a whole has failed to accord justice to the claimant").

Request.<sup>352</sup> In their statement, Muresa and Tire Group explained that the First Superior Court had ignored the existence of evidence that clearly demonstrated Bridgestone Corporation and Bridgestone Licensing's bad faith, threats, and reckless behavior.<sup>353</sup>

129. On 14 January 2014, Bridgestone Corporation and Bridgestone Licensing filed their response to Muresa and Tire Group's Cassation Request.<sup>354</sup> Bridgestone Corporation and Bridgestone Licensing argued, *inter alia*, that the evidence did not demonstrate that they had acted with recklessness; on the contrary, the Eighth Circuit Court had stated that the Bridgestone defendants had acted in good faith in challenging the registration of the RIVERSTONE trademark.<sup>355</sup>

130. As to the evidence that had been ignored by the First Superior Court, Bridgestone Corporation and Bridgestone Licensing argued that it was contradicted by other evidence,<sup>356</sup> did

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<sup>352</sup> See generally **Ex. R-0051**, Muresa and Tire Group's Statement in Support of the Cassation Recourse (3 January 2014).

<sup>353</sup> See generally **Ex. R-0051**, Muresa and Tire Group's Statement in Support of the Cassation Recourse (3 January 2014).

<sup>354</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing's Response to the Cassation Recourse (14 January 2014).

<sup>355</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing's Response to the Cassation Recourse (14 January 2014), pp. 2-3.

<sup>356</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing's Response to the Cassation Recourse (14 January 2014), p. 8.

not prove recklessness,<sup>357</sup> was untrustworthy,<sup>358</sup> and could not serve as a basis for overturning the First Superior Court’s Decision.<sup>359</sup>

131. With respect to the Demand Letter, which Muresa and Tire Group had continued to reference, Bridgestone Corporation and Bridgestone Licensing regurgitated the arguments that they had made in their Objection to Admissibility and asserted that it had no probative value.<sup>360</sup> Moreover, according to Bridgestone Corporation and Bridgestone Licensing, the First Superior Court had not actually ignored the Demand Letter; instead, the court had “acted correctly by not giving probatory value to it.”<sup>361</sup>

132. This response represents yet another instance in which Bridgestone Corporation and Bridgestone Licensing invoked Article 217 of the Judicial Code — and even *defended* the

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<sup>357</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse (14 January 2014), p. 9.

<sup>358</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse (14 January 2014), p. 10.

<sup>359</sup> See **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse (14 January 2014), p. 12.

<sup>360</sup> **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse (14 January 2014), pp. 4–5.

<sup>361</sup> **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse (14 January 2014), p. 7.

decision of the First Superior Court to apply Article 217 to the facts of the case.<sup>362</sup>

### **(vi) The Supreme Court Judgment**

133. On 28 May 2014, the Supreme Court issued its decision (“**Supreme Court Judgment**”). Two of the three magistrates on the panel joined the majority opinion, and the third magistrate dissented.<sup>363</sup> In its Judgment, the Supreme Court overturned the First Superior Tribunal’s ruling and ordered Bridgestone Corporation and Bridgestone Licensing to pay Muresa and Tire Group USD 5,000,000 in damages in addition to costs.<sup>364</sup> Although Bridgestone Licensing insists that the Judgment is not reasonable, the fact is that the difference between the First Superior Court and Supreme Court’s rulings is not the legal basis for their holdings, but a difference in the probative weight given to

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<sup>362</sup> **Ex. R-0052**, Bridgestone Corporation and Bridgestone Licensing’s Response to the Cassation Recourse (14 January 2014), pp. 4, 9–10 (“[T]he compensation for damages that the plaintiff claims and that was not recognized by the judgment of second instance, comes from the alleged reckless procedural proceeding provided for in Article 217 of the Judicial Code”).

<sup>363</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014).

<sup>364</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014).

the evidence by the different courts — a matter that is entirely within the discretion of a local court.<sup>365</sup>

134. Bridgestone Licensing levels many *post hoc* attacks on the Supreme Court Judgment in the Memorial. In doing so, however, it misrepresents important aspects of the Supreme Court’s analysis and conclusions and omits others. For these reasons, Panama sets forth herein a detailed description of the Judgment.

135. In the Judgment, the Supreme Court first summarized the procedural background and the basis for Muresa and Tire Group’s Cassation Request.<sup>366</sup> The Supreme Court then analyzed the Cassation Request. Based on its review of the decisions of the lower courts, the Supreme Court determined that the First Superior Court’s “general and global way” of referring to evidence did not constitute a “thorough analysis of the evidence”<sup>367</sup> Indeed, the First Superior Court’s analysis consisted of a single paragraph.<sup>368</sup> The Supreme Court thus agreed with Muresa and Tire Group’s argument that the First Superior Court

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<sup>365</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 7.

<sup>366</sup> *See* **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 2–6.

<sup>367</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p.7.

<sup>368</sup> **Ex. R-0037**, Decision of the First Superior Court (23 May 2013), p. 20.

had ignored the evidence.<sup>369</sup> As a result, the Supreme Court determined that it would have “to determine if an appropriate analysis of said evidence supports the Plaintiffs’ claims, thus having an influence on the dispositive part of the challenged Decision.”<sup>370</sup>

136. The Supreme Court set forth the categories of evidence that would be examined, which included evidence that had previously been ignored.<sup>371</sup> However, contrary to Claimants’ assertion in their Memorial,<sup>372</sup> the Supreme Court did not rely upon all of the categories of evidence identified by Muresa and Tire Group as having been previously ignored. For example, the Court declined to rely upon the second category of evidence listed by Muresa and Tire Group — *i.e.*, the certifications of sales authored by the Certified public accountant.<sup>373</sup>

137. The Supreme Court concluded that it would analyze all of the evidence, as it “was duly and timely submitted to the

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<sup>369</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p.7.

<sup>370</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p.7.

<sup>371</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 8–13.

<sup>372</sup> **Claimants’ Memorial**, ¶ 88 (stating that the Supreme Court determined that evidence described in paragraph 79 of Memorial, **which included the certifications**, had been ignored by the First Superior Court).

<sup>373</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 8–13.

Court[.]”<sup>374</sup> On the basis of this cumulative review, the Supreme Court held as follows:

a. Some of the evidence, including the Plaintiffs’ expert report, demonstrated the great importance that the RIVERSTONE-branded tires had for Muresa and Tire Group, as they generated higher sales and profits than other tires;<sup>375</sup>

b. The Plaintiffs’ witness statements “clearly and consistently 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>376</sup>

c. Muresa and Tire Group’s allegation that the Bridgestone Defendants had intimidated them by threatening legal actions in other markets was substantiated by the Demand Letter, which was included with both the report of the court-appointed expert and Muresa and Tire Group’s expert report.

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<sup>374</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 12–13.

<sup>375</sup> *See* **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 14–15.

<sup>376</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 15.

In the Demand Letter, the Bridgestone Defendants had “added, without any legal basis, at least under Panamanian law, that the Plaintiffs should abstain from selling the product;”<sup>377</sup> and

d. The evidence demonstrated that Bridgestone Corporation and Bridgestone Licensing “went to extremes to oppose the registration of a product brand that was conveniently commercially competitive. Then, after spending a significant amount of time in litigation, they withdrew the appeal they had filed against an adverse Decision.”<sup>378</sup>

138. Because the Supreme Court found that the First Superior Court had ignored evidence that would have changed its decision,<sup>379</sup> the Supreme Court held that there had been a “violation of Article 780, Judicial Code, and a violation of the provisions of Article 1644, Civil Code, in accordance with Article 217, Judicial Code.”<sup>380</sup>

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<sup>377</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 15.

<sup>378</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 16.

<sup>379</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 17.

<sup>380</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 13.

139. Claimants fail to note that the Supreme Court rejected one of Muresa and Tire Group's claims. Muresa and Tire Group alleged that the lower courts' decisions amounted to a violation of Article 1 of Law No. 57 of 1 September 1978, which recognizes the power of certified public accountants to attest to the veracity of financial documentation, but the Supreme Court rejected this claim.<sup>381</sup>

140. Claimants also fail to address a critical aspect of the Judgment relating to its scope and effect. The Court took pains to make clear that its findings were limited to the particular circumstances presented in this case. Specifically, it held:

**It is not this Chamber's intention to say that initiating a legal action to claim a right may be interpreted as a synonym for the damages that may be caused to a plaintiff - thus creating a coercion element for anyone who feels entitled to a claim and to use the means provided by the law to do so. However, in the present case, where there is strong evidence that the Plaintiffs/Appellants had a legal right to market a product, that such product was also substantially important to generate income and, conveniently, a commercially competitive item, such a situation may be key for anyone who, with no strong legal grounds and the will**

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<sup>381</sup> See generally *Ex. R-0034*, Decision of the Supreme Court of Panama (28 May 2014).

to cause damages to such commercial competitiveness, **wishes to jeopardize that party's dominant market presence.**

This Chamber considers that the conduct by Respondents BRIDGESTONE LICENSING SERVICES INC. and BRIDGESTONE CORPORATION is precisely a reflection of such a situation. The Respondents behavior cannot be held as good faith behavior; indeed, it is negligent behavior. The Respondents filed an action lacking in legal grounds against the current Plaintiffs in the present Ordinary Process by opposing the registration of the RIVERSTONE tire brand. Such action caused irreversible damages to the key part of the Plaintiffs' business activities.<sup>382</sup>

141. This clear and explicit statement about the fact-specific circumstances driving the Court's decision stands in stark contrast to Bridgestone Licensing's bald assertions in the Memorial that the Supreme Court's ruling would affect or prevent all future trademark opposition proceedings. For instance, Bridgestone Licensing asserted in the Memorial that the Supreme Court found that "simply exercising legal rights in bringing trademark oppositions proceedings [amounts to] reckless

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<sup>382</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 16–17.

behavior.”<sup>383</sup> In February of 2015, Mr. Kingsbury made a similar statement during a USTR Special 301 Hearing. He testified that “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>384</sup> These characterizations of the Supreme Court Judgment as a general attack on trademark opposition proceedings are entirely false. The Supreme Court expressly disclaimed the notion that the mere filing of an opposition proceeding generated tort liability and decided on the basis of cumulative evidence of, *inter alia*, the Demand Letter, the Trademark Opposition Proceeding, the fears of Muresa personnel, and the withdrawal of the appeal of the Trademark Opposition Proceeding, that the Bridgestone Defendants had abused their rights and acted in bad faith.<sup>385</sup>

### (vii) The Mitchell Dissent

142. Magistrate Harley J. Mitchell disagreed with the decision of the Court and issued a dissenting opinion. Much of Bridgestone Licensing’s denial of justice claim appears to be based

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<sup>383</sup> **Memorial**, ¶ 94; *see also id.*, ¶ 109 (stating that the “court determined that simply filing opposition proceedings was unlawful and ‘reckless,’ and ordered damages to be paid”), ¶¶ 25(p), 48, 113, 197, 215.

<sup>384</sup> *See Ex. C-0032*, Written Comments and Hearing Statement of Bridgestone Americas Inc., 2015 Special 301 Public Hearing (24 February 2015), p. 3 (emphasis added).

<sup>385</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp.14–17.

off of the text of Magistrate Mitchell’s dissenting opinion.<sup>386</sup> These striking similarities show that the denial of justice claim is no more than an argument about the misapplication of domestic law. However, Bridgestone Licensing omits portions of the dissenting opinion that contradict aspects of its denial of justice claim.

143. In the opinion, Magistrate Mitchell stated that he disagreed with:

a. The Court’s determination that the Demand Letter had been properly admitted and its interpretation of the Demand Letter as threatening;<sup>387</sup>

b. The finding by the majority that the Bridgestone defendants’ behavior met the standard required for liability under Article 217 of the Judicial Code;<sup>388</sup> according to the dissent, neither the Bridgestone defendants’ warning of the filing of

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<sup>386</sup> Compare **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 19–26 (Mitchell dissenting) *with*, **Claimants’ Memorial**, ¶¶ 185–190 (arguing that the Demand Letter had not been properly admitted), ¶ 204 (arguing that the Court had relied on witness evidence that was contradicted by other evidence), ¶ 205 (stating that the Court had not conducted any assessment of the amount of damages).

<sup>387</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 19–20 (Mitchell dissenting).

<sup>388</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 21 (Mitchell dissenting).

an opposition action or the withdrawal of the appeal were reckless;<sup>389</sup> and

c. The majority's alleged failure to compare the witness statements with contradictory documentary evidence;<sup>390</sup>

144. As to causation, Magistrate Mitchell noted that various pieces of evidence demonstrated that the decrease in sales was a result of contingency plans implemented by Muresa and Tire Group in response to fears of a seizure, though it never occurred.<sup>391</sup> In regard to the damages awarded, Magistrate Mitchell argued that the majority had not adequately supported its determination.<sup>392</sup>

145. Importantly, Magistrate Mitchell never alleged or suggested that there had been any corruption in the process. Additionally, Magistrate Mitchell never argued that the Judgment “show[ed] clear ignorance on the part of the Court,”<sup>393</sup> as Bridgestone Licensing now argues. In fact, while still disagreeing with the majority's finding on recklessness, and providing examples of reckless conduct, Magistrate Mitchell admitted that

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<sup>389</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 24–25, (Mitchell dissenting).

<sup>390</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 22, (Mitchell dissenting).

<sup>391</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 23–24, (Mitchell dissenting).

<sup>392</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), pp. 25–26, (Mitchell dissenting).

<sup>393</sup> **Claimants' Memorial**, ¶ 215.

Panamanian “legislation does not have a restrictive notion on what is abuse of a right or recklessness.”<sup>394</sup>

146. Moreover, Bridgestone Licensing now argues that the Supreme Court Judgment was arbitrary because, *inter alia*, it based its findings on the notion that tire sales had ceased, while the evidence demonstrated otherwise.<sup>395</sup> However, Magistrate Mitchell explicitly noted that the majority based its decision on the evidence of a *decrease* in sales: “[i]n the lawsuit, the Plaintiffs stated that owing to the opposition proceeding, they stopped selling the RIVERSTONE product. However, the decision states that the damages were caused by a decrease in sales. Therefore, the Plaintiffs never stopped selling the product.”<sup>396</sup>

147. Magistrate Mitchell thus disagreed with the majority’s conclusions. That a dissenting opinion expresses disagreements is a truism. However, neither the existence nor the substance of the dissenting opinion support Bridgestone Licensing’s claim that the Supreme Court Judgment reflects a failure of the entire Panamanian legal system (*i.e.*, its denial of justice claim). Indeed, in some respects, Magistrate Mitchell’s dissenting opinion directly contradict this claim, because it

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<sup>394</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 21 (Mitchell dissenting).

<sup>395</sup> **Memorial**, ¶ 204.

<sup>396</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 22, (Mitchell dissenting) (emphasis omitted).

demonstrates vigorous debate among the three justices hearing this case. These are hardly the hallmarks of a decision that no competent judge seeking to apply Panamanian law could have reached.<sup>397</sup>

**e. Bridgestone’s Post-Judgment Efforts**

**(i) Bridgestone’s Motion for Clarification and Modification**

148. On 16 June 2014, Bridgestone Corporation and Bridgestone Licensing filed a Motion for Clarification and Modification of the Supreme Court Judgment (“**Motion for Clarification and Modification**”), arguing that the damages calculations presented by Muresa and Tire Group’s experts were incorrect.<sup>398</sup> As a result, they asked the Supreme Court to modify the Judgment to establish the method of calculating damages and award an unspecified sum.<sup>399</sup>

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<sup>397</sup> Compare **First Arjona Report**, ¶ 115 with **First Lee Report**, ¶¶ 111–170.

<sup>398</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).

<sup>399</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. 6 (“the Honorable Chamber must have declared a judgment in abstract and must have set the basis on which to make the respective liquidation”).

149. On 20 June 2014, Muresa and Tire Group filed a response to the Motion for Clarification and Modification.<sup>400</sup> In their response, Muresa and Tire Group defended the experts' damages calculations, stating, *inter alia*, that “the expert report had the purpose of demonstrating the decrease in sales of RIVERSTONE tires suffered by Muresa,” and that it demonstrated “that there was a decrease in sales” during the relevant period.<sup>401</sup> Muresa and Tire Group also argued that under Article 1123 of the Judicial Code, clarifications are only proper when the operative part of the judgment is ambiguous or contradictory, which was not the case with the Supreme Court's Judgment.<sup>402</sup>

150. On 28 November 2014, the Supreme Court rejected the Motion for Clarification and Modification.<sup>403</sup> In a unanimous ruling, the Supreme Court held that Bridgestone Corporation and Bridgestone Licensing were inappropriately asking it to reconsider their prior evaluation of the evidence.<sup>404</sup>

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<sup>400</sup> **Ex. R-0054**, Muresa and Tire Group's Opposition to the Motion for Clarification and Modification (20 June 2014).

<sup>401</sup> **Ex. R-0054**, Muresa and Tire Group's Opposition to the Motion for Clarification and Modification (20 June 2014), pp.2-3.

<sup>402</sup> **Ex. R-0054**, Muresa and Tire Group's Opposition to the Motion for Clarification and Modification (20 June 2014), p. 4.

<sup>403</sup> **Ex. R-0055**, Decision by the Supreme Court of Panama on the Motion for Clarification and Modification (28 November 2014).

<sup>404</sup> *See* **Ex. R-0055**, Decision by the Supreme Court of Panama on the Motion for Clarification and Modification (28 November 2014), pp. 2-3.

151. Although Claimants mention this procedure in their Memorial, they fail to note that one of the signatories of this unanimous ruling was Justice Harley Mitchell, the dissenting magistrate. In sum, even the magistrate who believed that the Court had not sufficiently analyzed the issue of damages refused to modify the Supreme Court Judgment.

**(ii) Bridgestone’s Request for Review**

152. On 30 September 2014, prior to the Supreme Court’s ruling on the Motion for Clarification and Modification, Bridgestone Corporation and Bridgestone Licensing filed a Recourse for Review of the Supreme Court Judgment (“**Recourse for Review**”).<sup>405</sup> In their Memorial, Claimants mislabel a different post-Judgment filing as the Recourse for Review.<sup>406</sup>

153. In their Recourse for Review, Bridgestone Corporation and Bridgestone Licensing raised the following arguments:

- a. The Supreme Court improperly considered the Demand Letter because the letter was not

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<sup>405</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014).

<sup>406</sup> See **Memorial**, ¶ 105 (identifying a filing dated 10 December 2014 and supporting pleadings as the “Recourse for Review”).

properly admitted into evidence in accordance with procedural requirements;<sup>407</sup>

b. While the Supreme Court considered the actions of Bridgestone Corporation and Bridgestone Licensing “in **warning** other corporations about the filing of proceedings opposing the registration of marks in other countries” to be reckless, the Bridgestone Defendants had been unable to introduce evidence that they had prevailed in such legal actions in other countries.<sup>408</sup> The Bridgestone Defendants attached a copy of a favorable court judgment in Argentina as evidence that the companies initiated the Opposition Proceeding in Panama in good faith;<sup>409</sup> and

c. The Supreme Court judgment violated the *res judicata* of the Eighth Circuit Court’s ruling that

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<sup>407</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), pp. 6-8.

