

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID ARB. No. ARB/16/34

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

Claimants

vs.

THE REPUBLIC OF PANAMA

Respondent

REPLY

22 March 2019

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TABLE OF AUTHORITIES

Awards and Legal Decisions

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CLA-0038 (ENG)	<i>Mobil Investments Canada Inc. and Murphy Oil Corp. v Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012)</i>	<i>Mobil v. Canada</i>
CLA-0070 (ENG)	<i>Rumeli , Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award of July 29, 2008</i>	<i>Rumeli v. Republic of Kazakhstan</i>
CLA-0073 (ENG)	<i>Mondev International Ltd v. United States of America, ICSID case ARB(AF)/99/2, Award 11 October 2002</i>	<i>Mondev v. United States</i>
CLA-0078 (ENG)	American Convention on Human Rights (Pact of San José, November 1969)	<i>American Convention on Human Rights</i>
CLA-0086 (ENG)	Factory at Chorzów (Germany v. Poland), Merits, 1928 PCIJ (Ser. A) No. 17 (13 September 1928)	<i>Factory at Chorzów</i>
CLA-0099 (ENG)	International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001).	<i>Articles on State Responsibility</i>
CLA-0137 (ENG)	<i>Union Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award (31 August 2018)</i>	<i>UFG v. Egypt</i>
CLA-0138 (ENG)	<i>Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (4 October 2013)</i>	<i>Metal-Tech v. Uzbekistan</i>

File Reference	Full Citation	Short Description
CLA-0144 (ENG)	<i>Amco Asia Corporation v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Decision on the Application by Parties for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Respondent for Annulment of the Supplemental Award of October 17, 1990 (17 December 1992)	<i>Amco v. Indonesia</i>
CLA-0145 (ENG)	<i>Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine</i> , ICSID Case No. ARB/08/11, Award (25 October 2012)	<i>Bosh v. Ukraine</i>
CLA-0150 (ENG)	<i>Wena Hotels Ltd. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002)	<i>Wena Hotels v. Egypt</i>
CLA-0152 (ENG)	<i>Dombo Beheer BV v. Netherlands</i> , ECtHR, App. No. 1448/88, Merits and Just Satisfaction (27 Oct. 1993)	<i>Dombo v. Netherlands</i>
CLA-0154 (ENG)	<i>Murphy Exploration and Production Company International v. Republic of Ecuador II</i> , PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (6 May 2016)	<i>Murphy v. Ecuador</i>
CLA-0157 (ENG)	Judgment of December 5, 2014, of the First Chamber of the Supreme Court of Justice. Ordinary proceedings that DANNY JAVIER LOPEZ LEZCANO and FRANCISCO JAVIER LOPEZ ARAUZ pursued against GILBERTO LEDEZMA MIRANDA	Lopez v. Ledezma
CLA-0158 (ENG)	Judgment of April 21, 2009, of the Civil Chamber of the Supreme Court of Justice. Ordinary major claims proceedings that E.D.A., S.A. pursued against COOPERATIVA DE PRODUCTORES DE CAFÉ DE BOQUETE, R.L.	DURÁN v. Cooperativa de Productores de Café
CLA-0159 (ENG)	Morellini v Mizzi Family Holdings Pty Ltd [2016] FCAFC 13).	Morellini v Mizzi Family Holdings
CLA-0160 (ENG)	<i>Hertz v. Luzenac Group</i> , 576 F.3d 1103, 1117 (10th Cir. 2009).	<i>Hertz v. Luzenac</i>

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CLA-0161 (ENG)	<i>The North Face v. South Butt LLC</i> , Case 4:09-cv-02029-RWS (E.D. Mo. 2008).	<i>The North Face v. South Butt</i>
CLA-0162 (ENG)	<i>Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.</i> , 2019 U.S. App. LEXIS 7638, at *6.	<i>Louis Vuitton v. My Other Bag</i>
CLA-0163 (ENG)	Summary procedure proposed by CONNEXION ENTERPRISES, S.A. against GLOBAL FINANCE & INVESTMENT, S.A. Speaker: HERNAN A. DE LEON BATISTA.	Connexion v. Global Finance
CLA-0164 (ENG)	Process of opposition to the brand HPC POLO Y DISEÑO - 11839-2018 Registration No./Application: 231644-01, 231646- 01, 231649-01, 231650-01, 231651-01, 263143-01, Speaking Judge, Aidelena Pereira	HPC Polo v. Anabi
CLA-0165 (ENG)	P.H. KONKORD against INVERSIONES METALICAS, S.A. Y TECNO-SERVICIO, S.A. Speaker: MARIA EUGENIA LOPEZ ARIAS	P.H. Konkord v. Inversiones Metálicas
CLA-0166 (ENG)	SUJAIL ISSA K'DAVID appeals in cassation in the ordinary process of TRISHRI IMPEX, S. A. Y RITIKA MAHESH BUDHRANI. Speaking Judge: OYDÉN ORTEGA DURÁN in the chamber with HERNÁN A. DE LEÓN BATISTA.	Sujail v. Ritika

Books, Articles, and Reports

File Reference	Full Citation	Short Description
CLA-0077 (ENG)	Jan Paulsson, <i>Denial of Justice in International Law</i> , Cambridge University Press (2005)	Paulsson, <i>Denial of Justice</i>
CLA-0142 (ENG)	Smith, Gordon V et al. <i>Trademark Valuation - A Tool for Brand Management</i>	Gordon, <i>Trademark Valuation</i>
CLA-0143 (ENG)	J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> , §18.38 (4th Ed. 2016)	McCarthy, <i>Trademarks and Unfair Competition</i>

File Reference	Full Citation	Short Description
CLA-0146 (ENG)	Charles T. Kotuby, Jr., Luke A. Sobota, <i>General Principles of International Law and Due Process: Principles and Norms Applicable in Transnational Disputes</i> , in Chapter 3 Modern Applications of the Principles of International Due Process (15 March 2017)	Kotuby and Sobota, <i>General Principles of International Law and Due Process</i>
CLA-0147 (ENG)	ALI/UNIDROIT Principles of Transnational Civil Procedure	Principles of Transnational Civil Procedure
CLA-0149 (ENG)	Edwin Borchard, <i>Minimum Standard Of The Treatment Of Aliens</i> , 38 Michigan Law Review 445 (1940)	Borchard, <i>Minimum Standards</i>
CLA-0151 (ENG)	Alec Stone Sweet, <i>Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez</i> (2014)	Stone Sweet, <i>Proportionality</i>
CLA-0153 (ENG)	Constantine Partasides, <i>Proving Corruption in International Arbitration: A Balanced Standard for the Real World</i> , ICSID Review (2010).	Partasides, <i>Proving Corruption in International Arbitration</i>
CLA-0156 (ENG)	Gabriela Salinas, <i>The International Brand Valuation Manual: A Complete Overview and Analysis of Brand Valuation Techniques, Methodologies and Applications</i> (2009)	Salinas, <i>International Brand Valuation Manual</i>

EXHIBIT LIST

File Reference	Description
Exhibit C-0006 (ENG)	Bridgestone Panamanian Trademark Registration Record
Exhibit C-0007 (ENG)	Firestone Panamanian Trademark Registration Record
Exhibit C-0013 (ENG)	Letter from Foley & Lardner LLP to Sanchelina & Associates, P.A. (3 November 2004) (“Reservation of Rights Letter”)
Exhibit C-0014 (ENG-SPA)	Judgment No. 48, Eighth Civil Circuit Court
Exhibit C-0016 (ENG-SPA)	Civil Complaint filed by Muresa Intertrade S.A.
Exhibit C-0019 (ENG-SPA)	BSLS and BSJ Answer to Complaint
Exhibit C-0020 (ENG-SPA)	BSJ and BSLS Expert Report
Exhibit C-0022 (ENG-SPA)	Muresa and TGFL Appeal to Judgment
Exhibit C-0023 (ENG-SPA)	BSJ and BSLS Opposition to Muresa Appeal
Exhibit C-0024 (ENG-SPA)	Decision by the First Superior Court
Exhibit C-0027 (ENG-SPA)	Judgment of the Supreme Court of Justice, Civil Division
Exhibit C-0032 (ENG)	USTR Special 301 Report 2015
Exhibit C-0048 (ENG)	Agreement to License Trademarks Between BSLS and BSAH
Exhibit C-0052 (ENG)	Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001)
Exhibit C-0126 (ENG)	JP Morgan Chase Bank Statement (31 August 2016)
Exhibit C-0153 (ENG-SPA)	Testimony by Jose Orestes Medina Samaniego dated 21 April 2010
Exhibit C-0158 (ENG-SPA)	Testimony by Mirna Raquel Moreira Martinez dated 3 May 2010
Exhibit C-0161 (ENG-SPA)	Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2)

File Reference	Description
Exhibit C-0162 (ENG-SPA)	Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010
Exhibit C-0163 (ENG-SPA)	Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010
Exhibit C-0183 (ENG-SPA)	Order joining TGFL and LV International on 15 November 2005
Exhibit C-0186 (ENG-SPA)	Nullification Application Filed by Bridgestone Arguing that Muresa Complaint in Violation of Due Process dated 19 August 2009
Exhibit C-0188 (ENG-SPA)	Extracts from the Judicial Code of the Republic of Panama
Exhibit C-0193 (ENG-SPA)	Decision Accepting Evidence Presented by Muresa dated 26 January 2010
Exhibit C-0196 (ENG-SPA)	Interrogatory of Vera Luisa Lindo de Gutierrez dated 25 May 2010
Exhibit C-0201 (ENG-SPA)	Decision Denying Bridgestone's Nullification Application dated 6 December 2010
Exhibit C-0216 (ENG)	Transparency International Corruption Perceptions Index 2017
Exhibit C-0220 (ENG)	Transparency International and the U4 Anti-Corruption Resource Centre, Panama: Overview of Corruption Risks in the Judiciary and Prosecution Service (2014)
Exhibit C-0228 (ENG)	Export.gov Country Guide - Panama (last updated 14 November 2016)
Exhibit C-0268 (ENG)	Transparency International Corruption Index 2018
Exhibit C-0269 (ENG)	Freedom House Report
Exhibit C-0270 (ENG-SPA)	Articles Referencing Claims of Corruption by Justice Ortega made by Panamanian Lawyer Janio Lescure
Exhibit C-0271 (ENG)	Loan Agreement Between BSLS and BSAM
Exhibit C-0272 (ENG)	BSLS and BSAM Bank Statements
Exhibit C-0273 (ENG)	BSLS and BSAM Bank Statements
Exhibit C-0274 (ENG)	Affidavit of William Tolbert dated 25 June 2014
Exhibit C-0275 (ENG)	Lucom Appellate Brief

File Reference	Description
Exhibit C-0276 (ENG)	Affidavit of Jose Rigoberto Acevedo Castillo dated 18 May 2015
Exhibit C-0277 (ENG)	Global Competitive Index 2017-2018
Exhibit C-0278 (ENG)	Web Article, Colon Free Trade Zone, Panama
Exhibit C-0278 (ENG)	Web Article, Colon Free Trade Zone, Panama
Exhibit C-0279 (SPA)	Definition of The Subject of Proceedings
Exhibit C-0280 (ENG-SPA)	Extracts from the Panamanian Judicial Code
Exhibit C-0281 (SPA)	Legal Dictionary of Judicial Civil Procedure
Exhibit C-0285 (ENG)	Restatement (Second) of Torts § 682 (Am. Law Inst. 1977).
Exhibit C-0287 (ENG)	“Trademark Bullying: Legitimate Problem or Passing Fad?,” <i>World Trademark Review</i> (April/May 2013)
Exhibit C-0289 (ENG)	<i>The Fashion Law</i> (March 5, 2012) (www.thefashionlaw.com/home/iv-slams-university-of-pennsylvania-law-school) (last accessed March 11, 2019).
Exhibit C-0291 (ENG)	BLS 2017 OB Report
Exhibit C-0292 (ENG)	Investopedia – Definition of Unrealized Loss
Exhibit C-0293 (ENG)	BSCR Balance Sheet
Exhibit C-0294 (ENG)	NYU Stern Country Risk Premium Spreadsheet Cover Page
Exhibit C-0295 (ENG)	Cedeño Appeal Process
Exhibit C-0296 (ENG)	Los Derechos de los Accionistas y la Situación de los Minoritarios en las Sociedades Anónimas Panameñas
Exhibit C-0298 (ENG)	Guía de Jurisprudencia de la Propiedad Industrial

I. INTRODUCTION AND SUMMARY

1. This Reply is submitted by Bridgestone Licensing Services, Inc. (“**BSLS**”) and Bridgestone America, Inc. (“**BSAM**”) (together, the “**Claimants**”) in response to the Respondent’s Counter-Memorial dated 14 September 2018 (the “**Counter-Memorial**”) and pursuant to the Tribunal’s Procedural Order No. 1 dated 11 July 2017 and Amendment No. 4 to Annex A thereto dated 28 August 2018. Pursuant to the Tribunal’s communication of 14 March 2019, the Claimants reserve their right to submit an application to the Tribunal to supplement this Reply in order to address any documents that the Respondent was to produce by 14 February 2019, but have not yet been produced.

2. At the center of this case is a decision by the Panamanian Supreme Court that can only be described as shocking, arbitrary and profoundly unjust. No honest or competent court could possibly have given it. The Claimants set out in detail in their Memorial the numerous grave failures of the Judgment of the Supreme Court dated 28 May 2014 (the “**Supreme Court Judgment**”) to provide due process and the arbitrary and unjust nature of the conclusions reached by the Supreme Court. To the extent the Respondent has addressed those points, its answers are entirely unsatisfactory, as is explained below.
 - (a) The Supreme Court based its Judgment on Article 217 of the Judicial Code, even though Muresa Intertrade S.A. (“**Muresa**”) had not brought its claim under that provision and had not relied on or cited it at all in its claim.¹ This violated a mandatory requirement for all judgments at Article 991 of the Judicial Code.² Further, because Muresa was not bringing its claim under Article 217 and therefore BSLS and Bridgestone Corporation (“**BSJ**”) could not in accordance with the mandatory requirements of Panamanian law be found liable on that ground, no party (including Muresa) made any submissions on it to the Supreme Court. But even though Muresa’s claim

¹ Claimants’ Memorial ¶¶ 173-177.