<sup>408</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), p. 8.

<sup>409</sup> *See* **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), p. 8.

found that Bridgestone Corporation and Bridgestone Licensing had acted in good faith.<sup>410</sup>

154. It is not surprising that Claimants ignored this pleading in their Memorial. First, once again, they were given an opportunity to present their arguments with respect to the Demand Letter. Second, in this pleading, the Bridgestone Defendants explicitly admitted that they “warn[ed]” L.V. International of the potential opposition proceedings in other countries.<sup>411</sup> This contradicts Claimants’ insistence in their Memorial that the Demand Letter was not a threat.<sup>412</sup>

155. The Supreme Court denied the Recourse for Review on 7 November 2014.<sup>413</sup>

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<sup>410</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>411</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing’s Recourse for Review of the Supreme Court Decision (30 September 2014), p. 8.

<sup>412</sup> *See Memorial*, ¶ 3 (stating that the Demand Letter “related only to U.S. court proceedings and U.S. trademarks”), ¶ 32 (citing Ms. Jacobs-Meadway for the proposition that the Demand Letter was not “abusive, threatening, intimidating, or otherwise inappropriate”).

<sup>413</sup> **Ex. R.-0073**, Decision of the Supreme Court on the Recourse for Review (7 November 2014).

**(iii) Bridgestone’s Appeal of the Request for Review**

156. On 16 December 2014, Bridgestone Corporation and Bridgestone Licensing attempted to appeal the 7 November 2014 denial on the basis that Article 1204 of the Judicial Code does not limit review recourses to lower court judgments.<sup>414</sup> In their Memorial, Claimants incorrectly represent this appeal as the Recourse for Review.

157. On 16 March 2016, the Supreme Court denied Bridgestone Licensing’s appeal and observed — on the basis of Panamanian law — that review recourses were not available for Supreme Court judgments.<sup>415</sup>

**(iv) Bridgestone’s Motion for Clarification**

158. On 29 March 2016, Bridgestone Corporation and Bridgestone Licensing filed a Motion for Clarification of the Supreme Court’s denial of their request for review (“**Motion for**

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<sup>414</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).

<sup>415</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. 7.

**Clarification**”). On 9 May 2016, the Supreme Court denied the Motion for Clarification.<sup>416</sup>

## **2. Bridgestone Licensing’s Criticisms of the Judgment Are Baseless**

159. This comprehensive summary of the arguments, evidence, and decisions relevant to the local court proceedings is necessary to set the record straight. It also demonstrates that Bridgestone Licensing’s arguments about the application of Panamanian law — which are in any event capable of substantiating a denial of justice claim — are incorrect. These arguments are thoroughly debunked in the following chart:

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<sup>416</sup> See **Ex. R-0059**, Decision by the Supreme Court of Panama Denying the Motion for Clarification (9 March 2016).

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
<p>The Supreme Court applied Article 217 to Muresa and Tire Group's claims, even though Muresa and Tire Group did not invoke Article 217.<sup>417</sup></p>	<p>Bridgestone Licensing first invoked Article 217 in its response to Muresa and Tire Group's complaint and requested that the court apply Article 217.<sup>418</sup> The Bridgestone Defendants again invoked Article 217 as the "govern[ing]" law during the appeal proceeding.<sup>419</sup> The Bridgestone Defendants subsequently praised the appellate court for its application of Article 217 and asked the Supreme Court to likewise apply Article 217.<sup>420</sup> Bridgestone Licensing's current position thus represents a total about-face. Furthermore, pursuant to the principle of <i>iura novit curia</i> principle, a court can apply the law it deems relevant to allegations of abuse of process, which in the case the court did by applying Article 217.<sup>421</sup></p>

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<sup>417</sup> See **Memorial**, ¶ 169(a).

<sup>418</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2.

<sup>419</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>420</sup> See **Ex. R-0047**, Bridgestone Corporation and Bridgestone Licensing’s Objection to the Admission of the Cassation Recourse (16 September 2013), p. 8.

<sup>421</sup> See **First Lee Report**, ¶¶ 72–76.

Bridgestone Licensing’s Complaints	The Reality, As Demonstrated by the Evidence
<p>“The Supreme Court Judgment found BSLs and BSJ liable simply for having exercised their right to claim protection from the courts in relation to the application for registration of a potentially confusing similar trademark.”<sup>422</sup></p>	<p>The Supreme Court did not penalize the Bridgestone Defendants simply for initiating the Trademark Challenge Proceeding; it found them liable for abusive conduct under Panamanian tort law based on the totality of the circumstances.<sup>423</sup> The Supreme Court also expressly disclaimed the notion that the mere filing of an opposition proceeding created liability in tort and explicitly limited its findings to the specific circumstances of this case.<sup>424</sup></p>
<p>The Supreme Court considered the Bridgestone Defendants’ conduct in other countries (<i>i.e.</i>, the Demand Letter), but the Bridgestone Defendants did not have an opportunity to properly respond to this evidence “because it was not made in Muresa’s [original] complaint.”<sup>425</sup></p>	<p>The Demand Letter was submitted with the Plaintiff’s expert report <i>and with the court-appointed expert’s report</i> during the first instance of the Civil Proceeding, on 24 May 2010.<sup>426</sup> Notably, the regular rules of evidence do not apply to documents submitted with expert reports under Panamanian law.<sup>427</sup> The Bridgestone Defendants thus had ample time to address this evidence before the Supreme Court Judgment of 28 May 2014. Furthermore, (i) Bridgestone Licensing first raised the subject of its trademark opposition proceedings abroad, and (ii) it did so during the first instance on 13 October 2008.<sup>428</sup> Bridgestone Licensing cannot now claim that it was surprised by the relevance of or did not have time to submit evidence related to its conduct abroad.<sup>429</sup></p>

<sup>422</sup> **Memorial**, ¶ 197.

<sup>423</sup> *See Ex. R-0034*, Decision of the Supreme Court of Panama (28 May 2014), p. 16; *see also*, **First Lasso de la Vega Ferrari Report**, ¶¶ 75–79.

<sup>424</sup> *See Ex. R-0034*, Decision of the Supreme Court of Panama (28 May 2014), pp. 16–17; *see also* **First Lasso de la Vega Ferrari Report**, ¶¶ 75–79; **First Jacobson Report**, ¶ 67–68.

<sup>425</sup> **Memorial**, ¶ 196; *see also id.* at ¶ 195; **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 15 (stating that the Demand Letter is located in “pp. 2622-2628 and pp. 2955-2958” of the record, which respectively correspond to supporting documentation

[FOOTNOTE CONTINUED ON NEXT PAGE]

Bridgestone Licensing’s Complaints	The Reality, As Demonstrated by the Evidence
The Supreme Court ruled in favor of Muresa and Tire Group, despite the fact that the Bridgestone Defendants had presented evidence in support of their defense. <sup>430</sup>	In most cases, the parties to a litigation will present contradictory evidence; it is within the discretion of a domestic court to weigh that evidence and reach a decision in favor of one party.
The Supreme Court relied on the Plaintiff’s allegations that Muresa and Tire Group had been forced to halt sales of tires, which was inconsistent with the documentary evidence. <sup>431</sup>	The Supreme Court actually found — on the basis of the expert opinions and documentary evidence — that RIVERSTONE tire sales had decreased during the relevant period, which substantiated the Plaintiff’s claim of loss. <sup>432</sup> This is confirmed by Magistrate Mitchell in his dissenting opinion. <sup>433</sup>

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

provided by the court-appointed and plaintiffs’ experts); **First Lee Report**, ¶ 90.

<sup>426</sup> See **Ex. C-0162**, Accounting expert report of Mr. José Antonio Aguilar De Sedas and Ms. Psiquies De León (24 May 2010), page 2; **First Lee Report**, ¶¶ 101–07.

<sup>427</sup> **First Lee Report**, ¶¶ 87–107.

<sup>428</sup> See **Ex. R-0045**, Answer of Bridgestone Licensing to the Civil Torts Claim (13 October 2008), p. 2.

<sup>429</sup> See e.g., **First Lee Report**, ¶¶ 87–107; see also **First Lasso de la Vega Ferrari Report**, ¶¶ 93–101.

<sup>430</sup> See **Memorial**, ¶ 203.

<sup>431</sup> See **Memorial**, ¶¶ 204, 213.

<sup>432</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>433</sup> See **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 22 (Mitchell dissenting).

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
<p>“The amount of damages was not assessed at all” by the Supreme Court.<sup>434</sup></p>	<p>By the time the case reached the Supreme Court, there was an extensive record of documentary and expert evidence on the subject of damages, upon which the Supreme Court relied. As affirmed by Former Supreme Court Magistrate Lee, the Supreme Court does examine damages and its analysis is typical for a cassation proceeding.<sup>435</sup> Further, the fact that the Judgment rendered was for exactly USD 5 million results from the legal restriction that a judgment may not exceed the amount sought in the complaint. The record contained evidence of damages in excess of USD 5 million,<sup>436</sup> but the Supreme Court capped them.</p>

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<sup>434</sup> **Memorial**, ¶ 205.

<sup>435</sup> See **First Lee Report**, ¶¶ 160–71; **Ex. R-0070**, Decision of the Third Administrative Chamber of the Supreme Court of Justice of Panama (22 June 2004) (Authoring Magistrate: Adán Arnulfo Arjona L.); **Ex. R-0071**, Decision of the Third Administrative Chamber of the Supreme Court of Justice of Panama (16 January 2008) (Authoring Magistrate: Adán Arnulfo Arjona L.); (Authoring Magistrate: Adán Arnulfo Arjona L.); **Ex. R-0072**, Decision of the First Civil Chamber of the Supreme Court of Justice of Panama (30 July 2010) (Authoring Magistrate: Harley J. Mitchell D.)

<sup>436</sup> **First Lee Report**, ¶ 163.

Bridgestone Licensing's Complaints	The Reality, As Demonstrated by the Evidence
<p>The Supreme Court relied upon the Demand Letter, even though the Letter: (i) was not properly authenticated or verified; (ii) was not properly admitted; (iii) was not sent by Bridgestone Corporation or Bridgestone Licensing; (iv) was submitted in a foreign language; and (v) was not relevant.<sup>437</sup></p>	<p>Bridgestone Licensing's attempts to complain about the admission and relevance of the Demand Letter represent precisely the types of appeal arguments that are not denial of justice claims. In any event, Bridgestone Licensing: (i) does not — and cannot — dispute the authenticity of the Letter, as the Supreme Court found;<sup>438</sup> (ii) failed to mention that the Demand Letter was submitted with the court-appointed expert's report; (iii) cannot deny that the parent company and its subsidiaries are considered a single corporate family;<sup>439</sup> (iv) admits that the Letter was accompanied by a translation;<sup>440</sup> and (v) fails to mention that the Bridgestone Defendants admitted that the Letter was a “warning,”<sup>441</sup> which is clearly relevant to the charges of tortious conduct (including anti-competitive threats and warnings). In any event, the articles invoked by Bridgestone Licensing with respect to the Demand Letter do not apply to the evidence that experts provide because they consider it relevant to their report,<sup>442</sup> and Bridgestone Licensing had an opportunity to cross-examine the experts on the subject of the Letter.<sup>443</sup></p>

<sup>437</sup> **Memorial**, ¶ 193.

<sup>438</sup> **Ex. R-0034**, Decision of the Supreme Court of Panama (28 May 2014), p. 12–13.

<sup>439</sup> *See Request for Arbitration*, ¶ 1 (“Together, BSLS, BSAM and BSJ form part of the Bridgestone Group of companies (collectively, ‘Bridgestone’)”).

<sup>440</sup> **Memorial**, ¶ 190.

<sup>441</sup> **Ex. R-0056**, Bridgestone Corporation and Bridgestone Licensing's Recourse for Review of the Supreme Court Decision (30 September 2014), p. 8.

<sup>442</sup> *See First Lee Report*, ¶¶ 87–107.

<sup>443</sup> *See Ex. C-0198*, Interrogatory of Jose Antonio Aguilar De Sedas and Psiques De Leon, pp. 11–12; *see also First Lee Report*, ¶ 95.

## D. Conclusion

160. In sum, Bridgestone Licensing’s denial of justice claim amounts to impermissible appeal. Bridgestone Licensing asserts that “the Supreme Court’s understanding and application of Panamanian law was wrong.”<sup>444</sup> If true, this would not be relevant; a denial of justice requires a violation of *international* law. In any event, although it is not necessary for the purposes of this claim, Panama has provided a detailed account of the proceedings so as to correct Bridgestone Licensing’s many misrepresentations. This account demonstrates that the Supreme Court did not in fact misapply Panamanian law.

## IV. CLAIMANTS’ DAMAGES CASE FAILS

161. To award damages, the Tribunal must first determine that there has been an internationally wrongful act.<sup>445</sup> However, Panama has not breached its obligations under the TPA. For this reason alone, Claimants cannot recover damages.

162. Nonetheless, in the unlikely event that the Tribunal considers that Panama has breached Article 10.3, 10.4, or 10.5 of

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<sup>444</sup> **Memorial**, ¶ 214.

<sup>445</sup> See **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 3 to Art. 31 (Cambridge University Press, 2002) (quoting the *Chorzów* Judgment).

the TPA, Panama provides the Tribunal below with the proper framework for analyzing damages in this case.

163. The TPA does not specify the standard of relief that applies to the breaches asserted by Claimants. Consequently, the applicable standard is the customary international law standard set forth in Article 31 of the Articles on State Responsibility.<sup>446</sup> Article 31 provides: “The responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act.”<sup>447</sup> The requirement of full reparation is based on the PCIJ’s Judgment in the case concerning *The Factory at Chorzów*, in which the Permanent Court stated that a “responsible State must endeavour to wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>448</sup>

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<sup>446</sup> **RLA-0027**, James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, Art. 55 (Cambridge University Press, 2002) (explaining that the Articles are understood to apply in the absence of *lex specialis*).

<sup>447</sup> **RLA-0027**, James Crawford, The International Law Commission’s Articles On State Responsibility: Introduction, Text And Commentaries, Art. 31 (Cambridge University Press, 2002).

<sup>448</sup> **RLA-0027**, James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, Comment 4 to Art. 31 (Cambridge University Press, 2002) (quoting the *Chorzów* Judgment) (“The general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e. as an obligation of the responsible State **resulting from the breach**”); *see also id.*, Comment 6

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164. While Claimants agree that the applicable standard is that set forth in Article 31 and the *Chorzów* Judgment,<sup>449</sup> their analysis ends there. A claimant must do more, however, than cite the customary international law standard and assert conclusory statements about the amounts owed. Instead, Claimants bear the burden<sup>450</sup> of establishing three elements:

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

to Art. 31 (differentiating between “an internationally wrongful act” and “damage to a protected interest”).

<sup>449</sup> See **Memorial**, ¶ 226–227.

<sup>450</sup> **RLA-0070**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, (Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007), ¶ 58 (Fortier, Schwebel, El Kholy) (“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 (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”).

- a. **First**, Claimants must demonstrate that they have suffered a financially assessable injury.<sup>451</sup> As affirmed in the commentary to the Articles on State

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<sup>451</sup> 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), ¶ 232 (Berman, Veeder, Mourre) (stating that before the evaluation of damage, a claimant has the burden of “showing the precise nature of the injury, causation, and damage itself”); **RLA-0074**, *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19 (Award, 24 November 2010), ¶ 619 (Mourre, Chillón Medina, von Wobeser) (“La responsabilidad internacional del Estado por violación de las obligaciones previstas por el TBI no puede fundamentarse en supuestos hipotéticos”); see also **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. The 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-0077**, *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP America Production Company, Pan American Sur SRLA, Pan American Fuegoína, SRLA and Pan American Continental SRLA v. The Argentine Republic*, ICSID Case No. ARB/04/8 (Decision on Preliminary Objections, 27 July 2006), ¶ 178 (Caflisch, Stern, van den Berg) (holding that even if a tribunal were to exercise jurisdiction over hypothetical claims, at damages stage of the proceeding “damage that remains contingent or hypothetical . . . will have to be ruled out”); **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 5 to Art. 31 (Cambridge University Press, 2002) (“‘Material’ damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms”).

Responsibility, an “injury” does not include “merely abstract concerns.”<sup>452</sup> Instead, Claimants must prove that their injury “is assessable in financial terms;”<sup>453</sup>

b. *Second*, Claimants must prove that the alleged breach of the TPA actually *caused* the injury,<sup>454</sup> and

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<sup>452</sup> **RLA-0027**, James Crawford, *The International Law Commission’s Articles On State Responsibility: Introduction, Text And Commentaries*, Comment 5 to Art. 31 (Cambridge University Press, 2002)

<sup>453</sup> **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 5 to Art. 31 (Cambridge University Press, 2002) (“‘Material’ damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms”).

<sup>454</sup> **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Art. 31 (Cambridge University Press, 2002) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”) (internal numbering omitted); *see also*, **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 9 to Art. 31 (Cambridge University Press, 2002) (“Paragraph 2 [of Article 31] addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only ‘[i]njury ... caused by the internationally wrongful act of a State’ for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all

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c. **Third**, Claimants bear “[t]he burden of establishing by reliable evidence the quantum of damages or compensation.”<sup>455</sup>

165. Claimants have failed to satisfy *any* of these three requirements.

166. As Ripinsky notes, “It is . . . crucial to identify precisely the asset or assets to be valued.”<sup>456</sup> Previous tribunals have clearly assessed damages to different investments separately.<sup>457</sup> As the Tribunal is aware, Bridgestone Licensing’s

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consequences flowing from an internationally wrongful act”); **RLA-0078**, C. Dugan, D. Wallace, N. Rubins, B. Sabahi, INVESTOR-STATE ARBITRATION, 597 (Oxford University Press 2008).

<sup>455</sup> **RLA-0118**, AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, ICSID Case No. ARB/01/6 (Award, 7 October 2003), ¶ 12.1.10 (Nariman, Bernadini, Vukmir); see also, **RLA-0105**, Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4 (Award, 16 June 2010), ¶ 13.80 (Fortier, Magallón Gómez, Veeder) (“It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle *actori incumbit probatio* is ‘the broad basic rule to the allocation of the burden of proof in international procedure’”); **RLA-0082**, The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3 (Award, 6 May 2013), ¶ 289 (Berman, Francis Donovan, Lalonde) (stating that “actual economic loss or damage . . . is subject to the usual rules of proof”).

<sup>456</sup> **RLA-0168**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW 189 (British Institute of International Comparative Law, 2008).

<sup>457</sup> See e.g., **RLA-0164**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (Award, 28 September 2007), ¶¶

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investment is its ownership of the FIRESTONE trademark in Panama, and Bridgestone Americas' investment consists of its licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama. Indeed, the Tribunal made clear that the valuation of each of these investments is entirely distinct: the value of the ownership of a trademark is based on the collection of royalties, whereas the value of a trademark license is based on “the fruits of the exploitation of the trademark” (*i.e.*, profits from the sales of trademark-branded products).<sup>458</sup> Yet Claimants decided not to differentiate their distinct damages claims. That has left Panama with the task of disentangling their respective damages claims and addressing each baseless claim, in turn.