² Article 991 states, in relevant part, as follows: “*The judgment must be consistent with the causes of action adduced in the claim or subsequently in those cases explicitly contained therein and with the defenses that have been proved and would have been pleaded if so required in law. The respondent cannot be found liable for any additional amount or for a reason other than that stated in the claim.*” [emphasis supplied] (**Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 991); First Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018 (“First Arjona Report”) ¶ 35, Second Expert Report of Adán Arnulfo Arjona L. dated 22 March 2018 (“Second Arjona Report”) ¶¶ 18-39.

was not brought under Article 217, the Justices nevertheless considered it under that provision, and did so in private, without any reference to the parties. As a result, BSLS and BSJ had no opportunity to deal with it. This was an extraordinary approach for the Justices to take, and was obviously seriously unjust. It was a grave violation of the international law right of due process because the decision was based on a legal point that BSLS and BSJ had no opportunity to address.³ The Respondent's answer is that Article 217 was invoked by BSLS and BSJ in the litigation.⁴ That is true – BSLS and BSJ argued that Article 217 was the appropriate provision for the claim Muresa appeared to be making rather than Article 1644 of the Civil Code, and asked that the claims be dismissed on that basis.⁵ But that request did not succeed and Muresa maintained its claim solely under Article 1644. Hence at no time was it necessary or appropriate for BSLS and BSJ to respond to a claim under Article 217 because no such claim was ever brought. Mr. Lee argues that Article 217 was somehow inherent Muresa's Article 1644 claim, and he says that judges can apply any provision of law they deem appropriate.⁶ But with respect to Mr. Lee, he is obviously mistaken. The elements of a cause of action under Article 217 are different from those under Article 1644, and the latter does not encompass the former (or vice versa). Article 217 establishes a cause of action for loss arising out of *procedural actions pursued recklessly or in bad faith*. Article 1644 establishes a cause of action in tort for loss arising out of fault or negligence. Therefore it cannot possibly be right that Muresa's Article 1644 claim somehow implicitly or otherwise encompassed an Article 217 claim. They are entirely different. As to Mr. Lee's suggestion that judges can apply any provision of law they deem appropriate, if he means by this to suggest that judges can find a party liable under a cause of action that was never claimed,

³ See **CLA-0417** ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 3.1, "*The court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.*", and princ. 5.4 ("*The parties have the right to submit relevant contentions of fact ... and to offer supporting evidence.*").

⁴ Respondent's Counter-Memorial ¶ 81, 85.

⁵ Claimants' Memorial ¶ 50, **Exhibit C-0019**, BSLS and BSJ Answer to Complaint.

⁶ Expert Report of Jorge Federico Lee ("Lee Report"), ¶ 73-74.

he offers no authority for that suggestion, and it flies in the face of the mandatory requirements of Article 991 of the Judicial Code.

(b) The Supreme Court relied on a letter dated 3 November 2004 sent by Foley and Lardner on behalf of BFS Brands, LLC and Bridgestone/Firestone North American Tire, LLC to L.V. International, Inc (the “**Reservation of Rights Letter**”) that was produced only as an attachment to the report of Muresa’s quantum expert.⁷ The Reservation of Rights Letter was admitted on the Court record in violation of the different mandatory requirements of no less than five different Articles of the Judicial Code.⁸ To a common lawyer, perhaps it might be thought that non-compliance with rules of evidence is a technicality as to which the judge may have a discretion, but under Panamanian law, no judicial discretion applies and it is no exaggeration to say that in Panama this is a shocking defect of mandatory due process.⁹ Mr. Lee suggests that attaching the letter to an expert’s report was a valid way to adduce this evidence into the proceedings, but he offers no authority for that suggestions and it is wrong.¹⁰ Experts may include documents with their reports, but if any such document is then to be relied on by a party as evidence, or if a court is to place reliance on it, such document must have been admitted to the proceedings in accordance with the rules of evidence.¹¹ Complying with the formalities of admitting evidence is a mandatory requirement under Panamanian law, because when evidence is properly admitted, the parties have an opportunity to examine and challenge it. In the Muresa litigation, the Reservation of Rights Letter violated at least five requirements for lawful admission under numerous Articles of the Judicial Code, it was absolutely clear therefore that it was not

⁷ The Court’s quantum expert also attached a copy of the letter because she had received it from Muresa together with other documents. But she stated that she could not take this letter into account because it was not relevant to whether sales had ceased – **Exhibit C-0196**, Interrogatory of Vera Luisa Lindo de Gutierrez dated 25 May 2010.

⁸ Claimants’ Memorial ¶ 178-191

⁹ First Arjona Report ¶ 41-50, Second Arjona Report ¶ 40-52.

¹⁰ Lee Report ¶ 87-92.

¹¹ **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 871: “*Except where otherwise provided, documents issued by third parties shall only be assessed by the Judge: 1. When they are of a dispositive nature, if they have been explicitly acknowledged by their authors or ordered to be held as having been acknowledged; and 2. When they are testimonial in nature, assuming their content has been ratified in the proceeding via the formal procedures established for witness evidence.*”; Second Arjona Report ¶ 47.

and could not be lawfully admitted. The Reservation of Rights Letter was also produced by Muresa's expert in May 2010, months after the Eleventh Civil Circuit Court of the First Judicial District of Panama (the "**Eleventh Circuit Court**") had issued its order determining what evidence was to be admitted.¹² Therefore, BSLs and BSJ had no opportunity to respond to and deal with the Reservation of Rights Letter. In light of the reliance placed on that letter by the Supreme Court, this was a very serious breach of international law rights of due process.¹³

(c) The Supreme Court's Judgment was based on a finding of fact that in the Reservation of Rights Letter BSLs and BSJ had engaged in "obviously intimidating and reckless behaviour",¹⁴ despite Muresa having made no such allegation in its claim.¹⁵ Again this was contrary to a mandatory requirement at Article 991 of the Judicial Code that the court is permitted to make a finding of liability based on a fact only if that fact has been alleged in the relevant claim.¹⁶ Again, it is no exaggeration to say that in Panama this is a shocking defect of mandatory due process. Therefore BSLs and BSJS had not opportunity to address and respond to the spurious suggestion they had intimidated and acted recklessly. Again this was a grave violation of the international law right of due process.¹⁷ The Respondent ignores this point entirely because it has no answer to it.

(d) The finding of the Supreme Court that the Reservation of Rights Letter was a threatening and reckless action by BSLs and BSJ against Muresa is wholly illogical and impossible to understand.¹⁸ The letter was not sent by or on

¹² **Exhibit C-0193**, Decision Accepting Evidence Presented by Muresa dated 26 January 2010.

¹³ **CLA-0150 Wena Hotels Ltd. v. Arab Republic of Egypt**, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, ¶ 57: "*The said provision refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.*"

¹⁴ **Exhibit C-0027** - Judgment of the Supreme Court of Justice, Civil Division, at 20.

¹⁵ Claimants' Memorial ¶ 176, 195.

¹⁶ First Arjona Report ¶ 31; Second Arjona Report ¶ 27.

¹⁷ **CLA-0150 Wena Hotels Ltd. v. Egypt** ¶ 57

¹⁸ Claimants' Memorial ¶ 93, 96.

behalf of BSLS or BSJ, it was not sent to Muresa or Tire Group of Factories Ltd (“TGFL”), and it did not refer to Panama or intellectual property rights in Panama. Instead, the letter related to separate proceedings in the US, was a warning or “reservation of rights” letter that is entirely standard in the United States and elsewhere,¹⁹ and was sent in the United States to recipients in the United States, none of whom were party to the Supreme Court case. The letter stated, “*you and your client should know that Bridgestone/Firestone objects to and does not condone the use or registration anywhere in the world of the mark RIVERSTONE for tires. Hence, L.V. International, Inc. is acting at its own peril if it chooses to use the mark RIVERSTONE in other countries.*”²⁰ Ms. Lasso de la Vega Ferrari argues that letters of this nature are “*intended to intimidate the counterpart*”²¹ but that is inaccurate. As Mr. Molino notes, the purpose of such letter is “*the avoidance of legal actions and of the corresponding economic costs that they imply.*”²² Nevertheless, even Ms. Lasso de la Vega Ferrari admits that any effect of the letter is limited to “*the party to whom it is directed.*”²³ The letter was on any view therefore completely irrelevant to Muresa and TGFL’s claim and the Supreme Court’s finding was in breach of mandatory provisions of Panamanian law (in particular, Article 783 of the Judicial Code),²⁴ and was a grave violation of the international law right to a non-arbitrary process.²⁵ The Respondent and Mr. Lee ignore this point entirely because they have no answer to it.