167. Accordingly, this section is organized as follows:

- a. **Section IV.A** deciphers Claimants' damages claims, identifying which claims belong to which Claimant;

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407–79(Vicuña, Lalonde, Morelli Rico) (separately analyzing the injury to separate investments, and discussing how variables affect the individual investments in a different manner); *see also* **RLA-0165**, *Venezuela Holdings B.V. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 (Award, 9 October 2014), ¶¶ 307, 385 (Guillaume, Kaufmann-Kohler, El-Kosheri) (separately analyzing two different investments and valuing one using the discount cash flow method and measuring the second by the claimant's actual investment).

<sup>458</sup> **Decision on Expedited Objections**, ¶ 219.

b. **Section IV.B** addresses Claimants’ request for recovery of damages in connection with their investments outside of Panama;

c. **Section IV.C** demonstrates that Bridgestone Americas’ damages claim fails;

d. **Section IV.D** demonstrates that Bridgestone Licensing’s first damages claim for diminution of value fails; and

e. **Section IV.E** demonstrates that Bridgestone Licensing’s second damages claim for the amount awarded by Supreme Court Judgment fails.

#### **A. Deciphering Claimants’ Damages Claims**

168. As a preliminary matter, Claimants’ damages claims necessarily differ because of the distinct nature of their respective “investments.” On the one hand, Bridgestone Licensing may only assert claims for damage allegedly suffered in connection with its ownership of the FIRESTONE trademark. As stated by the Tribunal in its Decision on Expedited Objections, Bridgestone Licensing’s interest in the FIRESTONE trademark is “restricted to the royalties that it was to receive from B[ridgestone Americas].”<sup>459</sup> On the other hand, Bridgestone Americas may only assert claims for damage allegedly suffered in connection with its

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<sup>459</sup> **Decision on Expedited Objections**, ¶ 242.

licenses to use the FIRESTONE and BRIDGESTONE trademarks. As stated by the Tribunal, its interest in these licenses is limited to the profits from the sales of products bearing the Panamanian trademarks.<sup>460</sup>

169. Claimants assert two distinct damages claims. *First*, both Claimants seek compensation for the alleged diminution of value of their investments. *Second*, Bridgestone Licensing asserts a claim for the amount of the damages for which Bridgestone Corporation and Bridgestone Licensing were held jointly and severally liable in the Supreme Court Judgment (*i.e.*, USD 5.431 million).

### 1. Claimants' Joint Damages Claim

170. Claimants' principal damages claim is for the alleged diminution of the "value of the trademark rights owned by BSLs and BSAM."<sup>461</sup> Claimants allege that the Panamanian Supreme Court's judgment caused a decrease in value of Bridgestone Licensing's ownership of the FIRESTONE trademark and Bridgestone Americas' licenses to use the BRIDGESTONE and FIRESTONE trademarks.<sup>462</sup> Claimants calculate these

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<sup>460</sup> See **Decision on Expedited Objections**, ¶ 185 (describing "profits earned from sales under the FIRESTONE Trademark LICENSE of tires bearing the FIRESTONE mark" as "fruits of an investment").

<sup>461</sup> **Memorial**, ¶ 230.

<sup>462</sup> See **Memorial**, ¶ 230.

supposed damages into a fantastical range, beginning at USD 498,293 and extending to USD 12,812,952.<sup>463</sup>

171. The premise underlying this argument is fundamentally flawed. Claimants' theory is that "the right of a trademark is . . . the right to exclude others from using it,"<sup>464</sup> and they assert that "if the ability to exclude is diminished, the value of the trademark is diminished."<sup>465</sup> This, however, directly contradicts the Tribunal's determination that the value of a licensed trademark for the trademark "owner will reflect the amount of royalties" that the owner receives from the licensee.<sup>466</sup> In other words, for the owner of a trademark that does not itself use the trademark, the value of a trademark is the discounted cash flow of the stream of royalties that will be generated by licensing.<sup>467</sup>

172. Instead of focusing on sales and royalties, Claimants pursue a tortured and flawed reasoning process to construct their multi-million dollar damages claim. According to Claimants, domestic court decisions can impact the value of a trademark, including by impairing the exclusivity of the

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<sup>463</sup> **Memorial**, ¶ 233.

<sup>464</sup> **Memorial**, ¶ 233.

<sup>465</sup> **Memorial**, ¶ 233.

<sup>466</sup> **Decision on Expedited Objections**, ¶ 219.

<sup>467</sup> *See First Shopp Report*, ¶¶ 42, 45 (stating that measuring a royalty stream generated by licensing, and discounting the stream back to present value is an appropriate way to measure the value of a licensed trademark).

trademarks.<sup>468</sup> For that reason, in Claimants’ view, the Supreme Court Judgment created uncertainty for “*potential*” purchasers, investors, sublicensees, and acquirers.<sup>469</sup> Specifically, Claimants believe that these hypothetical, future investors might supposedly be concerned about how “*future courts*”<sup>470</sup> might resolve disputes involving trademark registrations *or* tort claims by existing competitors.<sup>471</sup> Claimants posit — without reason or support — that these hypothetical investors “*would likely* be aware of the Supreme Court Judgment” and would thus “likely” appreciate and act on the basis of the associated uncertainty of increased competition from existing competitors.<sup>472</sup> In turn, this uncertainty “*can be expected* to impact the economics of any transactions involving the BRIDGESTONE and FIRESTONE trademarks in Panama”<sup>473</sup> — although of course Claimants have not provided any evidence of such impacts, or even such transactions, to support

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<sup>468</sup> See **Memorial**, ¶ 233–34; see also **First Jacobs-Meadway Report**, ¶¶ 52–53, 58; **First Daniel Report**, ¶¶ 37–38.

<sup>469</sup> **Memorial**, ¶¶ 233–34 (emphasis added).

<sup>470</sup> **Memorial**, ¶ 233 (emphasis added).

<sup>471</sup> **Memorial**, ¶ 233.

<sup>472</sup> **Memorial**, ¶ 234 (emphasis added). See **Third Kingsbury Statement**, ¶ 8 (admitting that Panamanian courts have ruled in Bridgestone’s favor in cases where the trademark applicant was not an existing competitor: “[s]ince the Supreme Court judgment of 28 May 2014, BSLs and BSJ have opposed other trademark applications in Panama, However, none of these applicants based their application on . . . use of their marks in the Panamanian market, *and so none were existing competitors of BSLs and BSJ. Therefore, none of those cases are analogous*”) (emphasis added).

<sup>473</sup> **Memorial**, ¶ 234 (emphasis added).

this theory. Still, in Claimants' view, these theoretical, future consequences have diluted the value of both trademarks in Panama and remaining BSCR countries.<sup>474</sup>

## 2. **Bridgestone Licensing's Claim for Recovery of Damages Paid in the Panamanian Tort Case**

173. Claimants' second damages claim appears straightforward at first glance: according to Claimants, Bridgestone Licensing is owed the USD 5,431,000 for which it was held jointly and severally liable with Bridgestone Corporation under the Supreme Court Judgment.<sup>475</sup> This claim may only be asserted by Bridgestone Licensing, as Bridgestone Americas was not a party to the tort case giving rise to the Supreme Court Judgment,<sup>476</sup> and Bridgestone Licensing's co-defendant, Bridgestone Corporation, has no standing to make any claim under the TPA.<sup>477</sup>

174. However, as Panama will further explain below, Bridgestone Licensing's claim to the USD 5,431,000 suffers from

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<sup>474</sup> See **Memorial**, ¶ 234; see also *id.*, ¶ 148 (stating that "BSAM's claim for damages outside of Panama" is detailed in from paragraph 226 to 237).

<sup>475</sup> See **Memorial**, ¶ 223 ("BSLS have suffered loss of USD 5,431,000"); see also *id.*, ¶ 230 (identifying the Panamanian Supreme Court judgment payment as a loss "incurred by BSLS").

<sup>476</sup> **Decision on Expedited Objections**, ¶ 241.

<sup>477</sup> **Decision on Expedited Objections**, ¶ 221 ("BSJ . . . has no claim because, being a Japanese company, it falls outside the protection of the TPA").

two critical faults. On the one hand, Bridgestone Licensing has not established that it (as opposed to another Bridgestone Group company) has suffered any injury as a result of that payment. On the other hand, Bridgestone Licensing actively contributed to any injury it did suffer.

**B. Claimants Seek Damages for the Alleged Diminution in Value of their Investments *Outside of Panama***

175. One overarching problem with Claimants’ first damages claim is that it includes a request to recover damages for alleged loss suffered by investments outside of Panama.<sup>478</sup> According to Claimants, hypothetical concerns of hypothetical buyers looking to “acquir[e] trademark rights for the whole Central American region . . . or worldwide” diminish the value of those trademarks worldwide.<sup>479</sup> However, as discussed above, this claim falls outside of this Tribunal’s jurisdiction; Claimants seek to recover for the alleged loss to “trademark rights [in] the whole Central American region” — rights that are not “investment[s] in the territory of [Panama]” pursuant to the TPA. For that reason, the Tribunal need not consider the substance of this extra-territorial damages claim. In any event, this damages claim also fails for the reasons explained below.

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<sup>478</sup> See **Memorial**, ¶¶ 229–40 (describing the damages allegedly incurred both in Panama and the remaining BSCR region).

<sup>479</sup> **Memorial**, ¶ 151.

176. As a preliminary matter, it is surprising that Claimants have asserted a damages claim for this injury in light of the Tribunal’s findings on the subject in its Decision on Expedited Objections. Specifically, the Tribunal determined “that there is no *‘immediate cause-and-effect relationship’* between the Supreme Court judgment and the alleged effects outside Panama. On the contrary, the relationship is speculative and remote.”<sup>480</sup> The Tribunal also made clear that “a dispute as to whether States other than Panama are likely to copy Panama’s alleged abuse of the Claimants’ intellectual property rights to the detriment of the Claimants is both speculative and remote from each of the Claimants’ investments.”<sup>481</sup> Finally, the Tribunal cautioned Bridgestone Licensing to “consider carefully whether to pursue a claim in relation to events outside Panama in circumstances where the Tribunal has ruled that it has no jurisdiction to entertain an identical claim by BSAM.”<sup>482</sup>

177. Claimants nevertheless maintain their extra-territorial damages claim. In a transparent attempt to circumvent the Tribunal’s clear instruction, they insist that the renewed extra-territorial claim “is made on a different basis.”<sup>483</sup> Specifically, according to Claimants, the Supreme Court Judgment “creates

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<sup>480</sup> **Decision on Expedited Objections**, ¶ 247.

<sup>481</sup> **Decision on Expedited Objections**, ¶ 354.

<sup>482</sup> **Decision on Expedited Objections**, ¶ 355.

<sup>483</sup> **Memorial**, ¶ 148.

uncertainty for a potential purchaser of BSLS or BSAM’s trademark rights: how would future courts deal with trademark registrations by competitors?”<sup>484</sup> Even if this were a new damages claim not captured by the Tribunal’s Decision on Expedited Objections — which Panama denies — this damages claim should nonetheless be dismissed for the following reasons.

178. **First**, Claimants’ extra-territorial damages claim concerns the hypothetical actions of courts in other States. Claimants are explicit about this aspect of the claim in their Memorial; they argue that “jurisdictions outside of Panama may look to the status of the trademarks in Panama and the rest of the world in order to determine whether or not they should attain the more valuable ‘well-known’ status.”<sup>485</sup> This Tribunal has already made clear that the TPA was not designed “to bring within the jurisdiction of ICSID a dispute as to whether or not sovereign States not party to the TPA are likely to act in abuse of established intellectual property rights and, if they are, whether the respondent host State is liable for the consequences.”<sup>486</sup> Yet Claimants have asserted just such a claim. Moreover, the Tribunal previously held that “a dispute as to whether States other than Panama are likely to copy Panama’s alleged abuse of the Claimants’ intellectual property rights to the detriment of the Claimants is both

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<sup>484</sup> **Memorial**, ¶ 233.

<sup>485</sup> **Memorial**, ¶ 151.

<sup>486</sup> **Decision on Expedited Objections**, ¶ 353.

speculative and remote from each of the Claimants' investments.”<sup>487</sup> The same reasoning applies to Claimants' supposedly revamped extra-territorial damages claim with equal force.

179. Claimants' argument rests on the premise that hypothetical future buyers of the FIRESTONE trademark and the BRIDGESTONE and FIRESTONE licenses will be afraid to invest in the brands based on concerns about the future actions of future courts.<sup>488</sup> Claimants' experts echo this argument. For example, Mr. Arnulfo Arjona alleges that:

It is not possible to rule out that in the future these criteria may be used for the resolution of other similar cases. In my opinion, it is possible and not to be ruled out that the aforementioned risk could materialize itself if, in the future, the BSLs and BSJ companies decide, in protection of its trademarks, to enter into a process of opposition to the registration of a given trademark with the suffix “stone” which one of their competitors intends to register.<sup>489</sup>

180. Ms. Jacobs-Meadway also argues that:

Decisions of one tribunal may influence the determination of the issue in other

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<sup>487</sup> **Decision on Expedited Objections**, ¶ 354.

<sup>488</sup> *See Memorial*, ¶¶ 233–34.

<sup>489</sup> **First Arjona Report**, ¶ 14.

jurisdictions,”<sup>490</sup> and that the Supreme Court decision “has the potential to diminish the value of the [subject trademarks] . . . in other jurisdictions which might look to the Supreme Court decision in Panama for guidance.”<sup>491</sup>

181. Mr. Daniel bases his damages calculations on these conclusions by Mr. Arnulfo Arjona and Ms. Jacobs-Meadway,<sup>492</sup> but these conclusions are mere hypotheses unsupported by any concrete examples and contradicted by Panama’s experts Nadine Jacobson and Marissa de la Vega Ferrari.<sup>493</sup>

182. *Second*, Claimants’ extra-territorial damages claim is based on concerns about the treatment of non-Panamanian trademark rights by non-Panamanian courts on the basis of a Panamanian court decision adjudicating a claim in tort. The obvious breaks in this purported causal chain are both numerous and fatal to the claim. In particular, Claimants have provided no evidence to show that courts in other BSCR States will follow this tort-based, fact-specific decision of the Panamanian Supreme Court.

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<sup>490</sup> **First Arjona Report**, ¶ 47.

<sup>491</sup> **First Jacobs-Meadway Report**, ¶ 58.

<sup>492</sup> **First Daniel Report**, ¶¶ 38–40.

<sup>493</sup> *See* **First Jacobson Report**, ¶¶ 73–74; **First Lasso de la Vega Ferrari Report**, ¶¶ 101–07.

183. Nor can Claimants make such a showing. In reality, as explained at length during the Expedited Objections Hearing, there is no inter-American system of precedent. Claimants are instead asking this Tribunal to infer that courts in other Latin American States will somehow adopt the same position as a Panamanian court in other, unrelated cases simply because they are also Latin American. Panama was surprised to have seen this farfetched argument raised once; to see it raised again is disrespectful to the Tribunal, a waste of valuable resources for all concerned and an abuse of process. It constitutes a concrete manifestation of the Claimants' ongoing attempt to bully. It is at best ignorant of, and at worst, deliberately preying upon, inexcusable stereotypes that reduce dozens of independent, sovereign nations in a complex region of the world into a single, underdeveloped nation about which this Tribunal should sit in judgment and command.

184. The damages claim also fails because trademarks are registered in and linked to specific territories. This means that each State's courts adjudicate trademark disputes concerning the trademarks registered in that State on the basis of that State's trademark laws.<sup>494</sup> Furthermore, the Supreme Court Judgment was based in tort, and none of Claimants' experts even attempt to make an argument of the existence of an internationally harmonized

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<sup>494</sup> **First Jacobson Report**, ¶¶ 48, 73–74.

system of tort law. As such, the Panamanian Supreme Court's finding of liability in tort for abusive conduct simply has no bearing on the potential future rulings of Costa Rican, Puerto Rican, Guatemalan, and Dominican Republic courts in connection with future tort cases based on claims of abusive use of proceedings involving their territorial trademarks. Claimants' case consists of little more than saying that because the Supreme Court of England confirmed a multi-million dollar judgment in a tort case involving a car crash, drivers in France will pay less for cars for fear that the English decision might be applied in France. This is nonsensical and exceedingly speculative for purposes of establishing damages.

185. Indeed, Claimants have not even attempted to provide evidence to suggest that hypothetical investors could or should be concerned about their rights in these States. Puerto Rico, which is one of the BSCR Region States that form a part of the damages claim, serves as a good example. Puerto Rico is a United States Commonwealth;<sup>495</sup> federally registered trademarks — such as the FIRESTONE and BRIDGESTONE Trademarks — are protected by United States federal law. Yet Claimants have failed to provide *any* evidence that hypothetical investors interested in the Bridgestone companies' rights in Puerto Rico are or could be concerned that the Supreme Court Judgment will affect

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<sup>495</sup> **First Jacobson Report**, ¶ 74.

the protections offered by U.S. federal law.<sup>496</sup> The same is true for the remaining countries in the BSCR region. The aspersions cast by Claimants simply do not serve as a substitute for evidence that the protection offered by the relevant country’s trademark or tort law has been weakened by the Supreme Court Judgment.

### C. Bridgestone Americas’ Damages Claim Fails

186. As discussed in Section II.A above, Bridgestone Americas has not submitted a cognizable claim for breach of the TPA. Moreover, Bridgestone Americas has not — and is unable to — demonstrate that it has suffered any injury in connection with its investment (*i.e.*, the trademark licenses),<sup>497</sup> as required by the TPA.<sup>498</sup> For these reasons, the Tribunal need not evaluate Bridgestone Americas’ damages claim on its merits. In any event, a cursory review of Claimants’ damages submissions reveals that Bridgestone Americas has failed to meet its burden of quantifying its damages.<sup>499</sup> Even if the Tribunal were to evaluate the substance

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<sup>496</sup> **First Jacobson Report**, ¶ 74.

<sup>497</sup> *See supra* **Section II.A.1**.

<sup>498</sup> *See Ex. R-0001*, TPA, Art. 10.16.1(a) (The only type of “claim” that can be submitted to arbitration is “a claim . . . that **the claimant** has incurred **loss or damage** by reason of, or arising out of, [a] breach [by the respondent of an obligation under Section A of Chapter Ten],”) (emphasis added).

<sup>499</sup> *See RLA-0118*, AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, ICSID Case No. ARB/01/6 (Award, 7 October 2003), ¶ 12.1.10 (Nariman, Bernadini, Vukmir); see also *RLA-0105*, Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A.

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of Bridgestone Americas' damages claim, the Tribunal should reject it.

187. As stated previously, Bridgestone Americas' investment consists of its licenses to use BRIDGESTONE and FIRESTONE trademarks in Panama, and the value of that investment is based on the profits from sales of products bearing those trademarks.<sup>500</sup> In the Memorial, however, Claimants choose not to articulate and substantiate separately the claim based on damages to Bridgestone Americas' licenses. The reason for the decision to blur the lines between the two Claimants' respective damages claims is clear: Bridgestone Americas has not substantiated a claim for damages in connection with *its* investment (and hopes to piggy-back off of Bridgestone Licensing's claim and the claims of the ineligible claimant, Bridgestone Coporation).

188. Bridgestone Americas does not articulate how or why the value of its investment (namely, its licenses) has decreased. Instead, Claimants' damages expert, Mr. Daniels, quantifies the alleged damages suffered by Bridgestone Americas

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de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4 (Award, 16 June 2010), ¶ 13.80 (Fortier, Magallón Gómez, Veeder) ("It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle *actori incumbit probatio* is 'the broad basic rule to the allocation of the burden of proof in international procedure'").

<sup>500</sup> See **Decision on Expedited Objections**, ¶ 219.

based on a hypothetical decrease in the royalty rates for the BRIDGESTONE and FIRESTONE trademarks.<sup>501</sup> Royalty rates reflect the value of the ownership of a trademark (*i.e.*, Bridgestone Licensing’s investment); royalty rates do **not** reflect the value of Bridgestone Americas’ licenses.<sup>502</sup> To the contrary, as Panama’s damages expert, Mr. Matthew Shopp, notes, it is nonsensical to evaluate the value of a license based on royalty rates, because any decrease in royalty rates inures to the **benefit** of the licensee<sup>503</sup> — which in this case is Bridgestone America.

189. The value of Bridgestone Americas’ licenses, as noted by the Tribunal, actually depends instead on revenues from sales. But nowhere in Mr. Daniel’s report does he discuss or calculate damages based on a reduction of actual or projected sales. In fact, Mr. Daniel cannot calculate damages based on reduced sales, because he assumes that sales remained constant.<sup>504</sup> This is consistent with the Memorial, in which Claimants **concede** that the Supreme Court Judgment “may not impact revenues from sales to consumers, because consumers are unlikely to be aware of the Supreme Court Judgment.”<sup>505</sup>

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<sup>501</sup> See **First Daniel Report**, ¶¶ 80–107.

<sup>502</sup> **Decision on Expedited Objections**, ¶ 219.

<sup>503</sup> See **First Shopp Report**, ¶ 39.

<sup>504</sup> See **First Daniel Report**, ¶¶ 81–83, 93.

<sup>505</sup> **Memorial**, ¶ 234.

190. Claimants attempt to cover this fundamental flaw by employing the term “trademark rights” throughout their Memorial.<sup>506</sup> However, this obfuscation cannot hide the fact that not *once* in the Memorial does Bridgestone Americas argue that the value of its licenses — *i.e.*, its revenues from the sale of products bearing the trademarks — has decreased. Instead, Claimants and their experts state again<sup>507</sup> and again<sup>508</sup> and again<sup>509</sup>

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<sup>506</sup> See **Memorial**, ¶ 230.

<sup>507</sup> See **Memorial**, ¶ 234 (“[T]he Court’s decision can be expected to impact the economics of any transactions involving the BRIDGESTONE and FIRESTONE *trademarks* in Panama. Essentially, the BRIDGESTONE and FIRESTONE **marks** have become diluted.”) (emphasis added); **First Daniel Report**, ¶ 39 (“If the effect of the Supreme Court judgment is that it is unlawful for BSLs (or BSJs) to defend its trademark against actions by competitors, it follows that the economic value of the **trademark** is reduced.”) (emphasis added).

<sup>508</sup> See **Memorial**, ¶ 237 (“Mr. Daniel used these methodologies to calculate first the value of the BRIDGESTONE and FIRESTONE *trademarks* in Panama and in the region (the ‘BSCR Region’) before the Supreme Court Judgment, and then the value of the *trademarks* in Panama and the BSCR Region after the Supreme Court Judgment.”) (emphasis added); **First Daniel Report**, ¶ 43 (“Accordingly, my damages analysis determines the economic harm suffered by Claimants by calculating the decrease in value of the **Subject Trademarks** after the Supreme Court decision as of 28 May 2014.”) (emphasis added).

<sup>509</sup> See **Memorial**, ¶ 240 (“The resulting difference in the value of the BRIDGESTONE and FIRESTONE *trademarks* in Panama and the BSCR Region represents the damage suffered by BSLs and BSAM as a consequence of the Supreme Court Judgment.”) (emphasis added); **First Daniel Report**, ¶ 78 (“The following sections describe my analyses to determine the amount of economic harm suffered by BSLs and BSAM, *specifically the decrease in the indicated value of the Subject Trademarks* in Panama and BSCR resulting from the Supreme Court decision.”) (emphasis added).

that they are seeking damages for diminution of value of the trademarks. Bridgestone Americas has therefore failed to quantify its damages in connection with its investment, and its damages claim should therefore be rejected.<sup>510</sup>

**D. Bridgestone Licensing’s Claim for Diminution of Value of the FIRESTONE Trademark Fails**

191. For the reasons discussed above, the Tribunal need not evaluate Bridgestone Licensing’s damages claims, because Bridgestone Licensing has failed to demonstrate a substantive breach of the TPA. In any event, Bridgestone Licensing’s first damages claim regarding the alleged diminution of value of its investment also fails because Bridgestone Licensing has failed to meet its burden of proving: (1) actual injury; (2) causation; and (3) quantum.

192. Notably, all of the defects in Bridgestone Licensing’s damages case addressed below apply to the damages claim of Bridgestone Americas, which Claimants’ comingle with the damages claims of Bridgestone Licensing. However, because Bridgestone Americas’ damages claim is manifestly untenable for the reasons set forth in Sections II.A and V.C above, the analysis below is devoted to Bridgestone Licensing’s damages claims.

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<sup>510</sup> Bridgestone Americas’ damages claim also fails for all of the reasons set forth below with respect to Bridgestone Licensing’s damages claim in that Bridgestone Americas has also failed to prove actual injury, causation, and quantum.

## 1. Actual Injury: Bridgestone Licensing Has Failed to Prove Actual Injury

193. As discussed in Section II.A above, a claimant asserting a claim under the TPA must have “incurred” loss.<sup>511</sup> In addition to serving as a jurisdictional requirement under the TPA, evidence of actual injury is necessary for the purpose of proving damages under customary international law.<sup>512</sup> Arbitral tribunals including those cited by Claimants,<sup>513</sup> have confirmed this requirement and established that a claimant may only recover for actual loss — *i.e.*, not speculative or uncertain loss.<sup>514</sup> The

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<sup>511</sup> **Ex. R-0001**, TPA, Art. 10.16.1(a)(ii) (Limiting the type of claim that a Claimant may submit to arbitration only to those in which “the claimant *has incurred* loss or damage . . .”) (emphasis added).

<sup>512</sup> See **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 5 to Art. 31 (Cambridge University Press, 2002) (“[I]njury’ includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, **excluding merely abstract concerns** . . . ‘Material’ damage here refers to damage to property or other interests of the State and its nationals **which is assessable in financial terms**”) (emphasis added).

<sup>513</sup> See, *e.g.*, **CLA-0088**, *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (Partial Final Award, 6 May 2016), ¶ 425 (Hanotiau, Derains, Hobér) (“The full reparation standard aims at ‘full reparation’ of the concrete [*sic*] and actual damage incurred”).

<sup>514</sup> See **RLA-0074**, *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19 (Award, 24 November 2010), ¶ 619 (Mourre, Chillón Medina, von Wobeser) (“La responsabilidad internacional del Estado por violación de las obligaciones previstas por el TBI no puede fundamentarse en supuestos hipotéticos”); see also **RLA-**

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claimant bears the burden of establishing this actual injury.<sup>515</sup>  
Bridgestone Licensing’s first damages claim regarding the alleged

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**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”).

<sup>515</sup> 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 Kholy) (“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 (Bethlehem, Kantor, Vinuesa) (“the 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

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diminution of value of its investment fails because (a) Bridgestone Licensing has failed to allege that it has incurred actual injury; and (b) its claim is based on hypothetical and speculative injury.

**a. Bridgestone Licensing Has Not Alleged that It Has Incurred Any Actual Injury to Date**

194. Bridgestone Licensing has not alleged that it has incurred a concrete and actual injury as a result of the Supreme Court Judgment to date. As discussed below, the reason for this fatal omission is that there is no evidence to support a claim of actual injury.

195. The reality is that the Supreme Court Judgment did not affect Bridgestone Licensing's economic position. For instance, the Judgment did not affect Bridgestone Licensing's continued ownership of the FIRESTONE trademark. Further, Bridgestone Licensing has *not* argued or adduced evidence showing that: (i) sales of FIRESTONE products have decreased; (ii) the royalty rates it charges licensees have decreased; (iii) costs of monitoring or enforcement have increased; (iv) existing competitors have introduced new "-STONE" products in Panama or the BSCR region; or (v) courts have rejected the Bridgestone

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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.”).

group's various opposition actions due to the Supreme Court Judgment.<sup>516</sup>

196. To the contrary, the evidence shows that these economic and other indicators have remained the same. For example, even though the value of Bridgestone Licensing's investment depends on the royalties it receives for use of the FIRESTONE trademark, Bridgestone Licensing has not argued that the royalty rate has decreased in the four years since the Judgment was issued.<sup>517</sup> In fact, the 1 January 2015 sublicensing agreement between BATO and BSCR for the BRIDGESTONE trademark registered in Costa Rica maintained the same 1% royalty rate<sup>518</sup> that the Bridgestone companies traditionally applied to both the FIRESTONE and BRIDGESTONE trademarks. Moreover, Bridgestone Licensing has cited to favorable trademark decisions on “-STONE” marks rendered by Panamanian courts after the Supreme Court Judgment.<sup>519</sup> Bridgestone Licensing's

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<sup>516</sup> See **First Shopp Report**, ¶¶ 46, 51-53.

<sup>517</sup> Claimants have not provided any evidence of any change in the royalty rate of the BRIDGESTONE Trademark License.

<sup>518</sup> See **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 **First Shopp Report**, ¶¶ 59-61;

<sup>519</sup> See **Third Kingsbury Statement**, ¶¶ 8-11. While cases are fact specific in nature, the attempted distinction between existing competitors and new competitors is likely one without a difference. Nadine Jacobs catalogs other successful Bridgestone oppositions of “-STONE” suffix

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own evidence thus demonstrates that the value of its investment has not changed since the issuance of the Supreme Court Judgment.

197. In sum, Bridgestone Licensing has suffered no actual injury.

**b. Bridgestone Licensing’s Alleged Injury is Hypothetical and Speculative**

198. In the absence of proof of injury from reduced sales profits and corresponding reduced royalty revenue, Bridgestone Licensing is forced to base the calculations of its first damages claim on theoretical royalty rates that might be included in hypothetical agreements with potential investors.<sup>520</sup> This approach is insufficient to establish loss in accordance with the TPA and customary international law.

199. Bridgestone Licensing’s sole argument with respect to the alleged injury suffered is reproduced in relevant part below. This — the clearest statement of Bridgestone Licensing’s first damages claim — is riddled with direct references to the hypothetical and speculative nature of the so-called injury:

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marks even when the competitor was already using its potentially confusing mark. *See First Jacobson Report*, Annex B.

<sup>520</sup> *See Memorial*, ¶¶ 233-34; *see also First Daniel Report*, ¶ 101.

BSLS and BSAM have incurred damages of between USD 498,293 and USD 12,812,952 caused by the Supreme Court Judgment. . . . If a court found a trademark invalid, that would result in the trademark having zero value. Here, the Supreme Court did not find the trademark invalid, but it found that BSLS and BSJ had filed their trademark opposition not in good faith and unlawfully in breach of Article 217 and it held BSLS and BSJ liable for a damages award in an amount far in excess of any damages that could possibly have been incurred by Muresa. This *creates uncertainty* for a *potential* purchaser of BSLS or BSAM's trademark rights: how would *future* courts deal with trademark registrations by competitors? Would competitors file similar damages claims? Would *future* courts grant those claims, on the basis of the precedent set in the Supreme Court Judgment?

Such *uncertainty* may not impact revenues from sales to consumers, because consumers are unlikely to be aware of the Supreme Court Judgment, except to the extent that tires under confusingly similar “-STONE” marks enter the marketplace and divert sales because consumers are confused. However, potential sublicensees, distributors and other business partners and potential acquirers of the trademark rights in Panama *would likely* be aware of the Supreme Court Judgment, and the cloud of uncertainty

with respect to trademark scope and enforceability created by the Court's decision *can be expected* to impact the economics of any transactions involving the BRIDGESTONE and FIRESTONE trademarks in Panama. Essentially, the BRIDGESTONE and FIRESTONE marks have become diluted by the Supreme Court Judgment, and because they are famous marks, the impact on revenue is even greater.<sup>521</sup>

200. Claimants' own experts likewise repeatedly suggest that any injury is potential.<sup>522</sup> Bridgestone Licensing's damages claim thus rests on the *possible* creation of "uncertainty," or what Mr. Shopp characterizes an increased risk, likelihood, or potential, of future damages.<sup>523</sup> In short, these are all ways of expressing that Bridgestone Licensing's damages claim is hypothetical and speculative.

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<sup>521</sup> **Memorial**, ¶¶ 233-34 (emphasis added).

<sup>522</sup> See **First Jacobs-Meadway Report**, ¶ 51 (stating that "**it is not possible to rule out that in the future**" Panamanian Courts "**may**" follow the Supreme Court Judgment), ¶ 53 (stating that the loss of exclusivity "**increases the likelihood**" of increased competition), ¶ 58 (concluding that the Supreme Court Judgment's effects "**has the potential to diminish the value**" of the trademarks) (emphasis added); see also, **First Daniel Report**, ¶ 95 (detailing that the result of the Supreme Court decision is that Claimants are "**exposed to [certain] risk[s]**," that this exposure "**increases the likelihood**" of competition from products with confusingly similar marks, such that Claimants "**face the risk** of no longer benefitting from exclusive rights") (emphasis added).

<sup>523</sup> See **First Shopp Report**, ¶ 67 (internal quotations omitted).

201. On its face, this claim exemplifies that which Article 10.16.1(a)(ii) (mandating that a claimant have “incurred” loss) and the general requirement of actual injury are designed to exclude: a hypothetical and speculative claim. In any event, Bridgestone Licensing’s speculation is baseless for the following four reasons.

202. *First*, the supposed investors at the heart of Bridgestone Licensing’s claim are no more than a figment of its imagination. The claim is premised on the uncertainty that might be felt by “*potential* purchasers of the business . . . investors . . . sublicensees, distributors . . . [and] acquirers,” which in turn might lead to the diminution in value of the FIRESTONE trademark.<sup>524</sup> Yet Bridgestone Licensing has provided no evidence that any such potential acquirer exists, and because the Bridgestone group has a long-standing policy of not licensing trademarks outside of Bridgestone entities,<sup>525</sup> these potential investors are purely hypothetical. According to Claimants, these potential investors “would likely be aware of the Supreme Court judgment” and that this “can be expected to impact the economics of any transactions .

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<sup>524</sup> **Memorial**, ¶¶ 233-34 (emphasis added).

<sup>525</sup> *See Request for Arbitration*, ¶ 6 (“Each of BSLS and BSJ license their respective trademarks to other Bridgestone entities for production, sales, marketing and/or distribution”); *see also Decision on Expedited Objections*, ¶ 50 (“The trademark is only used in relation to tires by companies that are part of the group. Outside tire companies are not granted franchises to use the trademark”).

. . . in Panama.”<sup>526</sup> Because the investors themselves are hypothetical, their knowledge of the Supreme Court Judgment and the impact of that Judgment on their behavior is even more speculative.

203. *Second*, Bridgestone Licensing’s fear about the decrease in value of its trademark is hypothetical. Bridgestone Licensing has presented no evidence to suggest that the royalty rate for the FIRESTONE trademark in Panama — which reflects the value of Bridgestone Licensing’s investment — will actually decrease. Bridgestone Licensing has submitted a single licensing agreement postdating the Supreme Court Judgment: the Trademark Sublicense Agreement between Bridgestone Americas Tire Operations and Bridgestone Costa Rica (concerning the BRIDGESTONE trademark registered in Costa Rica).<sup>527</sup> For the reasons stated above, this license agreement is irrelevant because: (i) it does not concern an investment in Panama, and (ii) it concerns the *BRIDGESTONE* trademark, not the Firestone trademark that Bridgestone Licensing actually owns. In any event, Article 3.1 of this agreement establishes a royalty rate of 1%<sup>528</sup> —

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<sup>526</sup> **Memorial**, ¶ 234 (emphasis added).

<sup>527</sup> See **Ex. C-0049**, Agreement to Sublicense Trademarks between Bridgestone Americas Tire Operations, LLC and Bridgestone Costa Rica, S.A. (1 January 2015).

<sup>528</sup> **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.

the same rate charged in the licensing agreements that predate the Supreme Court Judgment.

204. *Third*, Bridgestone Licensing’s claim rests on an assumption about the *hypothetical* investors’ view of the *potential* behavior of Panamanian courts that is not grounded in law or in fact. Bridgestone Licensing argues that its hypothetical investors might be concerned about “how . . . *future courts* . . . [would] deal with trademark registrations by competitors . . . [or whether] *future courts* [would grant damages claims similar to Muresa and Tire Group’s].”<sup>529</sup> Yet Bridgestone Licensing has not presented any evidence that Panamanian courts either have or will follow the Supreme Court Judgment. In reality, Bridgestone Licensing cannot do so, because there is no system of precedent in Panama.<sup>530</sup> Moreover, the Supreme Court explicitly limited its decision to the unique circumstances presented (namely the Bridgestone Defendants’ abusive behavior). Bridgestone Licensing’s claim boils down to an argument that because Panama has a system for holding drivers responsible for damages caused by their reckless conduct, people will pay less for cars for fear of being held liable. This is no basis for a damages claim.

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<sup>529</sup> **Memorial**, ¶ 233 (emphasis added).

<sup>530</sup> See **First Lee Report**, ¶ 19; see also **First Arjona Report**, ¶ 99 (admitting that the Panamanian legal system is “not governed by a regime of precedents”).

205. In sum, Bridgestone Licensing failed to even allege actual injury and relied instead upon unsubstantiated arguments about speculative and hypothetical future loss. For these reasons, its damages claim should be dismissed.

## 2. Causation: Bridgestone Licensing Has Failed to Prove Causation

206. For the reasons stated above, the Tribunal need not reach the question of causation; Bridgestone Licensing failed to satisfy its initial burden by establishing either the existence of a breach of the TPA or actual injury. In any event, for the reasons set forth below, Bridgestone Licensing's damages claim also fails, because it has failed to demonstrate that the State's allegedly wrongful act (*i.e.*, the Supreme Court Judgment) caused its alleged injury.