- (e) Further, the finding of the Supreme Court that BSLS and BSJ’s opposition to Muresa’s trademark application was of itself brought “*with the intent to*

¹⁹ Expert Report of Roberta Jacobs-Meadway dated 11 May 2018 (“First Jacobs-Meadway Report”) ¶ 36.

²⁰ **Exhibit C-0013** – Reservation of Rights Letter

²¹ Expert Report of Marissa Lasso de la Vega Ferrari dated 14 September 2018 (“Lasso de la Vega Ferrari Report”) ¶ 89.

²² Expert Report of Edwin Molino dated 22 March 2019 (“Molino Report”) ¶ 81.

²³ Lasso de la Vega Ferrari Report ¶ 89.

²⁴ First Arjona ¶ 44; Second Arjona ¶ 53-54.

²⁵ **CLA-0151** Alec Stone Sweet, Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez (2014) p 943-944.

cause damages”²⁶ is impossible to understand.²⁷ BSLS and BSJ simply invoked the mechanism for trademark opposition mandated under Panamanian law, and did so on entirely reasonable grounds – namely that the use of the suffix “-STONE” in the context of tires is confusingly similar to the BRIDGESTONE and FIRESTONE marks. That opposition failed – so be it – but the finding of intention to cause harm was entirely unsupported by any evidence, and hence the Supreme Court’s judgment makes no attempt to identify any evidential basis for their finding. This was a grave violation of the international law right to a non-arbitrary process.²⁸ Mr. Lee has no answer to this allegation. Ms. Lasso de la Vega Ferrari attempts to deal with the point by denying that it was BSLS and BSJ’s opposition that was the basis of the Supreme Court’s finding, and she argues that it was other “*negligent and culpable conduct*” of BSLS and BSJ.²⁹ However, this flies in the face of the Supreme Court’s own judgment. Specifically, the Supreme Court expressly found that it was reckless to oppose a trademark if the applicant was already marketing competing products.³⁰ In light of that, it is perhaps academic that Ms. Lasso de la Vega Ferrari fails to explain on what legal and evidential basis she believes BSLS and BSJ’s behaviour to have been negligent and culpable. although she does not explain why any conduct of BSLS or BSJ was “*negligent*”.

- (f) The Supreme Court found that BSLS and BSJ’s supposed unlawful actions had caused loss to Muresa of US\$5,431,000 and that therefore BSLS and BSJ were liable in that amount.³¹ In violation of Articles 990 and 199 of the

²⁶ **Exhibit C-0027**, Judgment of the Supreme Court of Justice, Civil Division, at 21.

²⁷ Claimants’ Memorial ¶ 214-215.

²⁸ Stone Sweet, *Proportionality* p 943-944 – “*At the heart of due process is the idea that adjudication cannot be considered legitimate if it does not prevent arbitrariness from the standpoint of the parties. Indeed, at this point in time, the rule of law requires that every participant in a court proceeding possess rights to due process.*”

²⁹ Lasso de la Vega Ferrari Report ¶ 117.

³⁰ **Exhibit C-0027**, Judgment of the Supreme Court of Justice, Civil Division, at 21: “*However, as to the specific situation of this case, in which there were strong evidences that showed that the appellants plaintiffs had with legal basis the right to market a product that also constituted an item of great importance for their own profits in connection with the commercial activity they are engaged in and conveniently an element of commercial competitiveness for the opposing parties, it may represent a key situation for one who intends to commercially decrease that condition of market possession, without strong legal support and with the intent to cause damages because of the commercial competitiveness that this represents.*”

³¹ Claimants’ Memorial ¶ 205-207.

Judicial Code, the Supreme Court did not provide any explanation as to the basis for a finding of loss in that amount.³² It appears that the Supreme Court relied on the evidence of Muresa and TGFL's employee, Mirna Raquel Moreira Martinez,³³ as well as Muresa and TGFL's expert report in making its decision – though neither are referred to in the context of the determination that Muresa and TGFL had suffered loss of US\$5 million. But in any case, neither Ms. Moreira Martinez nor the expert offered any explanation, in financial terms, as to how they arrived at these figures. On the other hand, the Supreme Court ignored the financial records and evidence of its own expert (as well as BSLs and BSJ's expert) that found no loss and no basis on which to establish loss.³⁴ Mr. Lee's unsupported view is that the Supreme Court's analysis of quantum was "*implicit*" in the reasons given for determining liability on the part of BSLs and BSJ,³⁵ But an decision cannot be implied, it must be explicit under Articles 990 and 199 of the Judicial Code, which make clear that reasons and legal bases for decisions "*shall be cited*".³⁶ These were grave violations of the international law right to due process and to a non-arbitrary process.

3. The Panamanian Ambassador has said this shocking judgment was the result of corruption.³⁷ Former Panamanian Supreme Court Justice Arjona calls the judgment "*manifestly unjust*",³⁸ and "*manifestly arbitrary, irrational and unjust*".³⁹ Panamanian trademark lawyer Edwin Molino describes it as "*arbitrary, abusive, unreasonable, and unjust*".⁴⁰ Before he was hired by the Respondent for the purposes of this case, even the Respondent's own expert witness, former Supreme Court Justice Mr Jorge Federico Lee, considered the impugned judgment highly suspect – referring to the repeated corruption allegations and complaints made against the drafting Justice, Mr Oyden

³² First Arjona Report ¶ 80-81; Second Arjona Report ¶ 72-73.

³³ **Exhibit C-0158** – Testimony by Mirna Raquel Moreira Martinez dated 3 May 2010.

³⁴ **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 5; and **Exhibit C-0020** – BSJ and BSLs Expert Report, at 7.

³⁵ Lee Report ¶ 161

³⁶ **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 990.

³⁷ Witness Statement of Jeffrey Lightfoot dated 9 May 2018 ¶ 11; Witness Statement of Steven Akey dated 30 April 2018 ¶ 8.

³⁸ First Arjona Report ¶ 115.

³⁹ Second Arjona Report ¶ 8.

⁴⁰ Molino Report ¶ 104.

Ortega.⁴¹ But having since been hired by the Respondent, he now says “*the judgment was issued with strict adherence to Panamanian law and respecting the fundamental guarantee of due process*”.⁴² In light of the facts, that opinion is surprising and unfortunately has the ring of advocacy. Indeed, the furthest the Respondent’s Panamanian trademark law expert is willing to go is to suggest that the Supreme Court Judgment is not so wrong as to be “*manifestly unfair or arbitrary*”,⁴³ and it seems she says that only on the basis of a disputed assertion that BSJ and BSLS “*were able to submit their points of view and file all the recourses they deemed appropriate*.”⁴⁴ The best that the Respondent’s international trademark law expert can say on the matter is that it is within Panama’s right as a sovereign state to make any judgment it likes.⁴⁵

4. Although denial of justice is principally a procedural standard, sometimes, “*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*.”⁴⁶ That is the case here.
5. However, this does not mean that the Claimants must prove corruption or the like in order to establish denial of justice—it is sufficient that no honest or competent court could possibly have given it. But where a judgment is found to have been tainted by corruption, it necessarily follows there is a denial of justice. Of course, it is a very rare case where direct proof of such corruption can be obtained. But because of the obvious difficulty of obtaining direct evidence, there is well established authority that circumstantial evidence of corruption can be sufficient: “*As has long been recognised, corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption*.”⁴⁷ And even where circumstantial evidence is insufficient positively to establish corruption in a particular

⁴¹ Claimants’ Reply on Application for Removal of Respondent’s Expert Witness as to Panamanian Law dated 16 November 2018 ¶¶ 16-18; Second Witness Statement of Jorge Federico Lee dated 27 November 2018, ¶ 5-7.