207. The Articles of State Responsibility make clear that a State is bound to make full reparation only for those injuries that are "***caused by*** the [State's] internationally wrongful act."<sup>531</sup> International arbitral tribunals have consistently applied this requirement when assessing damages claims.<sup>532</sup> A claimant bears

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<sup>531</sup> **RLA-0027**, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Art. 31 (Cambridge University Press, 2002) (emphasis added).

<sup>532</sup> *See, e.g., RLA-0073, Victor Pey Casado And Foundation "Presidente Allende" v. The Republic of Chile*, ICSID Case No. [FOOTNOTE CONTINUED ON NEXT PAGE]

the burden of proving causation;<sup>533</sup> if a claimant fails to meet its burden of proof, it will not be awarded damages, even if a tribunal finds that the State violated an international obligation.<sup>534</sup>

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ARB/98/2 (Award, 13 September 2016), ¶ 218 (Berman, Veeder, Mourre) (“The Tribunal starts with the fact that the injury in question has to be that caused by the specific breach. Causation is of the essence”); see **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 779 (Hanotiau, Born, Landau) (“Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by BGT”); **RLA-0081**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (Partial Award, 13 November 2000), ¶ 316 (Hunter, Schwartz, Chiasson) (“the burden is on [Claimant] to prove the quantum of the losses in respect of which it puts forward its claims; compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by [Claimant] must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes”).

<sup>533</sup> See **RLA-0088**, Mark Kantor, VALUATION FOR ARBITRATION, p. 104 (Wolters Kluwer 2008) (“Compensation is, of course, payable only for the consequences of injuries caused by the breaching party’s conduct. The injured claimant, therefore, has the burden of demonstrating that the claimed quantum flowed from that conduct.”); see also, **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) (“It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights”); **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 787 (Hanotiau, Born, Landau).

<sup>534</sup> See, e.g., **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*

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208. Judge Crawford's commentary to Article 31 clarifies the causation requirement:

It is only '[i]njury ... caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury *resulting from* and *ascribable to* the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.<sup>535</sup>

In fact, as stated by Judge Crawford, the State's internationally wrongful act must be both the factual and proximate cause of the injury.<sup>536</sup> Factual causation requires claimants to establish that

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*N.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. Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶¶ 805–06 (Hanotiau, Born, Landau); **RLA-0083**, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final Award, 3 September 2001), ¶ 235 (Briner, Cutler, Klein); **RLA-0084**, *Nordzucker AG v. The Republic of Poland*, Ad Hoc Arbitration (Third Partial and Final Award, 23 November 2009), ¶ 64 and § 8 (Van Houtte, Bucher, Tomaszewski).

<sup>535</sup> **RLA-0027**, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Comment 9 to Art. 31 (Cambridge University Press, 2002).

<sup>536</sup> **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 10 to Art. 31, p. (Cambridge University Press, 2002) ("[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be

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their injury would not have occurred “*but for*” the breach.<sup>537</sup> The requirement of proximate causation serves to exclude “damage which is ‘too indirect, remote, and uncertain to be appraised.’”<sup>538</sup> In other words, a claimant “has to show that the last, direct act, the immediate cause . . . [is] not so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm.”<sup>539</sup> International tribunals have thus considered that both elements of causation (factual and proximate) must be proven in order to establish causation.<sup>540</sup> Notably, a claimant’s damages will be

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the subject of reparation. In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity’”).

<sup>537</sup> See **RLA-0090**, *LG&E Energy Corp. LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 (Award, 25 July 2007), ¶ 48 (de Maekelt, Rezek, van den Berg).

<sup>538</sup> **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Comment 10 to Art. 31 (Cambridge University Press, 2002) (internal quotations omitted).

<sup>539</sup> **RLA-0083**, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final Award, 3 September 2001), ¶ 234 (Briner, Cutler, Klein).

<sup>540</sup> See **RLA-0080**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22 (Award, 24 July 2008), ¶ 785 (Hanotiau, Born, Landau); **RLA-0166**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Award, 16 September 2015), ¶ 382 (Kaufmann-Kohler, Lalonde, Stern) (“It is generally accepted that factual causation is not sufficient. An additional element linked to the nature of the cause, sometimes called “cause in law” or adequate causation is required”); see also, **RLA-0167** *Burlington Resources Inc. v. Republic of Ecuador*, ICSID

[FOOTNOTE CONTINUED ON NEXT PAGE]

reduced if and to the extent that the claimant contributed to the injury in question.<sup>541</sup>

209. Bridgestone Licensing must therefore demonstrate that the Supreme Court was both the factual and proximate cause

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Case No. ARB/08/5 (Decision on Reconsideration and Award, 7 February 2017), ¶ 333 (Kaufmann-Kohler, Stern, Drymer) (“It is true that factual causation is not sufficient, and that an additional element linked to the exclusion of injury that is too remote or indirect (sometimes referred to as legal or adequate causation) is required”)

<sup>541</sup> See **RLA-0055**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. g. Republic of Chile*, ICSID Case No. ARB/01/7 (Award, 25 May 2004), ¶ 243 (Rigo Sureda, Lalonde, Oreamuno Blanco) (decreasing damages by 50% because Claimant’s decisions increased business risks); see also **RLA-0085**, *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2 (Award, 15 March 2016), ¶¶ 6.97-6.102 (Veeder, Cremades, Simma) (applying the “general approach . . . deriving from a consistent line of international legal materials,” and decreasing the claimant’s damages by 30% due to its own contribution); **RLA-0086**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227 (Final Award, 18 July 2014), ¶¶ 1633-1637 (Fortier, Poncet, Schwebel) (stating that “an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered,” and apportioning 25% of the responsibility for injury on the claimants); **RLA-0087**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID ARB/06/11 (Award, 5 October 2012), ¶¶ 659-687 (Fortier, Williams, Stern) (decreasing damages by 25% due to Claimants’ contributory fault); **RLA-0027**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Art. 39, p. 240 (Cambridge University Press, 2002) (“[T]he contribution to the injury by wilful or negligent action or omission of . . . any person or entity in relation to whom reparation is sought.”).

of the alleged decrease in value of the FIRESTONE trademark in Panama. Bridgestone Licensing has failed to satisfy this burden.

**a. The Supreme Court Judgment Is Not the Cause-in-Fact of Any Diminution of Value**

210. The Supreme Court Judgment concerned the tortious conduct of Bridgestone Corporation and Bridgestone Licensing, and it did not address or affect Bridgestone Licensing's ownership of the FIRESTONE trademark. Bridgestone Licensing has thus failed to prove that the cause of the alleged diminution of value was Supreme Court Judgment.

211. The facts underlying this dispute begin with the U.S. Opposition Proceeding and the sending of the Demand Letter, followed by the conduct in the Trademark Opposition Proceeding initiated by Bridgestone Corporation and Bridgestone Licensing. The Eighth Civil Circuit Court determined that the RIVERSTONE mark was not capable of causing confusion among consumers and rejected their claim.<sup>542</sup> Thereafter, the BSJ and BSLS voluntarily withdrew their appeal of the Eighth Civil Circuit Court's ruling.<sup>543</sup>

212. The subsequent Civil Proceeding that produced the Supreme Court Judgment was initiated by Muresa and Tire Group.

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<sup>542</sup> See **Memorial**, ¶ 25(e); see also **Ex. R-0034**, Judgement of the Supreme Court Of Panama (28 May 2014).

<sup>543</sup> See **Memorial**, ¶ 25(f).

The Plaintiffs alleged that Bridgestone Corporation and Bridgestone Licensing were *liable in tort*,<sup>544</sup> and the Supreme Court ultimately determined that the Bridgestone Defendants were liable under both Article 1644 of the Civil Code and Article 217 of the Judicial Code.<sup>545</sup> The former imposes liability for negligent conduct generally, and the latter article imposes tort liability for reckless conduct in connection with a legal proceeding.<sup>546</sup> In other words, in arriving at its decision, the Supreme Court considered and applied tort provisions of Panamanian law; it did not adjudicate the Bridgestone Defendants' intellectual property rights under Panamanian trademark law, nor did its holding affect their ownership of, or license rights for, the trademarks at issue.

213. Yet Claimants' diminution of value claim is based on the following premise:

[T]he right of a trademark is a negative right – the right to exclude others from using it. If the ability to exclude is

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<sup>544</sup> See **Ex. C-0016**, Muresa's Civil Complaint (12 September 2007), p.4

<sup>545</sup> See **Ex. C-0023**, Bridgestone Corporation and Bridgestone Licensing Services' Opposition to Muresa's Appeal (11 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”).

<sup>546</sup> See **Ex. C-0205**, Article 1644 of the Civil Code of Panama; see also **Ex. R-0067**, Article 217 of the Judicial Code of Panama.

diminished, the value of the trademark is diminished . . . If a court found a trademark invalid, that would result in the trademark having zero value.<sup>547</sup>

214. Here, however, no “court found a trademark invalid.”<sup>548</sup> In fact, the only decision applying Panamanian trademark law was the decision of the Eighth Civil Circuit Court in the Trademark Opposition Proceeding. The Eighth Civil Circuit Court disagreed with the Bridgestone group’s assertion that the RIVERSTONE trademark was confusingly similar and should not be registered under Panamanian law. As such, any increase in competition by products bearing confusingly similar marks — which, in any event, has not occurred — would be the result of the Eighth Civil Circuit Court’s decision; but for that decision, such alleged increased competition (which ultimately never materialized) would not have occurred. The same cannot be said of a judgment of the Supreme Court finding certain defendants liable in tort for a series of acts which cumulatively were found to constitute abusive conduct.

215. Furthermore, Bridgestone Licensing has failed to present any evidence in support of its counterintuitive argument that the Supreme Court judgment (which did not deal with the

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<sup>547</sup> **Memorial**, ¶ 233.

<sup>548</sup> **Memorial**, ¶ 233.

trademarks at issue) was the factual cause of the alleged injuries to its ownership of the FIRESTONE trademark.

**b. The Supreme Court Judgment Is Not the Proximate Cause of Any Diminution of Value**

216. The injury alleged by Bridgestone Licensing is also too indirect, remote, and uncertain to have been caused by the Supreme Court Judgment. The very premise of this argument — that future buyers may be afraid to purchase the FIRESTONE trademark and related trademark licenses — is not substantiated by Claimants. This argument is fundamentally flawed, as Bridgestone Licensing has failed to demonstrate that the Supreme Court Judgment was the proximate cause of its alleged injuries.

217. As noted above, the requirement of proximate causation serves to exclude “damage which is ‘too indirect, remote, and uncertain to be appraised.’”<sup>549</sup> The *Lauder v. Czech Republic* tribunal clarified the requirement of proving proximate cause as follows:

Even if the breach therefore constitutes one of several “*sine qua non*” acts, this alone is not sufficient. In order to come to a finding of a compensable damage *it is*

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<sup>549</sup> **RLA-0027**, James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, Comment 10 to Art. 31, p. 204 (Cambridge University Press, 2002) (internal quotations omitted).

*also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause . . . did not become a superseding cause and thereby the proximate cause.*<sup>550</sup>

218. Bridgestone Licensing must therefore demonstrate that the alleged future injury it complains of — if and to the extent that it ever materializes — will be the product of the Supreme Court Judgment, rather than a superseding act. However, in order for the injury that Bridgestone Licensing anticipates to occur, the following steps would have to take place:

219. *First*, Bridgestone Licensing would have to engage in negotiations (and eventually a transaction) with the hypothetical investors that it discusses in the Memorial. However, the possibility of Bridgestone Licensing concluding transactions with these hypothetical investors is remote in light of the fact that: (i) Bridgestone Licensing is not likely to sell the FIRESTONE trademark to a non-Bridgestone entity, and (ii) Bridgestone group has a long-standing corporate policy, which dictates that the Bridgestone group will not license its trademark to outside

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<sup>550</sup> **RLA-0083**, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL (Final Award, 3 September 2001), ¶ 234 (Briner, Cutler, Klein) (emphasis added).

companies.<sup>551</sup> Bridgestone Licensing has not alleged that this policy has or will change; as such, even hypothetical investors will have no role in its licensing regime.

220. *Second*, these hypothetical investors would have to take certain action. According to Claimants, these potential investors “would likely be aware of the Supreme Court judgment” and that this “can be expected to impact the economics of any transactions . . . in Panama.”<sup>552</sup> In other words, for the injury to materialize, these investors would have to: (i) be aware of the Supreme Court Judgment; (ii) be concerned about the alleged impact of that tort-based Judgment on the trademark rights; and (iii) alter their behavior in the hypothetical transaction with Bridgestone Licensing. This series of steps to be taken by private actors outside of Panama’s control plainly constitute intervening causes.

221. In any event, if the hypothetical fears of these hypothetical investors materialized, the resulting events would also constitute intervening causes. Bridgestone Licensing asserts that the hypothetical investors will be concerned about: (i) the potential

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<sup>551</sup> See **Request for Arbitration**, ¶ 6 (“Each of BSLs and BSJ license their respective trademarks to other Bridgestone entities for production, sales, marketing and/or distribution”); see also **Decision on Expedited Objections**, ¶ 50 (“The trademark is only used in relation to tires by companies that are part of the group. Outside tire companies are not granted franchises to use the trademark”).

<sup>552</sup> **Memorial**, ¶ 234 (emphasis added).

treatment by “future courts” of “trademark registrations by competitors,” and (ii) the possibility that competitors will file damages claims against the investors.<sup>553</sup> If a court ever did treat the FIRESTONE mark unfavorably, or a competitor filed a damages claim, those events would also break the chain of causation.

222. This last point is bolstered by Bridgestone Licensing’s own evidence. Mr. Kingsbury notes that subsequent trademark registration challenges filed by Bridgestone entities *in Panama* were successful.<sup>554</sup> In doing so, Mr. Kingsbury has demonstrated that: (1) these decisions, including trademark opposition decisions in Panama, are fact-specific in nature,<sup>555</sup> and (2) the Supreme Court Judgment has not prevented the Bridgestone Group from challenging trademark registrations in Panama. These cases show that the Supreme Court case had no chilling effect on

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<sup>553</sup> **Memorial**, ¶ 233.

<sup>554</sup> *See Third Kingsbury Report*, ¶ 8.

<sup>555</sup> *See Third Kingsbury Report*, ¶ 8 (distinguishing between favorable Panamanian cases references and the present case on the basis that the competitors in those cases were not existing competitors); *see also First Lasso de la Vega Ferrari Report*, ¶ 67 (stating that when determining likelihood of confusion, each case is decided based on the evidence presented). While cases are fact specific in nature, the attempted distinction between existing competitors and new competitors is likely one without a difference. Nadine Jacobs catalogs other successful Bridgestone oppositions of “-STONE” suffix marks even when the competitor was already using its potentially confusing mark. *See First Jacobson Report*, Annex B.

Bridgestone Licensing. Further, Bridgestone Licensing mixes opposition cases and tort cases.

223. In conclusion, even if the alleged diminution in value of which Bridgestone Licensing complains were to materialize, the Supreme Court Judgment would not be the proximate cause of that future injury.

### **3. Quantum: Bridgestone Licensing Has Failed to Prove Quantum**

224. If the Tribunal were to reach the issue of quantum, it would find that Bridgestone Licensing's quantum analysis is as flawed as its other submissions.

225. Chief among these flaws is Mr. Daniel's failure to consider damage to Bridgestone Americas' investment (*i.e.*, BRIDGESTONE and FIRESTONE trademark *licenses*). His damages calculations cannot therefore be used to support Bridgestone Americas' claims (which, in any event, should be dismissed before reaching the question of quantum). For that reason, the following analysis specifically addresses only the submissions and calculations in support of Bridgestone Licensing's damages claims; however, were it necessary to address quantum with respect to a claim by Bridgestone Americas, the arguments set forth below would apply *mutatis mutandis* to Bridgestone Americas.

226. In addition to these foundational issues, there are two broad categories of problems that render Mr. Daniel's quantum analysis irrelevant. First, Mr. Daniel's approach to the question of damages suffers from three fundamental flaws. Second, Mr. Daniel commits three errors in actually calculating the damages figures, which results in significantly overstated damages estimates. Each category of problem is addressed in turn below.

**a. Bridgestone Licensing's Quantum Analysis Suffers from Three Fundamental Flaws**

227. Mr. Daniel's analysis of Bridgestone Licensing's Damages suffers from three fundamental flaws. Specifically, as described below, Mr. Daniel: (i) uses the incorrect valuation date; (ii) overlooks the fact that Bridgestone Licensing has not suffered any injury; and (iii) assumes that future injury is certain. As Pamana's damages expert, Matthew Shopp, explains, Mr. Daniel's analysis is based on an "inappropriate and unreliable framework."<sup>556</sup> It is this framework that produced the damages that Bridgestone Licensing now requests.

228. In order to assess the quantum of damages properly, Mr. Daniel's flaws must be corrected. In his expert report, Mr. Shopp did just that. As described below, the result of this

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<sup>556</sup> See **First Shopp Report**, ¶ 54.

corrected quantum analysis was clear: “[Bridgestone Licensing’s] damages are zero.”<sup>557</sup>

**(i) The Three Faulty Premises Driving Mr. Daniel’s Analysis**

**(a) Mr. Daniel Includes Bridgestone Corporation’s Investment in his Analysis**

229. Mr. Daniel fails to calculate the alleged injury to Bridgestone Licensing’s specific investment.<sup>558</sup> Instead, he calculated damages based on the purported values of *both* the BRIDGESTONE and FIRESTONE trademarks. To recall, the BRIDGESTONE trademark is owned by Bridgestone Corporation,<sup>559</sup> which has no standing and is ineligible to bring claims under the TPA. Bridgestone Licensing can only recover for damage to its investment (*i.e.*, the FIRESTONE trademark in Panama). It is therefore entirely inappropriate for Mr. Daniel to have calculated quantum based on alleged injury to both trademarks without the specific amount of damages caused to the value of ownership of each trademark. As a result, the following analysis of Bridgestone Licensing’s damages claim is directed at

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<sup>557</sup> **First Shopp Report**, ¶ 55.

<sup>558</sup> Mr. Shopp includes the issue discussed above with respect to Bridgestone Americas.

<sup>559</sup> **See Claimant’s Request**, ¶ 12.

Mr. Daniel's calculations with respect to the FIRESTONE trademark.

**(b) Mr. Daniel Adopts an  
*Ex Ante* Approach**

230. The first flaw in Mr. Daniel's analysis is the date of his valuation. In his report, Mr. Daniel calculates the diminution in value of the FIRESTONE trademark as of the date of the Supreme Court Judgment, 28 May 2014.<sup>560</sup> This approach (the *ex-ante* approach) "is most applicable in cases of expropriation or other breaches where the economic impact is immediate and well-defined."<sup>561</sup> However, Bridgestone Licensing does not allege an immediate impact; indeed, there is nothing immediate whatsoever about the impact that Bridgestone Licensing has come to formulate. As Panama has explained, Bridgestone Licensing has only alleged speculative future injury.

231. By contrast, an *ex-post* approach — in which the valuation date is the date of the calculation — is used in cases in which "the effect of the breach is not immediately felt, is not well-defined, and continues to evolve over time."<sup>562</sup> This is precisely such a case. As affirmed by Mr. Shopp, "it makes far more sense, from an economic and damages perspective, to consider if and how

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<sup>560</sup> See **First Shopp Report**, ¶ 62; see also **First Daniel Report**, ¶¶ 43, 47, 63, 77, 91, 106, et al.

<sup>561</sup> See **First Shopp Report**, ¶ 62.

<sup>562</sup> See **First Shopp Report**, ¶ 63.

the risk associated with the Supreme Court Decision has evolved over time.”<sup>563</sup> Mr. Daniel’s decision to use the ex-ante approach was therefore “a needlessly speculative exercise,”<sup>564</sup> and it also caused him “to artificially increase and overstate [Bridgestone Licensing’s] damages.”<sup>565</sup>

**(c) Mr. Daniel Assumes  
that Bridgestone  
Licensing Has  
Suffered Loss**

232. As discussed in detail above, Bridgestone Licensing has not alleged — let alone demonstrated with evidence — that it has incurred actual injury to date. Indeed, there is no evidence to suggest that Bridgestone Licensing has incurred any actual financial loss as a result of the Supreme Court Judgment. For that reason, Bridgestone Licensing’s damage claim is based exclusively on the “risk of potential future damages.”<sup>566</sup>

233. Yet in his quantum analysis, Mr. Daniel assumes that these hypothetical future damages have already materialized.<sup>567</sup> As explained below, he does so by inputting certain sources of loss (such as a decrease in royalty rates) into his so-called Actual

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<sup>563</sup> See **First Shopp Report**, ¶ 64.

<sup>564</sup> See **First Shopp Report**, ¶ 64.

<sup>565</sup> See **First Shopp Report**, ¶ 42.

<sup>566</sup> See **First Shopp Report**, ¶¶ 67-78; see also **First Jacobson Report**, ¶¶ 69-74 (explaining that Supreme Court Judgment has not impeded Bridgestone Licensing’s intellectual property rights).

<sup>567</sup> See **First Shopp Report**, ¶ 149.

Scenario that do not reflect the reality of the situation to date. This renders Mr. Daniel's Actual Scenario misleading and ultimately unusable for the purpose of calculating actual damages.

**(d) Mr. Daniel Incorrectly Assumes that Bridgestone Licensing Will Suffer the Alleged Future Injuries**

234. Mr. Daniel also incorrectly assumes that the hypothetical future injury of which Bridgestone Licensing complains (*i.e.*, a decrease in the value of its trademark due to a loss of exclusivity) is certain.<sup>568</sup> As affirmed by Mr. Shopp, however, this future injury is unlikely to occur for four reasons: (1) the supposed risks have not materialized to date, (2) a 2015 sublicensing agreement for the BRIDGESTONE trademark in Costa Rica suggests that Bridgestone entities have not revalued the relevant trademarks to date, (3) Panama has not become a riskier country for intellectual property rights, and (4) as trademarks are territorial in nature, the low probability of future loss in Panama is even lower in the other States in the BSCR Region.<sup>569</sup> Each of these is discussed in turn below.

235. *First*, as Mr. Shopp explains, “[A]lthough the fact that a risk has not yet materialized does not mean that it does not

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<sup>568</sup> See **First Shopp Report**, ¶ 149.

<sup>569</sup> See **First Shopp Report**, ¶¶ 79-90.

exist . . . the longer the period in which no risk materializes, the lower the probability of its future occurrence.”<sup>570</sup> Because Bridgestone Licensing has suffered no injury in the four years since the date of the Supreme Court Judgment, the risk to its financial position in the future is “virtually non-existent.”<sup>571</sup>

236. *Second*, the sublicensing agreement between BATO and BSCR concerning the BRIDGESTONE Trademark in Costa Rica —which was concluded 1 January 2015, seven months following the 28 May 2014 Supreme Court Judgment — maintained Bridgestone group’s traditional 1% royalty rate.<sup>572</sup> Although Bridgestone Licensing’s damages claim concerns the FIRESTONE trademark, this licensing agreement serves as an accurate proxy, because the effect of the Supreme Court Judgment (if any) should be the same for the BRIDGESTONE and FIRESTONE trademarks.<sup>573</sup>

237. If the Bridgestone Group believed that the BRIDGESTONE trademark had decreased in value, transfer

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<sup>570</sup> **First Shopp Report**, ¶ 80.

<sup>571</sup> *See* **First Shopp Report**, ¶ 82.

<sup>572</sup> *See* **First Shopp Report**, ¶¶ 83-85; **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.

<sup>573</sup> Thus, if Claimants consider that the value of the BRIDGESTONE trademark is unaffected by the Supreme Court Judgment (as demonstrated by the 2015 sublicensing agreement), then the same would be true with respect to the FIRESTONE trademark. The fundamental link between the value of the two trademarks is further demonstrated by the fact that their royalty rates are identical at 1%.

pricing rules would have “required [Bridgestone’s intra-company licensing agreement] to reflect the lower value.”<sup>574</sup> In sum, Bridgestone Licensing still values the FIRESTONE trademark at 1% today.

238. **Third**, and contrary to Mr. Daniel’s baseless assumptions, Panama has not become a riskier country for intellectual property rights.<sup>575</sup> Publications by World Economic Forum and the Property Rights Alliance demonstrate that Panama is an increasingly safe place for investments.<sup>576</sup>

239. **Fourth**, as a result of the territorial nature of trademarks, “risk of future losses in the broader BSCR Region is even more remote because it involves an additional conditional step: that foreign courts will consider the Supreme Court Decision in their own legal proceedings involving the [Firestone trademark].”<sup>577</sup>

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<sup>574</sup> See **First Shopp Report**, ¶¶ 85.

<sup>575</sup> See **First Shopp Report**, ¶¶ 86-87.

<sup>576</sup> See **First Shopp Report**, ¶ 87.

<sup>577</sup> See **First Shopp Report**, ¶¶ 89; see also **First Jacobson Report**, ¶71 (explaining that Bridgestone has “succeeded in numerous actions around the world just in the past two years”).

**(ii) The Actual Damages After Applying the Correct Framework**

240. In light of the fact that each of these three premises underlying Mr. Daniel’s quantum analysis is flawed, the damages figures he produces cannot and should not be trusted. In this regard, Mr. Shopp concludes that “Mr. Daniel’s damages analysis is based on an incorrect framework and cannot be relied upon to accurately assess [Bridgestone Licensing’s] losses.”<sup>578</sup>

241. Mr. Shopp evaluated quantum without making these faulty assumptions. In doing so, he concluded that “there is substantial evidence that [Bridgestone Licensing’s] damages are zero.”<sup>579</sup>

**b. The Flaws in the Inputs of Bridgestone Licensing’s Quantum Analysis**

242. The aforementioned flaws and assumptions are glaring and ultimately fatal to Mr. Daniel’s quantum analysis. However, for the sake of completeness, and to demonstrate to the Tribunal the specific calculation errors made by Mr. Daniel, Panama’s damages expert has applied this faulty framework and conducted his own calculation of quantum.

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<sup>578</sup> **First Shopp Report, ¶ 91.**

<sup>579</sup> **First Shopp Report, ¶ 91.**

**(i) Mr. Daniel’s Quantum Analysis**

243. Claimants’ damages expert, Mr. Daniel, uses a two-step method to calculate damages. *First*, Mr. Daniel calculates the value of the FIRESTONE trademark without taking into consideration the Supreme Court Judgment (“**But-For Scenario**”).<sup>580</sup> Thereafter, Mr. Daniel calculates the value of the FIRESTONE trademark taking the Supreme Court Judgment into account (the “**Actual Scenario**”).<sup>581</sup>

244. Mr. Daniel uses a discounted cash flow approach (“**DCF Approach**”) to value the FIRESTONE trademark.<sup>582</sup> The DCF Approach “stems from the fundamental premise that the value of an asset can be determined by reference to the cash flows it can produce.”<sup>583</sup> To calculate the cash flows under the DCF Approach, Mr. Daniel employs the relief-from-royalty method, “whereby the value of intellectual property is measured by

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<sup>580</sup> See **First Daniel Report**, Section 7.1; see also **First Shopp Report**, ¶ 49 (describing what Mr. Daniel calls his “*Before*” scenario as the “But-For Scenario”).

<sup>581</sup> See **First Daniel Report**, Section 7.2; see also **First Shopp Report**, ¶ 49 (describing what Mr. Daniel calls his “*After*” scenario as the “Actual Scenario”).

<sup>582</sup> **First Shopp Report**, ¶ 44.

<sup>583</sup> **First Shopp Report**, ¶ 43.

reference to the royalty stream it could generate if it were licensed to another company.”<sup>584</sup>

245. There are “six key inputs” in Mr. Daniel’s calculations: (1) tire sales revenues; (2) royalty rates; (3) tax rates; (4) discount rates; (5) cash flow duration; and (6) long-term growth rate.<sup>585</sup>

246. Mr. Daniel’s damages calculation proceeds as follows:

a. *First*, Mr. Daniel identifies historical tire sales revenues and projects future tire sales revenues;<sup>586</sup>

b. *Second*, Mr. Daniel multiplies the tire sales revenues by the royalty rate to determine pre-tax cash flows;<sup>587</sup>

c. *Third*, Mr. Daniel deducts taxes from the pre-tax revenues;<sup>588</sup> and

d. *Fourth*, the annual after-tax cash flows are discounted to the date of the Supreme Court

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<sup>584</sup> **First Shopp Report**, ¶ 44.

<sup>585</sup> *See First Shopp Report*, ¶ 45.

<sup>586</sup> *See First Daniel Report*, ¶¶ 81-83, 93.

<sup>587</sup> *See First Daniel Report*, ¶¶ 84-86, 94-102.

<sup>588</sup> *See First Daniel Report*, ¶¶ 87, 103.

Judgment, using Mr. Daniel's chosen discount rates.<sup>589</sup>

247. Further, as Mr. Shopp further notes:

“The . . . Cash Flow Duration in Mr. Daniel's valuation includes an eight-year finite projection period and then a residual value calculation that captures the value for all subsequent years to perpetuity (i.e., forever). The residual value is calculated using a standard perpetuity equation, where the final year's after-tax cash flows is divided by the . . . Discount Rate minus the . . . Long-Term Growth Rate. The discounted cash flows from the eight-year finite projection period are then added together with the residual value to obtain the total value of the [Firestone trademark].<sup>590</sup>

248. As a result of the above calculations, the potential value of the FIRESTONE trademark in the But-For Scenario is between USD 113,019 and USD 183,072 in Panama and between USD 2,109,218 and USD 2,998,117 in the BSCR Region, including Panama.<sup>591</sup>

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<sup>589</sup> See **First Daniel Report**, ¶¶ 88-91, 104-106.

<sup>590</sup> **First Shopp Report**, ¶ 46

<sup>591</sup> **First Daniel Report**, Figure 3.

249. Thereafter, Mr. Daniel calculates the FIRESTONE trademark's value in the Actual Scenario.<sup>592</sup> There are only two inputs that change in Mr. Daniel's Actual Scenario: the applicable royalty rate and discount rates.<sup>593</sup> The changes that are made to the applicable royalty rate and the discount rates for the purpose of the Actual Scenario both account for the *same* supposed loss of exclusivity caused by the Panamanian Supreme Court decision.<sup>594</sup>

250. First, to modify the applicable royalty rates, Mr. Daniel relies on two studies that analyze the difference in royalty rates between exclusive and non-exclusive agreements for a single trademark.<sup>595</sup> Mr. Daniel thus replaces the 1% royalty rate (which is drawn from the existing license agreements) with two potential royalty rates: 0.5% and 0.6%.<sup>596</sup>

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<sup>592</sup> See **First Daniel Report**, ¶ 92-106; see also **First Shopp Report**, ¶ 49.

<sup>593</sup> See **First Shopp Report**, ¶¶ 129-134.

<sup>594</sup> See **First Daniel Report**, ¶ 96-97 (“Mr. Daniel “quantifie[s] the economic impact of the Supreme Court decision on Claimants by calculating the difference in value between exclusive and non-exclusive rights to the Subject Trademarks in a licensing context”); see also *id.*, ¶ 105 (stating that the new discount rates are designed to be a proxy for the supposed loss of exclusivity); see also **First Shopp Report**, ¶¶ 137-141 (discussing Mr. Daniel's double-counting of the supposed loss of exclusivity). In addition to the inherent flaw in double-counting the supposed loss of exclusivity, the potential impact of the Supreme Court Judgment would be far less than a loss of exclusivity.

<sup>595</sup> **First Daniel Report**, ¶¶ 98-101.

<sup>596</sup> **First Daniel Report**, ¶ 101.

251. Next, Mr. Daniel modifies the discount rates applicable to both Panama and the BSCR Region to account for the “Bridgestone’s impaired trademark protection (effectively resulting in non-exclusive rights).”<sup>597</sup> To do so, Mr. Daniel assumes that the Supreme Court Judgment increased Panama’s risk profile from being a moderate-risk country to being at the same level as Pakistan, the highest-risk country.<sup>598</sup>

252. On the basis of these calculations, Mr. Daniel identifies the potential value of the FIRESTONE trademark in the Actual Scenario is between USD 53,707 and USD 71,968 in Panama and between USD 1,105,450 and USD 1,287,529 in the BSCR region, including Panama.<sup>599</sup>

253. Mr. Daniel then subtracts the value figures in the Actual Scenario from the value figures in the But-For Scenario.<sup>600</sup> Those differences reflect Bridgestone Licensing’s potential damages. This produces four potential damages sums, ranging from USD 59,311 to USD 1,710,588.<sup>601</sup> Once one adds the USD 5,431,000 payment for the Supreme Court Judgment (which Bridgestone Licensing also claims), the actual amount of damages

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<sup>597</sup> **First Daniel Report**, ¶ 105.

<sup>598</sup> *See* **First Shopp Report**, ¶ 141 & note 108; *see also* **First Daniel Report**, Appendix 8.3 (equating Panama to Pakistan in the last row and in column “Selected Country/Regions After”).

<sup>599</sup> **First Daniel Report**, Figure 4.

<sup>600</sup> **First Daniel Report**, Figure 5; *see also* **Memorial**, ¶ 240.

<sup>601</sup> **Memorial**, ¶ 233.

that Bridgestone Licensing is claiming ranges from USD 5,490,311 to USD 7,141,588.

**(ii) The Flaws in the Inputs of  
Bridgestone Licensing’s  
Quantum Analysis**

254. In making these calculations, a number of the inputs Mr. Daniel used are fundamentally inappropriate. For that reason, even if the Tribunal were to ignore the faulty premises and assumptions discussed above (which it should not), the calculations presented by Mr. Daniel produce figures that are significantly overstated. Specifically, Mr. Daniel commits serious errors in calculating both the But-For Scenario<sup>602</sup> and the Actual Scenario.<sup>603</sup>

255. The following sections: (a) identify and correct Mr. Daniel’s errors in calculating the But-For Scenario; (b) identify and correct Mr. Daniel’s errors in calculating the Actual Scenario; and (c) discuss Mr. Shopp’s modified calculations, which correct for these errors but use Mr. Daniel’s flawed framework.

**(a) Mr. Daniel Committed  
Serious Errors in  
Calculating the But-  
For Scenario**

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<sup>602</sup> **First Shopp Report**, ¶ 95 (These errors also affect the Actual Scenario because the But-For Scenario “serves as the starting point for the Actual Scenario valuation”).

<sup>603</sup> **First Shopp Report**, ¶ 95.

256. Mr. Daniel commits two significant errors in calculating the But-For Scenario: (i) He overstates tire sales revenues, and (ii) he incorrectly calculates the initial discount rate.<sup>604</sup>

(I) Mr. Daniel  
Overstates Tire  
Sales Revenues

257. First, Mr. Daniel “grossly overstates” sales revenues for FIRESTONE-branded tires in both Panama and the broader BSCR Region. In particular, “[h]is calculation includes revenues for tires that were not sold to customers in Panama or the BSCR Region, [which] therefore should not be included in the valuation . . . in those markets.”<sup>605</sup>

258. When Mr. Daniel inputs the sales of tires in Panama, he includes sales to Comercializadora OM, a company that appears to operate exclusively in Guatemala.<sup>606</sup> Mr. Daniel also includes sales to at least two buyers inside the Colon Free Trade Zone who likely export these tires to consumers in non-Panama markets.<sup>607</sup> As these sales figures do not represent sales to consumers inside Panama, “the associated royalty payments do not

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<sup>604</sup> See **First Shopp Report**, ¶ 97.

<sup>605</sup> **First Shopp Report**, ¶ 100.

<sup>606</sup> See **First Shopp Report**, ¶¶ 101, 103.

<sup>607</sup> **First Shopp Report**, ¶¶ 101, 103.

form part of the value of the [Firestone trademark] in Panama.”<sup>608</sup>  
As a result, the royalties derived from these sales should not be classified as royalties for Panamanian sales.<sup>609</sup>

259. Mr. Daniel also inflates sales revenues for the entire BSCR region. In fact, “around half of the Tires Sales Revenues are sales from BSCR’s tire manufacturing plant to other Bridgestone Group companies *outside of Central America and the Caribbean* (mostly to the United States).”<sup>610</sup> As Bridgestone Licensing has not asserted a claim for diminution of value outside of the BSCR region, these sales figures should not be included in the calculation of damages. Sales to the two buyers in the Colon Free trade zone who do not appear to have any operations in the BSCR region should also be excluded.<sup>611</sup>

260. In conducting his own calculations, albeit using Mr. Daniel’s flawed framework, Mr. Shopp removes both sets of these non-applicable sales revenues from the calculation.<sup>612</sup> By correcting the overstated tire revenues, Mr. Shopp determines that actual sales revenues for the FIRESTONE trademark are USD 15.8

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<sup>608</sup> See **First Shopp Report**, ¶ 101.

<sup>609</sup> See **First Shopp Report**, ¶ 101.

<sup>610</sup> **First Shopp Report**, ¶ 106; see also *id.*, ¶¶ 108-109.

<sup>611</sup> **First Shopp Report**, ¶ 111.

<sup>612</sup> **First Shopp Report**, ¶¶ 104, 110-112. With respect to the BSCR Region, Mr. Shopp maintains the sales revenue from Comercializadora OM because it operates in Guatemala.

million in Panama<sup>613</sup> and USD 328.5 million in the BSCR Region.<sup>614</sup>

(II) Mr. Daniels  
Applies Inflated  
Discount Rates

261. As a part of his analysis of the But-For Scenario, Mr. Daniel applies inflated discount rates. Under the DCF approach, the projected future cash flow is then discounted back to present value by applying discount rates. To determine the appropriate discount rate, Mr. Daniel first identifies a base discount rate and then modifies it to account for risk in Panama and the BSCR Region.<sup>615</sup>

262. *First*, Mr. Daniel estimates both the weighted average cost of capital (“WACC”) and the cost of equity, and uses these numbers as two baseline potential discount rates. The WACC represents “the average cost of capital for a company’s entire asset base,” including low, moderate, and high-risk assets.<sup>616</sup> This is inappropriate in this context, because intellectual property assets have a higher risk than other assets. For that reason, Mr. Shopp concludes that it is more appropriate to use the cost of

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<sup>613</sup> See **First Shopp Report**, Table 5.