⁴² Lee Report ¶ 170.

⁴³ Lasso de la Vega Ferrari Report ¶ 92.

⁴⁴ Lasso de la Vega Ferrari Report ¶ 93.

⁴⁵ Expert Report of Nadine Jacobson dated 14 September 2018 (“Jacobson Report”) ¶ 19.

⁴⁶ CLA-0077, Paulsson, *Denial of Justice* at 98.

⁴⁷ CLA-0137, *UGF v. Egypt* ¶ 7.52.

case, the Claimants submit that such evidence should be taken into account in considering the factual matrix of an impugned judgment.⁴⁸

6. In the present case, the whiff of corruption permeates the whole story. The admission of corruption by the Panamanian Ambassador has already been mentioned, but there is much more.
7. At a macro level, Panama is still considered to be one of the most corrupt countries in the world,⁴⁹ and its judicial system has been characterized as “*plagued by corruption*.”⁵⁰ And there have been numerous allegations and complaints of corruption against the Supreme Court justice that drafted the impugned judgment, Justice Ortega. Indeed, yet further new allegations against him continue to surface even during these proceedings.⁵¹ That the Respondent’s investigation of such complaints never goes anywhere comes as no surprise: investigations into Supreme Court Justices can only be conducted by the National Assembly, and vice versa. In practice, it is generally recognized this means each has a significant incentive never properly to investigate the other, or risk themselves coming under equivalent scrutiny. The very design of the system ensures there is no effective scrutiny.⁵²
8. In this arbitration the Tribunal has ordered the Respondent to produce documents on corruption investigations into the Supreme Court Justices who drafted the Supreme Court Judgment, as well as documents and communications between the Supreme Court Justices and any third parties created in relation to the Supreme Court Judgment,⁵³ but as of this date the Respondent has produced nothing at all. Indeed, the Respondent’s refusal to explain what document searches it has done, the outright refusal of certain organs of the Panamanian government such as the Public Ministry to comply with the Tribunal’s order, and the Respondent’s unexplained insistence on

⁴⁸ **CLA-0138**, *Metal-Tech v. Uzbekistan* ¶ 243.

⁴⁹ Transparency International has given Panama a corruption score of 37 out of 100 in 2018 (any score under 50 is considered to be very poor). See **Exhibit C-0268**, Transparency International Corruption Perception Index 2018; see also **Exhibit C-0216**, Transparency Corruption Perceptions Index 2017.

⁵⁰ **Exhibit C-0269**, Freedom House Report.

⁵¹ **Exhibit C-0270**, Articles Referencing Claims of Corruption by Justice Ortega made by Panamanian Lawyer Janio Lescure.

⁵² **Exhibit C-0228**, Export.gov Country Guide - Panama (last updated 14 November 2016); **Exhibit C-0220**, Transparency International and the U4 Anti-Corruption Resource Centre, Panama: Overview of Corruption Risks in the Judiciary and Prosecution Service (2014); Claimants’ Memorial ¶¶ 116-130.

⁵³ Procedural Order No. 7, Annex A.

confidentiality above and beyond the regime stated in the Trade Promotion Agreement entered into between the United States of America and the Republic of Panama (“TPA”) shows Panama’s great sensitivity on this subject. It is a reasonable inference that Panama would be more cooperative and open with the Tribunal were it not in possession of evidence that it would prefer not see the light of day.

9. The Respondent says very little about corruption in the Supreme Court. As the distinguished arbitrator Constantine Partasides has noted: “*once a certain prima facie threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate – given the nature of the allegation – for the defendant to sit back and not contribute to the evidentiary exchange on the issue . . . plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation.*”⁵⁴ But in the face of the material provided by the Claimants, the Respondent has given almost no evidentiary showing, let alone the adequate showing that Mr. Partasides suggests is required. Where, it might be asked, are the numerous complaints of corruption made against the relevant Justices, where is the evidence collected in the investigation of those complaints, where are the findings of those investigations, where are the email records of the relevant Justices and their bank account records?

10. But rather than addressing the due process failures of the judgment and the evidence of corruption, the Respondent’s defense is limited in essence to five main points. Each of these points is wrong for the reasons outlined below.

(1) Argument that BSAM was not a Party to the Panamanian Proceedings

11. First, the Respondent argues that only a party to the impugned court proceedings can bring a denial of justice claim, citing *Arif v Moldova*.⁵⁵

12. But while *Arif v Moldova* is authority for the proposition that the claimant must have been party to the proceedings in a denial of justice claim brought under customary international law, it is also authority for the proposition that the claimant does not need to have been a party to the proceedings in a denial of justice claim brought under the

⁵⁴ **CLA-0153**, Partasides, *Proving Corruption in International Arbitration* ¶¶ 63-66.

⁵⁵ Respondent’s Counter-Memorial ¶ 14; **RLA-0063**.

fair and equitable treatment standard. The latter is BSAM's claim in the current arbitration,⁵⁶ and like Mr. Arif, who was also not a party to the proceedings at issue, BSAM has a clear interest in the proceedings in Panama.

13. Indeed, the Tribunal has already found that BSAM is properly able to bring a claim in relation to the proceedings that resulted in the Supreme Court Judgment:

“241. . . . BSAM has made it plain that it makes no claim in relation to the judgment debt. That debt, however, is only part of the total of at least US \$16 million that BSLS and BSAM claim jointly. So far as BSAM is concerned, the issue is whether the dispute in relation to its claim arises directly from its investment, and the same issue arises in respect of the balance of BSLS's claim, although no specific challenge has been made to that at this stage.

242. It seems to the Tribunal that the two claims must stand or fall together. Each claims in respect of its interest in the FIRESTONE trademark, BSLS as the owner and BSAM as the licensee. Each was benefitting from the exploitation of the trademark. BSLS's interest in the trademark was restricted to the royalties that it was to receive from BSAM for the use of the trademark. BSAM's interest was in the fruits of the exploitation of the trademark. BSAM had relied upon BSLS to protect the trademark and thus to protect BSAM's interest in the trademark. As Ms. Williams explained, BSAM as licensee could have joined with BSLS in opposing the registration of the RIVERSTONE trademark. Had it done so, it would no doubt also have been joined as a defendant in the proceedings that resulted in the Supreme Court's judgment.”⁵⁷

(2) Argument that the Denial of Justice Claim Amounts to no More than an Appeal of Panamanian Law

14. Second, the Respondent argues that all of the Claimants' arguments on denial of justice amount to an impermissible appeal of a Panamanian Supreme Court Judgment, and the errors pointed out by the Claimants do not constitute breaches of international law. It is true that the Claimants have explained in detail the many ways in which the Supreme

⁵⁶ The claim made by BSAM and BSLS is explicitly brought under the fair and equitable treatment standard at Article 10.5 of the TPA.

⁵⁷ Decision on Expedited Objections ¶¶ 241-242.

Court Judgment was inconsistent with Panamanian law, and have adduced evidence on this from a former Panamanian Supreme Court Justice, Mr. Arjona. The purpose of this, however, is not to attempt to appeal the Supreme Court Judgment, but rather to demonstrate that the Supreme Court Judgment was arbitrary, unjust, and irrational and in breach of Panama's fair and equitable treatment standard under the TPA.

15. Each of the grave breaches of Panamanian due process in the Supreme Court Judgment also give rise to breaches of international law standards of due process, as outlined at paragraph 2 above.
16. The evidence of corruption relating to the Supreme Court Judgment has been outlined above, as has the Respondent's failure to provide any adequate evidential showing in response.

(3) BSLS's Alleged Mischaracterization of the Supreme Court Judgment

17. Third, the Respondent argues that the Tribunal need not concern itself with alleged errors in the Supreme Court Judgment because BSLS and BSAM have not asserted any valid claims in respect thereof. However, the Respondent argues that if the Tribunal did examine the Supreme Court Judgment closely, it would find that the complaints made by the Claimants are "*incorrect*."⁵⁸ The Respondent includes a lengthy history of the proceedings, in an attempt to suggest that the Supreme Court correctly and logically applied Panamanian law. But, as is methodically explained in the expert reports of Mr. Arjona and Mr. Molino, the Respondent is simply not right in its characterization of the Supreme Court Judgment.

(4) BSLS Cannot Claim for all or any of the US \$5.4 Million Damages Award

18. The Respondent makes two points here. First, that BSLS should not be able to claim any of the US \$5,431,000 damages award because it has "*utterly failed to demonstrate that it actually suffered the alleged loss*."⁵⁹ Despite the fact that BSLS has provided copies of a bank statement showing the payment it made to Muresa, the Respondent maintains that since BSLS obtained funds to make the payment from a loan from

⁵⁸ Respondent's Counter-Memorial ¶ 159.

⁵⁹ Respondent's Counter-Memorial ¶ 279.

BSAM, BSLS did not suffer “*actual loss*.”⁶⁰ BSLS has provided evidence of the loan between itself and BSAM, and of payments of interest made by BSLS to BSAM to service the loan. It is absurd for the Respondent to argue that there is anything suspicious or uncommercial about a company obtaining financing in order to pay a debt.

19. Second, the Respondent argues that BSLS should not recover the full amount of damages in any case, because both it and BSJ were held jointly and severally liable for this amount. Echoing its failed abuse of process claim in the Expedited Objections phase of this dispute, the Respondent argues that BSLS “*chose to incur an injury*” by paying the damages and therefore its “*strategic decision amounts to a contribution to the injury*” by BSLS.⁶¹ But the Tribunal has already found that there was “*nothing improper or colorable in BSLS discharging the whole of the judgment debt for which it was jointly liable when it did.*”⁶²
20. BSLS paid the full amount of the judgment debt, using financing from BSAM, because that was what it agreed with BSJ, due to the simple fact that BSLS and BSAM were the two entities responsible for the group’s trademark protection in the Americas.

(5) BSAM and BSLS have not demonstrated any loss in excess of US \$5.4 million

21. Finally, the Respondent argues that BSLS and BSAM have not shown that they have suffered any loss as a result of the Supreme Court Judgment because their sales of tires in Panama and the “**BSCR Region**”⁶³ have not dropped. But BSLS and BSAM do not claim sales have dropped. It would be surprising if consumers of tires in Panama or elsewhere were aware of, or interested in, the Supreme Court Judgment, and therefore one would not expect a direct and immediate impact on sales in the same way as if there had been a faulty tire recall.
22. Rather, BSLS and BSAM’s investment in Panama is their trademark rights. When considering an impairment to trademark rights resulting from the issuance of a judicial decision, it is not appropriate simply to consider sales of tires. The question is whether

⁶⁰ Respondent’s Counter-Memorial ¶ 280.

⁶¹ Respondent’s Counter-Memorial ¶¶ 284-285.

⁶² Decision on Expedited Objections ¶ 330.

⁶³ The BSCR Region includes Panama, Costa Rica, Puerto Rico, Guatemala and the Dominican Republic.

the Supreme Court Judgment has impaired the value of the trademark rights. The Supreme Court Judgment, from the date it was issued in Panama to this day, has made the engagement of customary measures to enforce the BRIDGESTONE and FIRESTONE marks fraught with financial risk and legal uncertainty for the parties that enjoy those rights. Importantly, the Claimants' damages analysis in this case does not turn on diversion of trade and lost sales because the damage at issue is not the impact of immediate marketplace confusion (although marketplace confusion could arise over time), as in a typical trademark infringement case, but rather the impact of a judicial decision on the value of trademark rights. Therefore, a damages approach that is a simplistic lost sales analysis is not rational under the circumstances, and a different approach is needed to appropriately measure loss.

23. The Claimants' damages expert has employed commonly accepted valuation methodologies to measure the impairment to the value of the BRIDGESTONE and FIRESTONE marks. However, because the impact of a judicial decision on trademark value is to be assessed, impairment to the trademarks must be viewed from the perspective of persons who would find a judicial decision to be economically impactful – specifically, the perspective of a potential acquirer of or investor in the trademark rights. Such acquirer or investor would readily appreciate the economic relevance of the Supreme Court Judgment that imposed financial and legal risk on two extremely well-known and successful global brands. The Supreme Court Judgment found that a Reservation of Rights Letter and simply invoking trademark opposition procedure in Panama were unlawful in circumstances where the party applying for the trademark was a competitor. Since the very purpose of a trademark is to allow the public to be able to distinguish between products and exclude confusingly similar trademarks from the marketplace and trademark registers, this decision to effectively deny the Claimants the very ability to challenge such confusingly similar marks, regardless of the outcome of the challenge, seriously diminishes the trademark rights held by BSLS, BSJ, and BSAM. The impact on value naturally depends on what assumptions are made, so the Claimants' expert has provided a range of numbers, with explanations as to the factors and assumptions underlying the figures.
24. Further, it is critical to recognize the inherent nature of globally well-known trademarks in assessing damages resulting from impairment of the marks in one particular

jurisdiction. The special characteristic of trademarks is that a trademark is a unitary, singular representation of business goodwill (which goodwill is shared equally and indivisibly among a trademark owner and any number of licensees and sublicensees). When a trademark reaches the level of global recognition that the BRIDGESTONE and FIRESTONE marks have, both recognized as “well-known” in several countries, the damage incurred in one jurisdiction has consequences in others.⁶⁴ For example, the Supreme Court Judgment may undermine the ability to attain “well-known” status for the BRIDGESTONE and FIRESTONE marks in other jurisdictions, and may be used defensively by third parties to attach in other jurisdictions where “well-known” status was already attained. Put simply, the impairment to the global marks that resulted in Panama from the Supreme Court Judgment necessarily creates impairment, and the resulting economic consequences, in other relevant jurisdictions. For these reasons, the Claimants include in their damages analysis not only impairment of rights in Panama, but also impairment of rights in the BSCR Region – a market that includes Panama and that has been treated by BSAM for purposes of advertising, promotion and manufacturing under the marks as a consolidated market. Thus, a purchaser or investor in the BRIDGESTONE and FIRESTONE marks in Panama would likely find not only the trademark rights in Panama to be impaired by the Supreme Court Judgment, but also the trademark rights in the operationally-integrated BSCR Region.

II. BSAM’S CLAIM FOR DENIAL OF JUSTICE UNDER ARTICLE 10.5

25. The Respondent argues that it is not open to BSAM to bring a claim under Article 10.5 alleging denial of justice because BSAM was not a party to the underlying court proceedings, citing the tribunal’s decision in *Arif v Moldova* in support.⁶⁵ But *Arif v Moldova* does not support the Respondent’s argument. In that case, the claimant, Mr. Arif, was the shareholder of an entity which was party to court proceedings in Moldova, but Mr. Arif himself was not a party. He claimed denial of justice under the France-Moldova Bilateral Investment Treaty (“**BIT**”) on two bases: first, as a separate claim under customary international law, and second, as part of the fair and equitable treatment standard in the BIT. As the Respondent noted, the tribunal held that only a party to court proceedings could claim denial of justice under the customary

⁶⁴ First Jacobs-Meadway Report ¶ 33-34.