<sup>614</sup> See **First Shopp Report**, Table 9.

<sup>615</sup> See **First Shopp Report**, ¶ 114-16; see also **First Daniel Report**, ¶¶ 88-91.

<sup>616</sup> See **First Shopp Report**, ¶ 119.

equity as a proxy.<sup>617</sup> As a result, instead of applying two discount rates to both Panama and the BSCR region, Mr. Shopp only applies the discount rate based on the cost of equity.<sup>618</sup>

263. *Second*, when adjusting his baseline discount rate, Mr. Daniel uses an inappropriate methodology to calculate a country’s risk.<sup>619</sup> Specifically, when adjusting the discount rate to account for risk, Mr. Daniel “adjusts the entire discount rate (including all of its component factors, such as the risk-free rate and equity risk premium)” through a non-standard method that “has no support in any valuation texts or authorities.”<sup>620</sup>

264. In conducting his analysis, Mr. Shopp used standard country risk premiums for Panama and for the BSCR Region, and he determined that the appropriate discount rate is 16.36% for Panama and 17.67% for the BSCR Region.<sup>621</sup>

**(b) The Actual Value of  
the FIRESTONE  
Trademark in The  
But-For Scenario**

265. In making these corrections — while still applying Mr. Daniel’s flawed analysis — the value of the FIRESTONE

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<sup>617</sup> See **First Shopp Report**, ¶¶ 119-121.

<sup>618</sup> See **First Shopp Report**, ¶ 121.

<sup>619</sup> See **First Shopp Report**, ¶¶ 122-123 and notes 87, 88 .

<sup>620</sup> **First Shopp Report**, ¶ 122.

<sup>621</sup> See **First Shopp Report**, ¶ 124.

Trademark is USD 105,532 in Panama<sup>622</sup> and USD 2,174,099 in the BSCR region.<sup>623</sup>

**(c) Mr. Daniel Committed Serious Errors in Calculating the Actual Scenario**

266. The difference in Mr. Daniel's estimated values of the FIRESTONE trademark between the But-For and Actual Scenarios is attributable to a change in two variables: the royalty rate and the discount rate.<sup>624</sup> Mr. Daniel again committed serious errors when estimating and applying these changes for the purpose of the But-For Scenario. As shown below, Mr. Daniel: (1) double-counted damages by adjusting both the royalty rate and discount rate to account for the *same* purported loss of exclusivity; (2) overstated the impact of this purported loss of exclusivity; and (3) treated the potential impact of the Supreme Court Judgment as a certainty, rather than as the risk — indeed, the speculative risk — that it is.

**(I) Mr. Daniel Double-Counts**

267. Mr. Daniel modified the royalty and discount rates in the Actual Scenario to account for the impact of the Supreme

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<sup>622</sup> See **First Shopp Report**, ¶ Table 12.

<sup>623</sup> See **First Shopp Report**, ¶ Table 13.

<sup>624</sup> See **First Shopp Report**, ¶¶ 129-134.

Court Judgment.<sup>625</sup> Yet both of these modifications are designed to account for the very same (alleged) loss of exclusivity. This amounts to double-counting. As stated by Mr. Shopp:

It is incorrect to apply a lower royalty rate for loss of exclusivity, and then further apply a higher discount rate to account for the same loss of exclusivity. Put differently, if the rights to the [FIRESTONE trademark] have switched from exclusive rights to non-exclusive rights via the lower royalty rate, they cannot also be subject to a higher discount rate to account for the same thing. To include both is double-counting that artificially inflates damages.<sup>626</sup>

In reality, the appropriate method to take account of the purported loss of exclusivity is by modifying the royalty rate — and only the royalty rate.<sup>627</sup> As a result, Mr. Shopp does not make a separate modification to the discount rates in the Actual Scenario to account for the purported loss of exclusivity.

(II) Mr. Daniel Overstates the Impact of The Loss of Exclusivity

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<sup>625</sup> **First Shopp Report**, ¶ 137.

<sup>626</sup> **First Shopp Report**, ¶ 140.

<sup>627</sup> *See* **First Shopp Report**, ¶ 141.

268. Mr. Daniel also commits errors in determining the appropriate decrease in the royalty rate, which he does in an effort to account for the purported loss of exclusivity.<sup>628</sup> In assessing the appropriate royalty rate, Mr. Daniel relies on two studies that analyze the difference between royalty rates for exclusive and non-exclusive intellectual property licenses.<sup>629</sup> Based on these studies, Mr. Daniel reduces the applicable royalty rate from 1.0% to 0.5-0.6%.<sup>630</sup> In doing so, he committed two serious errors.

269. *First*, Mr. Daniel confuses the potential effect of the Supreme Court decision with a loss of exclusivity.<sup>631</sup> A loss of exclusivity occurs when another “company gains the right to sell the same branded product.”<sup>632</sup> In this case, by contrast, “at most, BSJ and BSLs would be unable to prevent existing competitors from selling tires under a “-STONE” brand name.”<sup>633</sup> Mr. Kingsbury admits as much when he differentiates the Supreme Court Judgment from subsequent favorable decisions on the basis that the competitors in those cases were not existing competitors.<sup>634</sup> There can be no question that a competitor’s

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<sup>628</sup> See **First Shopp Report**, ¶¶ 142-148.

<sup>629</sup> See **First Shopp Report**, ¶ 142; see also **First Daniel Report**, ¶¶ 97-101.

<sup>630</sup> See **First Shopp Report**, ¶¶ 132, 142; see also **First Daniel Report**, ¶¶ 101.

<sup>631</sup> **First Shopp Report**, ¶ 144.

<sup>632</sup> **First Shopp Report**, ¶ 144.

<sup>633</sup> See **First Shopp Report**, ¶¶ 145.

<sup>634</sup> See **Third Kingsbury Statement**, ¶ 8.

ability to sell the same branded products has a greater impact than a competitor’s ability to sell similarly-branded products. As a result, “the potential impact of the Supreme Court Decision on royalty rates must be less than a loss of exclusivity.”<sup>635</sup>

270. **Second**, Mr. Daniel ignores studies that find that exclusivity may not result in **any** significant difference in royalty rates.<sup>636</sup> In fact, the three additional studies considered by Mr. Shopp found that exclusivity does not result in higher royalty rates.<sup>637</sup>

271. In continuing to use Mr. Daniel’s flawed framework, Mr. Shopp correctly estimated the (significantly lower) potential impact of the Supreme Court Judgment under this theory. He determined that a 25% decline in royalty rates is a more reasonable estimate,<sup>638</sup> as opposed to the 40-50% decrease applied by Mr. Daniel.

(III) Mr. Daniel  
Mistakenly  
Assumes that  
the Alleged  
Impact of the  
Supreme Court  
Judgment Is a  
Certainty

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<sup>635</sup> **First Shopp Report**, ¶ 145.

<sup>636</sup> **First Shopp Report**, ¶ 146.

<sup>637</sup> **First Shopp Report**, ¶ 146.

<sup>638</sup> **First Shopp Report**, ¶¶ 148.

272. As stated previously, Bridgestone Licensing has neither alleged — nor has it in fact — suffered any loss to date. By estimating the decrease in royalty rates that represents the purported loss of exclusivity and then applying that decreased rate, Mr. Daniel is mistakenly assuming that the risk of loss in the future is 100%.<sup>639</sup>

273. However, as Mr. Shopp confirms, the probability of a future loss of exclusivity for the FIRESTONE trademark is “effectively zero.”<sup>640</sup> Still, to provide the Tribunal with some guideposts, Mr. Shopp continues the damages calculation by applying a range of probabilities of future loss from 0% to 100%.<sup>641</sup>

**(d) The Actual Damages  
After Correcting the  
Calculations**

274. In conclusion, Mr. Daniel’s report is replete with faulty premises, assumptions, and inputs. These errors are both fundamental and fatal to his quantum analysis.

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<sup>639</sup> **First Shopp Report**, ¶¶ 149-150.

<sup>640</sup> **First Shopp Report**, ¶¶ 152; *see also* **First Jacobson Report**, ¶¶ 67-74 (explaining that sanctioning abusers of intellectual property rights “provides a vital check on abuse of IP rights,” and that the Supreme Court Judgment has not impeded Bridgestone Licensing’s intellectual property rights).

<sup>641</sup> *See* **First Shopp Report**, ¶ 154, Table 14 (showing the outcome at 0%, 50%, and 100% probabilities), Appendix C (showing the full range of probabilities from 0% to 100%).

275. Panama's damages expert, Mr. Shopp, undertakes a thorough, step-by-step analysis to debunk Mr. Daniel's report. Mr. Shopp demonstrates that the faulty premises underlying Mr. Daniel's framework of analysis invalidate his calculations. He further demonstrates that an objective quantum analysis necessarily produces a damages figure of zero.

276. However, for the sake of completeness, Mr. Shopp also conducted his own calculations using Mr. Daniel's flawed framework, but correcting his mistaken inputs. After correcting the errors in Mr. Daniel's calculations, Mr. Shopp provides the Tribunal with a range of damages estimates based on the probability that a loss of exclusivity will occur in the future:

a. *Assuming a 100% probability*, the FIRESTONE trademark's value would decrease by USD 26,383 in Panama and USD 543,525 in the BSCR Region.<sup>642</sup>

b. *Assuming a 50% probability*, the FIRESTONE trademark's value would decrease by USD 13,191 in Panama and USD 271,762 in the BSCR Region.<sup>643</sup>

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<sup>642</sup> See **First Shopp Report**, ¶ 158, Appendix C.

<sup>643</sup> See **First Shopp Report**, ¶ 158, Appendix C.

c. *Assuming a 0% probability, the FIRESTONE trademark would not decrease in value.*<sup>644</sup>

277. These calculations are designed to demonstrate the significant impact of Mr. Daniel's input errors, and these figures do not reflect Panama's position on quantum. Instead, as affirmed by Panama's damages expert: "[w]hen a proper damages framework is applied, there is *no* evidence that Claimants have suffered, or will suffer, any damages as a result of the Supreme Court Decision."<sup>645</sup> Bridgestone Licensing should not be awarded any damages.

**E. Bridgestone Licensing's Claim for the Recovery in the Tort Case Fails**

278. Bridgestone Licensing also asserts a claim for the amount of the damages for which Bridgestone Corporation and Bridgestone Licensing was held jointly and severally liable in the Supreme Court Judgment (*i.e.*, USD 5.431 million). At first glance, this damages claim appears straightforward. However, Bridgestone Licensing has failed to substantiate its claim of actual

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<sup>644</sup> Although the summary tables in Mr. Shopp's report highlights the 100%, 50%, and 0% probabilities, he has calculated the damages estimates under the full range of probabilities from 0% to 100%. *See First Shopp Report*, Appendix C.

<sup>645</sup> *First Shopp Report*, ¶ 91 (emphasis added).

injury. In any event, Bridgestone Licensing is not entitled to the full amount of the Judgment.

**1. Bridgestone Licensing Has Failed to Prove It Suffered Actual Injury in Connection With Its Claim**

279. According to Bridgestone Licensing, it suffered an injury in the amount of USD 5,431,000 based on its payment of the damages awarded by the Supreme Court to Muresa and Tire Group.<sup>646</sup> However, Bridgestone Licensing has utterly failed to demonstrate that it actually suffered the alleged loss.

280. As the Tribunal will recall, evidence emerged during the Hearing on Expedited Objections that the money used by Bridgestone Licensing to pay Muresa and Tire Group did not originate from Bridgestone Licensing.<sup>647</sup> As the parent company that “control[s] the money,”<sup>648</sup> Bridgestone Corporation paid the Judgment “through” Bridgestone Licensing<sup>649</sup> by having

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<sup>646</sup> See **Memorial**, ¶ 223.

<sup>647</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”). BSJ is the only parent company of BSLS. Thus, the reference to “Bridgestone,” can only mean “BSJ”) (emphasis added).

<sup>648</sup> See **Expedited Objections Hearing Transcript** (Day 3) 424:21–424:22.

<sup>649</sup> **Request for Arbitration**, ¶ 53; see also **Expedited Objections Hearing Transcript (Day 3)**, Tr. 496:22–497:2 (Mr. Kingsbury) (“Ultimately, yes, you know, Bridgestone is the parent company. They’re the ones who are paying as the parent of Bridgestone Services”).

Bridgestone Americas transfer USD 5.8 million to Bridgestone Licensing for payment of the Judgment.<sup>650</sup> For that reason, Bridgestone Licensing did not suffer the actual loss.

281. Mr. Kingsbury characterized this transfer as a “loan” during his testimony at the Hearing on Expedited Objections.<sup>651</sup> Bridgestone Licensing, however, failed to provide *any* evidence about the terms of this “loan” or any repayments made by Bridgestone Licensing. Indeed, Bridgestone Licensing neglected to mention the “loan” at all in the Memorial. As the party bearing the burden of demonstrating loss, it is inexcusable for Bridgestone Licensing to submit a claim in the absence of clear evidence demonstrating that it actually suffered this loss. As a result, Bridgestone Licensing’s claim for USD 5.431 million should be rejected.

## **2. Bridgestone Licensing’s Claim Should Not be Granted in Full**

282. In the event that the Tribunal, in spite of the material issues identified above, accepts Bridgestone Licensing’s claim for USD 5.431 million in damages, the amount of damages should be reduced to take into account Bridgestone Licensing’s contribution to its own injury.

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<sup>650</sup> See **First Shopp Report**, ¶ 135; see also **Expedited Objections Hearing Transcript (Day 3)**, Tr. 482:12–483:07 (Mr. Kingsbury).

<sup>651</sup> See **Expedited Objections Hearing (Day 3)**, Tr. 424:21–424:22.

283. On 28 May 2014, the Panamanian Supreme Court held Bridgestone Corporation and Bridgestone Licensing jointly and severally liable as a result of their negligent and reckless conduct.<sup>652</sup> As discussed during the Expedited Objections phase, the Bridgestone Defendants were not subject to enforcement proceedings and were not pressured into paying the Judgment. Nevertheless, more than two years after the Supreme Court Judgment — and nearly a year after Claimants Bridgestone Licensing and Bridgestone Americas filed a Notice of Arbitration as a necessary precursor to this arbitration — the payment of the Judgment became a sudden priority.

284. Bridgestone Licensing then allegedly transferred the funds to Muresa and Tire Group — funds that it had received from Bridgestone Americas. By Mr. Kingsbury’s own admission, the viability of Claimants’ claims before this Tribunal motivated the decision to have Bridgestone Licensing pay the Judgment.<sup>653</sup> In other words, Bridgestone Licensing chose to incur an injury in the form of payment of the Supreme Court’s damages award in circumstances in which that injury could (and should) have been sustained by its parent company or, at the very least, shared.

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<sup>652</sup> See **Ex. R-0034**, Judgment of the Supreme Court of Panama (28 May 2014).

<sup>653</sup> See **Expedited Objections Hearing Transcript (Day 3)**, Tr. 484:01–484:03 (Mr. Kingsbury) (admitting that obtaining jurisdiction was a factor in the decision to have Bridgestone Licensing pay the full amount ordered by the Supreme Court Judgment).

285. This strategic decision amounts to a contribution to the injury by Bridgestone Licensing, and accordingly Bridgestone Licensing should not be able to recover damages for injury that it affirmatively chose to incur. Notably, the Tribunal observed that “It may well be that BSLS’s motive for paying the entirety of the judgment debt was to achieve [the] end [of orchestrating international jurisdiction in order to benefit its parent Bridgestone Corporation]. Whether it was or not, the consequences of BSLS’s payment is an issue that will fall to be resolved if and when quantum comes to be considered. *It does not follow that the whole of the payment will be recoverable as loss sustained by BSLS.*”<sup>654</sup>

286. Interestingly, despite the aforementioned statement in the Decision on Expedited Objections, and despite the fact that Claimants bear the burden of proof of showing loss, Bridgestone Licensing fails to address this subject in its Memorial. Perhaps this is because Bridgestone Licensing has no answer to the objective evidence, which shows that it contributed to the injury for which it now seeks compensation. Accordingly, to be “consistent with fairness as between the responsible State and the victim of the breach,”<sup>655</sup> if the Tribunal decides to award damages to

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<sup>654</sup> **Decision on Expedited Objections**, ¶ 329 (emphasis added).

<sup>655</sup> **RLA-0027**, James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Comment 2 to Art. 39.

Bridgestone Licensing for its second damages claim, the amount of damages should be reduced to take into account Bridgestone Licensing's contribution to causing those damages.

## V. CONCLUSION

287. As discussed at the outset,<sup>656</sup> Bridgestone Corporation — the Japanese parent company pulling the strings of this proceeding<sup>657</sup> — has long been in the business of undermining and eradicating competitors, no matter the cost. In 2014, when the Panamanian Supreme Court held Bridgestone Corporation and Bridgestone Licensing liable for their abusive conduct, Bridgestone Corporation set its sights on the Republic of Panama.

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<sup>656</sup> *See supra* Section I.

<sup>657</sup> Bridgestone Corporation has been involved in the major strategy decisions relevant to this proceeding. *See, e.g., Expedited Objections Hearing Transcript (Day 3)*, Tr. 482:15–483:07 (Mr. Kingsbury) (admitting that “people in Tokyo” were involved in the decision to have Bridgestone Licensing pay the damages award for the purpose of pursuing a claim under the TPA); **Ex. R-0033**, Memorandum sent by J. Lightfoot (12 January 2015), p. 1 (informing the Panamanian Embassy of “Bridgestone[’s]” dispute with Panama, and defining “Bridgestone” as including Bridgestone Corporation). Furthermore, the evidence shows that Japanese nationals do everything from the hiring of counsel to the initiation of this arbitration. *See Ex. C-0086*, Legal Representation Agreements for Mallory Smith (which was signed by an employee of Bridgestone Corporation); **First Kingsbury Statement**, ¶ 5 (conceding that all of BSLS’s directors are Japanese nationals); **Ex. C-0001**, Power of Attorney for BSLS (28 September 2016) (which was signed in Japan by a Mr. Kitamura); **Expedited Objections Hearing Transcript (Day 3)**, Tr. 429:11–16 (Mr. Kingsbury) (explaining that Mr. Kitamura is “the Head of the BRIDGESTONE trademark group, and he [wa]s also an officer and a member . . . [of] Bridgestone Licensing Services”).

Apparently incensed that a court could hold the multinational giant liable in tort, Bridgestone Corporation began applying pressure on the sovereign State.

288. This pressure — repeatedly described as diplomacy by Claimants<sup>658</sup> — has included a variety of abusive tactics. In particular, Claimants:

- a. Channeled funds<sup>659</sup> to a shell subsidiary without employees<sup>660</sup> or office space<sup>661</sup> for the admitted purpose of manufacturing a claim under the TPA;<sup>662</sup>

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<sup>658</sup> See, e.g., **Request for Arbitration**, § II.J (“Bridgestone’s Attempts to Resolve the Matter Through Diplomatic Channels”), ¶ 51; **First Akey Statement**, ¶ 4.