⁶⁵ Respondent’s Counter-Memorial ¶ 22; **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013) ¶ 435.

international law standard. However, the tribunal considered that the denial of justice claim made under the fair and equitable treatment standard of the BIT was a separate cause of action, and found that such claims were not limited only to parties to the underlying proceedings.⁶⁶ The tribunal held: “*the standard of fair and equitable treatment also protects the foreign shareholder in a local company. If the standard is breached by a denial of justice, the State will be held responsible towards the indirect investor for a breach of fair and equitable treatment.*”⁶⁷ BSAM has a direct investment in Panama, and such investment also takes the form of an interest in BSLs and BSJ’s investment. In that sense BSAM is analogous to Mr. Arif as an investor for the purposes of a fair and equitable treatment claim.

26. The Tribunal has already found that BSAM has an investment in Panama, in the shape of its trademark licenses, and that its investment was the subject of the Supreme Court Judgment – “*BSAM had relied upon BSLs to protect the trademark and thus to protect BSAM’s interest in the trademark. As Ms. Williams explained, BSAM as licensee could have joined with BSLs in opposing the registration of the RIVERSTONE trademark. Had it done so, it would no doubt also have been joined as a defendant in the proceedings that resulted in the Supreme Court’s judgment.*”⁶⁸ BSAM’s claim under Article 10.5 is a claim for breach of the fair and equitable treatment standard, which specifically includes the obligation not to deny justice. As an investor in the asset the subject of the Supreme Court Judgment, BSAM is entitled to the protections of Article 10.5 of the TPA, despite not being a party to the underlying court proceedings.
27. The Respondent’s second complaint about BSAM’s claims is that it “*fails to identify or quantify any loss.*”⁶⁹ But this assertion betrays a fundamental misunderstanding of intellectual property.
28. As discussed in the damages section at **Part VIII**, below, the Respondent is under the misapprehension that where trademarks are licensed, it is the licensor who retains most or all of the goodwill associated with the trademark. The Respondent argues that if the

⁶⁶ **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013) ¶ 422.

⁶⁷ **RLA-0063**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award, 8 April 2013) ¶ 438.

⁶⁸ Decision on Expedited Objections ¶ 242.

⁶⁹ Respondent’s Counter-Memorial ¶ 24.

value of the trademarks diminishes, that will only be to BSAM's benefit, since that would mean that BSAM would pay a lower royalty rate.⁷⁰ But this suggestion is both illogical, and contrary to the most basic principles of how trademarks and trademark licenses work. Put simply, if the trademark is worth less to BSLS as licensor because the mark's enforceability is impaired, it follows that it is worth less to BSAM as licensee. BSAM is the entity that manufactures, distributes and sells the tires bearing the trademark owned by BSLS (and BSJ). While a lower royalty rate might sound superficially attractive to an unaffiliated licensee, in fact it is not attractive if lower royalties result from a brand that is less valuable. If the brand is worth less because it is legally impaired or encumbered, BSAM will not be able to sell tires bearing the brand for as high a price. Therefore, while the cost to the licensee will be less, so too will the revenues. Such economic impacts cannot be discounted simply because they have not yet been felt. The Supreme Court Judgment cases – and will continue to cast into the future – a shadow over the enforceability and scope of the marks. A house built on a fault in the earth clearly would be worth less than a house built on solid ground, even if the moment in time at which the house falls is unknown and cannot be predicted.

29. As the parties discussed at length during the Preliminary Objections phase, the TPA expressly includes intellectual property rights as an asset that may be a covered investment under Chapter 10 of the TPA.⁷¹ It follows that where a breach of protection under the TPA impacts intellectual property rights, then an assessment of loss and damage must be undertaken by reference to the specific features of intellectual property rather than merely the kinds of loss typically associated with tangible assets. By way of illustration, if BSAM had a tire store in Panama that was physically damaged rather than trademark licenses, then any loss to BSAM might be assessed by reference to the cost of the property and lost store's sales figures and revenue. That is the approach the Respondent argues that the Claimants should take here.⁷² But BSAM does not have a tire store or any tangible assets in Panama, and diversion of trade from consumer confusion is not at issue. Instead, of course, BSAM's investment is trademark licenses, and, as explained above, that intellectual property is impacted by Panama's breach more in terms of a reduction in the value of the brand than in immediate loss of sales and

⁷⁰ Respondent's Counter-Memorial ¶ 27.

⁷¹ TPA, Article 10.29(f).

⁷² Respondent's Counter-Memorial ¶¶ 28-29.

revenue. Mr. Daniel explains that the impact of Panama’s breach may not have an immediately discernible effect and the damage may be as yet unrealized, though no less real.⁷³ In particular, the value of the intellectual property right owner’s brand will be reduced if estimated future profits are less than would otherwise be the case or if there is an increased risk that future profits will be less than would otherwise be the case. This is because impairment of trademark rights as seen in this case, namely narrowing of exclusivity, are likely in due course to result in greater competition by competitors operating under more closely similar marks, and hence reduced profits. And in this case, the Supreme Court Judgment increases the risk of such an outcome. In short, an acquirer (be it a purchaser or a licensee or an investor) would pay less for the BRIDGESTONE and FIRESTONE trademark rights in Panama following the Supreme Court Judgment, because of the uncertainty now affecting the fundamental right of the trademark owner or licensee to oppose or otherwise enforce rights against potential confusingly similar marks.

III. BSL’S CLAIM FOR DENIAL OF JUSTICE UNDER ARTICLE 10.5

30. The Respondent alleges that BSL has failed to demonstrate any loss in connection with its investment.⁷⁴ BSL’s claims for loss are in two categories: first, the amount of the damages award ordered by the Panamanian Supreme Court, and second, damage to the value of the FIRESTONE trademark. The Respondent’s complaint with respect to the first is that BSL “*has not established that it actually incurred the loss it now claims.*”⁷⁵ The Respondent’s rather thin basis for this argument is language in the Request for Arbitration (“**Request**”), which it says shows that BSL “*acted as no more than a pass-through agent for the payment of the funds.*”⁷⁶ Paragraph 53 of the Request provides, “*Bridgestone, through its subsidiary BSL, which was jointly and severally liable for the judgment, paid the damages award to Muresa and TGFL on August 19, 2016.*” “*Bridgestone*” was defined in the Request as the “*Bridgestone group of companies.*”⁷⁷ To be clear, the above sentence in the Request was not, and was not intended to be, a detailed or precise description of the mechanics of the payment of

⁷³ Second Daniel Report ¶ 41.

⁷⁴ Respondent’s Counter-Memorial ¶ 32.

⁷⁵ Respondent’s Counter-Memorial ¶ 39.

⁷⁶ Respondent’s Counter-Memorial ¶ 39.

⁷⁷ Claimants’ Request for Arbitration ¶ 1.

damages within the Bridgestone group, but was simply a factual statement: the damages payment was made by BSLS, which was (and is) one of the companies in the Bridgestone group of companies.