<sup>659</sup> See **Expedited Objections Hearing Transcript (Day 3)**, Tr. 482:15–483:07 (Mr. Kingsbury) (admitting that Bridgestone Licensing paid the damages award in Panama using a \$6 million dollar “loan” from Bridgestone Americas), 496:22–497:2 (Mr. Kingsbury) (“Ultimately, yes, you know, Bridgestone is the parent company. They’re the ones who are paying as the parent of Bridgestone Services”); **Request for Arbitration**, ¶ 53 (“Bridgestone, through its subsidiary BSLS . . . paid the damages award to Muresa and TGFL on August 19, 2016”).

<sup>660</sup> See **Expedited Objections Hearing Transcript (Day 2)**, Tr. 324:03–324:04 (Claimants’ counsel) (“BSLS does not itself employ individuals”).

<sup>661</sup> See **Claimants’ Rejoinder on Expedited Objections**, ¶ 51 ([O]ffice space is not formally leased by BSLS . . . .”); **Expedited Objections Hearing Transcript (Day 2)**, Tr. 325:01 (Claimants’ counsel) (“[S]pace is not formally leased to BSLS”).

<sup>662</sup> See **Expedited Objections Hearing Transcript (Day 3)**, Tr. 484:01–06 (Mr. Kingsbury) (“Q. Okay. And did counsel tell you that if Bridgestone Corporation paid this you would have no case to bring under

[FOOTNOTE CONTINUED ON NEXT PAGE]

b. Approached representatives of Panama's Executive Branch in hopes of getting the Executive Branch to interfere with the independent judiciary;<sup>663</sup>

c. Distorted key aspects of the local litigation (e.g., the facts, the record, and the text of the Supreme Court Judgment)<sup>664</sup> so as to cast the Judgment as an aberration. This unethical behavior including blatant misrepresentations of the Supreme Court Judgment in a formal, public USTR Special

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

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"). Notably, Bridgestone Americas cannot claim damages for the Supreme Court Judgment because it was not a party to the litigation, so Bridgestone Licensing *was* the only claimant for these purposes.

<sup>663</sup> See **First Akey Statement**, ¶ 5 ("I understood that the purpose of the meeting [with the Ambassador at the Panamanian Embassy] was for Bridgestone to explain to the Ambassador that it felt it had been treated unfairly and see whether there was anything the Ambassador could suggest to resolve the issue"); **Ex. R-0032**, Email from Y. McNamara to R. Galan (23 December 2014) ("[W]e would greatly appreciate the opportunity to provide further details [about the local proceeding] in person [to the Ambassador] and seek your assistance in bringing this matter to a proper resolution . . . "); **Ex. R-0033**, Memorandum sent by J. Lightfoot (12 January 2015), p. 3 ("Bridgestone therefore respectfully requests the assistance of the Panamanian Embassy in engaging the broader Panamanian Government on this issue [of the Supreme Court Judgment] . . .").

<sup>664</sup> See *supra* **Section III.C.**

301 public hearing,<sup>665</sup> which resulted in publication of the same canards in the USTR annual reports;<sup>666</sup>

d. Asserted a claim that the Supreme Court Judgment amounted to an expropriation,<sup>667</sup> even though Claimants' "investments" remained intact, only to withdraw that facially invalid<sup>668</sup> claim;

e. Asserted what this Tribunal called a "speculative and remote" claim for at least \$10 million in damages in related to investments outside of Panama, which was dismissed for lack of jurisdiction,<sup>669</sup>

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<sup>665</sup> Bridgestone's Mr. Kingsbury stated that "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," when in reality the Supreme Court expressly disclaimed the possibility that the mere filing of a trademark opposition proceeding created liability. *Compare Ex. C-0032*, Written Comments and Hearing Statement of BSAM, 2015 Special 301 Public Hearing (24 February 2015), p. 3 (emphasis added) *with Ex. R-0034*, Decision of the Supreme Court of Panama (28 May 2014), pp. 21–22.

<sup>666</sup> *See Ex. C-0033*, 2015 Special 301 Report, United States Trade Representative, Executive Office of the President of the United States (April 2015); *C-0260*, Office of the United States Trade Representative, Special 301 Report (April 2016).

<sup>667</sup> *See Request for Arbitration*, ¶ 66.

<sup>668</sup> *See Expedited Objections Hearing Transcript (Day 4)*, Tr. 583:9–12 (counsel for Panama) ("[Claimants'] expropriation claim is a claim based on an alleged increase in costs, all the while they're still able to sell their tires. That's absurd.").

<sup>669</sup> *Decision on Expedited Objections*, ¶¶ 247–48.

f. Sought and were granted a courtesy meeting with the Panamanian Ambassador to the United States,<sup>670</sup> initially described that meeting as a typical diplomatic encounter,<sup>671</sup> reversed course and accused the Ambassador of calling a panel of Supreme Court Judges corrupt,<sup>672</sup> and attempted to transform this wild allegation into a binding admission by the sovereign State under international law;<sup>673</sup> and

g. Failed to substantiate their claims of treaty breaches (*e.g.*, by failing to identify even *one* comparator for their national treatment claim<sup>674</sup>) and their claims for damages (*e.g.*, by failing to show injury<sup>675</sup> and causation<sup>676</sup>) — despite the fact

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<sup>670</sup> See **First Gonzalez-Revilla Statement**, ¶ 4.

<sup>671</sup> See **Request for Arbitration**, ¶ 50 (“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>672</sup> See **Memorial**, ¶ 210.

<sup>673</sup> See **Memorial**, ¶ 8 (“In his capacity as Ambassador to the U.S., he had full representative authority on behalf of Panama and his admission of corruption is Panama’s admission”).

<sup>674</sup> See *supra* **Sections II.A.1 & II.B.1**.

<sup>675</sup> See *supra* **Section IV.D**.

<sup>676</sup> See *supra* **Section IV.C**.

that the alleged breach occurred more than four years ago.<sup>677</sup>

289. The list goes on. This is not the type of conduct that Panama — or indeed any sovereign State — expects to be exposed to when consenting to investment arbitration.

290. Nor did Panama expect to encounter the malicious attacks on its governmental institutions and the very rule of law that Claimants casually scatter throughout their Memorial — none of which is justified. For example, at the outset of their Memorial, Claimants’ remark that the Supreme Court Judgment “renders Panama’s trademark system largely meaningless.”<sup>678</sup> There is simply no basis for this assertion.<sup>679</sup>

291. As a preliminary matter, this generalized indictment of the current state of Panama’s entire intellectual property regime seriously misrepresents Claimants’ own expert’s position, which they cite in support of this attack; Ms. Jacobs-Meadway in fact hedges this baseless claim by stating that the system *could* be

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<sup>677</sup> During the Expedited Objections phase, Claimants complained of the “limited time available to put together and exhibit” evidence relevant to fundamental questions like the existence of an investment and Bridgestone Licensing’s so-called activities. **Claimants’ Response on Expedited Objections**, ¶ 5. That was three years after the Supreme Court Judgment. Now, more than four years after the Judgment, Claimants have had more than enough time to substantiate their claims, which they remain unable to do.

<sup>678</sup> **Memorial**, ¶ 2.

<sup>679</sup> See **First Jacobson Report**, ¶¶ 67–68.

rendered meaningless *at some point in the future if* an inventive waterfall of events actually transpires.<sup>680</sup>

292. More importantly, far from triggering the collapse of Panama's trademark protection regime, the Supreme Court Judgment demonstrates that intellectual property owners can defend against abusive and anti-competitive behavior in Panama. In fact, the existence of avenues for legal recourse against such conduct is a fundamental hallmark of a meaningful trademark system, so much so that many major multilateral treaties concerning intellectual property rights include a provision requiring such safeguards. Panama's intellectual property expert, Ms. Nadine Jacobson, explains:

The Panama Supreme Court has merely issued a decision against what it deemed to be a trademark bully, a decision it had every right to make as a sovereign and a decision that is in accordance with the practices of many other countries that have similar methods of restitution set out in their laws for such abusive acts. [ . . . ]

[A]s discussed above, safeguards are necessary to ensure trademark owners do not abuse their rights and act beyond the

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<sup>680</sup> See **First Jacobs-Meadway Report**, ¶ 40 (“If the Supreme Court decision were to be followed, such that trademark owners could not oppose trademarks of competitors without incurring the risk of significant monetary penalty, Panama’s trademark system would be rendered largely meaningless”).

scope of what the law allows. Such safeguards are an important counterweight to the enforcement provisions of trademark law. The essential need for these safeguards is evidenced by the many IP treaties that articulate them and the multitude of countries that have found it necessary to implement them, as noted earlier. Panama's trademark system is not rendered meaningless by providing such recourse against abusive behavior by trademark owners, as the avenues and remedies for the legitimate enforcement of trademark rights still exist in and are upheld by the laws of Panama. Rather, these safeguard provisions merely provide a vital check on abuse of IP rights.<sup>681</sup>

293. In keeping with their paean of gratuitous attacks, Claimants devote an entire section of their Memorial to the subject of corruption within the Panamanian judiciary<sup>682</sup> and go so far as to characterize the general “state of the Panamanian courts” as “derisory.,”<sup>683</sup> when the law is clear that generalized These allegations serve no other purpose than to poison the proverbial well, as “general reports [of corruption] . . . cannot substitute for evidence of a treaty breach in a specific instance.”<sup>684</sup> These

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<sup>681</sup> See **First Jacobson Report**, ¶ 67.

<sup>682</sup> See **Memorial**, § XII.

<sup>683</sup> **Memorial**, ¶ 210.

<sup>684</sup> **RLA-0101**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Final Award, 23 April 2012), ¶ 303 (Kaufmann-Kohler, Wladimiroff, Trapl).

generalized attacks are presumably designed to distract from the foundational problems with Claimants' actual claims.

294. Hindered by the terms of the TPA and basic rules of international law, Claimants have been forced to whittle down these claims over time. They have had to withdraw their expropriation claim;<sup>685</sup> they have had to admit that Bridgestone Licensing's only interest is in royalties from sales and that Bridgestone Americas' only interest is in revenues from sales;<sup>686</sup> and their speculative claim for damages related to investments outside of Panama has been dismissed.<sup>687</sup>

295. However, Claimants persist in submitting unsubstantiated claims that do nothing but waste the Parties' and this Tribunal's time and resources. For example, Claimants' conclusory "claims" of a breach of Articles 10.3 and 10.4 together

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<sup>685</sup> Compare **Request for Arbitration**, ¶ 66 with **Memorial**, §§ XV–XVI (omitting an expropriation claim).

<sup>686</sup> See **Decision on Expedited Objections**, ¶ 219 ("If the owner [*i.e.*, Bridgestone Corporation and Bridgestone Licensing] 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 [*i.e.*, Bridgestone Americas] will reflect the fruits of the exploitation of the trademark, out of which the royalties are paid.").

<sup>687</sup> See **Decision on Expedited Objections**, ¶ 247 ("For the reasons there given, it finds that there is no '*immediate cause- and-effect relationship*' between the judgment given by the Supreme Court and the alleged effects outside Panama. On the contrary, the relationship is speculative and remote. For this reason, the Tribunal finds that the claims made by BSAM in relation to losses caused outside Panama fall outside its jurisdiction").

comprise *eight* paragraphs,<sup>688</sup> of which *one* is devoted to the facts of this case.<sup>689</sup> Furthermore, although Claimants have invoked the “national treatment” and “most-favored nation” provisions of the TPA, their miniature exposé lacks even a suggestion — let alone any supporting evidence — that a comparator in like circumstances was treated more favorably than Claimants. Claimants’ failure to plead the basic, well-established prerequisites of national treatment and MFN claims makes them “claim[s] for which an award in favor of [Claimants] cannot be granted” as a matter of law, pursuant to Article 10.20.4 of the TPA.<sup>690</sup> Bridgestone Americas’ claim of a denial of justice under Article 10.5 — a claim that it has no standing to bring because Bridgestone Americas was not a party to the local proceedings about which it now complains — is also “a claim for which an award in favor of [Claimant] cannot be granted” as a matter of law under Article 10.20.4 or ICSID Arbitration Rule 41(2).<sup>691</sup>

296. That leaves only Bridgestone Licensing’s denial of justice claim. Upon closer examination, this claim amounts to no more than a disgruntled appeal of a decision with which they

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<sup>688</sup> See **Memorial**, ¶¶ 216–22.

<sup>689</sup> See **Memorial**, ¶ 222.

<sup>690</sup> **Ex. R-0001**, TPA, Art. 10.20.4.

<sup>691</sup> See **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013), ¶ 435 (Cremades, Hanotiau, Knieper) (“[A] 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”).

disagree and a set of general grievances and alleged violations of Panamanian law cloaked in a denial of justice claim. Surprisingly, Claimants have been explicit about this (impermissible) objective: Again and again, Claimants have admitted<sup>692</sup> or implied<sup>693</sup> that their goal is to overturn — or somehow eradicate — the judgment of the Supreme Court. That is simply not possible under Panamanian law, because the judgments of the Supreme Court are final and are not subject to appeal.<sup>694</sup> Such an appeal is also not possible under international law under the guise of denial of justice, because international courts and tribunals cannot sit in appeal of local court decisions,<sup>695</sup> and this Tribunal should not be fooled by Claimants’ transparent attempt to lure the Tribunal into reversing an unfavorable judgment of a local court.

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<sup>692</sup> See, e.g., **First Akey Statement**, ¶ 4 (“I was contacted by Tom Kingsbury, who is Chief Counsel for Intellectual Property for the Americas . . . to see whether any diplomatic or government channels could be pursued *to assist Bridgestone in overturning the decision*”) (emphasis added).

<sup>693</sup> See, e.g., **Request for Arbitration**, ¶ 50 (noting that Claimants requested a meeting with the Ambassador to “inquire[] as to domestic remedies available in addition to the two post-judgment appeals it had filed,” implying that the companies sought information about potential extra-judicial remedies); **Ex. C-0035**, Congressional Support Letters (September 2016), p. 1 (“We write on behalf of Bridgestone Americas to express concern about the climate for American businesses in Panama. . . . [W]e urge you to work with the Panamanian government to ensure *Bridgestone has the opportunity to seek an appropriate remedy in this case*”) (emphasis added).

<sup>694</sup> See **First Lee Report**, ¶¶ 44–58.

<sup>695</sup> See *supra* Section III.A.

297. Finally, Bridgestone Licensing has utterly failed to substantiate its claims for damages. *First*, it has not proven that it bore the economic burden of paying the full damages award against Bridgestone Corporation and Bridgestone Licensing. *Second*, by Bridgestone Licensing has wholly failed to prove that the Supreme Court Judgment had any impact on its royalties — which is the only way it could suffer damages in connection with its investment.

298. These fundamental flaws in Claimants' case are set forth in the chart below:

	<b>Articles 10.3 and 10.4 Claims (MFN and National Treatment)</b>	<b>Article 10.5 Claim (Denial of Justice)</b>	<b>Damages</b>
<b>Bridgestone Americas</b>	The claim is not one for which an award can be made because BSAM: (i) was not a party to the proceeding that forms the “treatment” at issue; and (ii) did not, and could not, plead the requisite comparator element..	The claim is not one for which an award can be made because BSAM cannot claim a denial of justice on the basis of a proceeding to which it was not a party.	In the absence of viable claims, there is no need to consider the issue of damages. BSAM also failed to allege any damage to its investment ( <i>i.e.</i> , the trademark licenses), and in any event, sales have not decreased, leaving damages unrealized, speculative, and unproven.
<b>Bridgestone Licensing</b>	The claim is not one for which an award can be made because BSLs did not, and could not, plead the basic prerequisites of the claims.	The claim fails on the merits, because BSLs submitted an impermissible appeal.	<p>BSLS failed to prove actual injury in the amount of USD 5,431,000.</p> <p>BSLS has requested between \$1,003,769 and \$1,710,588 for alleged injury to investments outside of Panama, which falls outside of the jurisdiction of the this Tribunal.</p> <p>BSLS has requested between \$59,311 and \$111,104 for hypothetical injury in Panama, which falls outside of the jurisdiction of this Tribunal.</p>

299. For all of the reasons set forth above, this Tribunal should use its authority to correct this abuse of the international investment system. Facing the frivolous nature of Claimants’

MFN and national treatment claims and Bridgestone Americas' denial of justice claim, Panama would be justified in invoking Article 10.20.4 of the TPA to excise these meritless claims from this matter before proceeding with the one hopeless denial of justice claim. Nevertheless, in the interest of judicial economy, Panama will forgo requesting a separate Article 10.20.4 proceeding. Panama instead invites Claimants to withdraw these meritless claims forthwith. Should Claimants forgo this opportunity to desist from these claims, the continued exercise of jurisdiction over these meritless claims could amount to an excess of power, and tremendous inefficiencies would result from pursuing further submissions or document requests in pursuit of these claims. If Claimants fail to withdraw their meritless claims within 30 days, Panama urges the Tribunal to exercise its discretion under ICSID Rule 41(2) to dismiss immediately Claimants' MFN and national treatment claims and Bridgestone Americas' denial of justice claim. In light of Claimants' continued advancement of these frivolous claims, Panama also requests that the Tribunal award full costs and attorneys' fees to Panama with applicable compounding interest.<sup>696</sup>

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<sup>696</sup> See **RLA-0167**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Decision on Reconsideration and Award, 7 February 2017), ¶ 620 (Kaufmann-Kohler, Stern, Drymer) (“[T]he apportionment of costs requires an analysis of all of the circumstances of the case, including to what extent a party has contributed to the costs of the arbitration and whether that contribution

[FOOTNOTE CONTINUED ON NEXT PAGE]

## VI. RELIEF REQUESTED

300. For the foregoing reasons, the Republic of Panama respectfully requests that the Tribunal:

- a. Use its discretion under ICSID Rule 41(2) to dismiss all of Bridgestone Americas' claims, should Bridgestone Americas fail to withdraw these claims within 30 days;
- b. Use its discretion under ICSID Rule 41(2) to dismiss Bridgestone Licensing's claims under Articles 10.3 ("National Treatment") and 10.4 ("Most-Favored-Nation Treatment") of the TPA, should Bridgestone Licensing fail to withdraw these claims within 30 days ;
- c. Reject Bridgestone Licensing's claim for a denial of justice under Article 10.5 of the TPA;
- d. In any event, reject Bridgestone Licensing's claims: (i) for compensation for reduced royalties from sales, whether in Panama or elsewhere, and (ii) to recover the USD 5.431 million in damages awarded to Muresa and Tire Group; and

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*[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]*

was reasonable and justified. . . . It should also take into account the procedural conduct of the parties, and in particular whether such conduct delayed the proceedings or increased costs unnecessarily").

e. Award to Panama all costs of the arbitration, attorneys' fees, and costs and expenses of Panama.

Respectfully submitted,



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