31. The Claimants have been open about the fact that BSLS obtained a loan from BSAM in order to pay the damages award,⁷⁸ have provided the bank statement that demonstrates payment by BSLS to Muresa,⁷⁹ and have disclosed to the Respondent the loan agreement between BSLS and BSAM.⁸⁰ The fact that BSLS obtained an inter-company loan in order to make the payment is not, as the Respondent suggests, suspicious; nor does it imply that BSLS did not make the payment itself. Inter-company loans are not unusual in large corporations, and the loan between BSLS and BSAM is a genuine loan, documented as such, and recorded as such in the accounts of both companies.⁸¹ Interest payments are made on a quarterly basis by BSLS to BSAM for the loan, which has not yet been repaid.⁸² The Respondent suggests that the money for the damages payment was “*funneled*” to BSLS from BSJ,⁸³ but it offers no basis for this assertion, and it is not true. BSJ had no role in the payment of the damages to Muresa. BSAM made the loan to BSLS because, as the Claimants explained in the Memorial, BSAM is the entity responsible for the use of the BRIDGESTONE and FIRESTONE marks in the Americas and assisting BSLS with payment of this judgment within the Americas fell squarely within its remit.⁸⁴
32. Further, it is not surprising that as between BSLS and BSJ, who were held jointly and severally liable for the payment of the Supreme Court’s damages award, it was BSLS that made the payment in full. As the Claimants have explained, In the Americas, FIRESTONE has historically been the more significant brand. Although sales of BRIDGESTONE tires have overtaken FIRESTONE tires in the BSCR Region since 2016, before that, FIRESTONE tires were the bigger seller in the BSCR Region, including in Panama. Since it has large subsidiaries in the Americas with large staff and

⁷⁸ Expedited Objections Hearing Transcript (Day 3), 482:15-483:03.

⁷⁹ **Exhibit C-0126**, BSLS Bank Statement (August 2016).

⁸⁰ **Exhibit C-0271**, Loan Agreement Between BSLS and BSAM.

⁸¹ **Exhibit C-0272**, BSLS Bank Statements.

⁸² **Exhibit C-0273**, BSLS Bank Statements.

⁸³ Respondent’s Counter-Memorial ¶ 40.

⁸⁴ Claimants’ Memorial ¶ 139.

resources, BSJ has directed BSAM and BSLS to manage and deal with issues arising in and relating to the Americas.

33. As to loss in excess of the US \$5.4 million damages award, the damages theory on which BSLS's case is based is not hypothetical, as the Respondent suggests.⁸⁵ BSLS owns the FIRESTONE trademark in Panama and in other countries. The Claimants do not suggest that the Supreme Court Judgment would be known to consumers of tires in Panama or anywhere else, or if they were aware of the Supreme Court Judgment, that it would affect their decision to purchase FIRESTONE or BRIDGESTONE-branded tires. Therefore, although the Supreme Court Judgment will have an impact on sales eventually (as explained further in **Part VIII** below), its immediate impact is not necessarily seen in sales. Instead, the Claimants argue that the Supreme Court Judgment, which arbitrarily held BSLS and BSJ liable for damages simply for opposing the registration of an arguably confusingly similar and thus encroaching trademark, has impaired the value of the FIRESTONE and BRIDGESTONE trademarks themselves and the licenses to use the trademarks, because of the cloud of uncertainty now cast over them by this judgment. The impairment is real, and the most apposite way to conceive of it is by considering a potential acquirer or licensee or investor in the trademark or the trademark licenses. The fact that this acquirer of these intellectual property rights is hypothetical does not mean that the loss is hypothetical.⁸⁶ Put in tangible terms: if a house is affected by subsidence, its value will decrease. The fact that the house is not currently for sale and that there is no purchaser for the house does not mean that the value has not decreased. It may mean that it is harder to determine what the reduced value of the house is. But no purchaser of the house, knowing about the subsidence, would pay full market value for it. The Claimants' damages theory is discussed in more detail in **Part VIII** below.

IV. DENIAL OF JUSTICE

34. There is no definitive test for denial of justice under international law. At paragraphs 157 to 162 of the Memorial, the Claimants set out certain formulations that previous tribunals have developed—however, as the tribunal in *Mondev v USA* stated, it is “a

⁸⁵ Respondent's Counter-Memorial ¶ 35.

⁸⁶ Respondent's Counter-Memorial ¶ 35.

somewhat open-ended standard,”⁸⁷ because of the wide range of possibilities and factual circumstances that could amount to a denial of justice. Other than noting that there is “*an extremely high threshold for a finding of a denial of justice under international law,*”⁸⁸ the Respondent does not advance the issue any further and does not offer an alternative test that the Tribunal might use in this case.

35. The Claimants accept that there is a high standard for a finding of a denial of justice. The Claimants’ position is that the Supreme Court Judgment meets that standard, because, in the words of a former Panamanian Supreme Court Justice, it was manifestly “*arbitrary, irrational, and unjust.*”⁸⁹ The Claimants’ complaint is not that Panamanian law does not contain adequate procedures to ensure due process. Rather, the Claimants argue that Panama’s justice system failed the Claimants because Panama’s own principles and laws were abandoned by the Supreme Court in this case, and because Panama has failed to end the systemic corruption within the judiciary that it admits exists and which gave rise to the impugned judgment. Accordingly, the Claimants highlight the ways in which the Supreme Court Judgment ignored Panamanian law, not for the purposes of asking the Tribunal to adjudicate issues of Panamanian law, but to demonstrate the extent to which “*the courts failed to meet international law’s requirements for the conduct of a civil proceeding.*”⁹⁰
36. In addition to its argument as to the standard of proof for denial of justice claims, the Respondent contends that the Claimants’ claim for denial of justice fails for the following reasons: (a) the Claimant relies on errors in the application of Panamanian law but these are not violations of international law standards;⁹¹ (b) the allegations of corruption do not satisfy the high standard of proof required for proving corruption in international arbitration;⁹² and (c) the Claimants’ arguments amount to an attempt to appeal the Supreme Court Judgment under Panamanian law.⁹³

⁸⁷ **CLA-0073**, *Mondev v. United States* ¶ 127.

⁸⁸ Respondent’s Counter-Memorial ¶ 48.

⁸⁹ First Arjona Report ¶ 112; Second Arjona Report ¶ 8.

⁹⁰ **RLA-011**, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16 (Award, 6 July 2012) ¶ 268.

⁹¹ Respondent’s Counter-Memorial ¶¶ 53-54.

⁹² Respondent’s Counter-Memorial ¶¶ 56-62.

⁹³ Respondent’s Counter-Memorial ¶¶ 63-64.

37. The Respondent’s first objection is misconceived. The Claimants allege that the serious errors of Panamanian law that led to the findings in the Supreme Court Judgment are violations of international law standards – but in order to explain these violations, it is of course necessary to describe the serious errors of Panamanian law. The international law standard for due process may be defined as “*Fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control.*”⁹⁴ In order to understand whether justice was administered honestly, impartially, and without bias in the Supreme Court Judgment, the Tribunal must understand what the relevant standards of Panamanian law were so that it can see whether the Supreme Court Judgment adhered to them. The Tribunal is tasked with determining whether the acts of the Panamanian Supreme Court “*constitute internationally unlawful acts,*”⁹⁵ but it can only do that if it has a complete understanding of what the Panamanian Supreme Court decided. In *Bosh v Ukraine*, the tribunal explained this clearly: “*the Tribunal considers that in order to determine whether the Respondent is in breach of the fair and equitable treatment standard, the Tribunal is required to assess, inter alia, whether the law applicable to the proceedings before the Ukrainian courts to which B&P was a party (namely Ukrainian municipal law) was properly and fairly applied.*”⁹⁶ Serious errors in the application of Panamanian law and violations of Panamanian standards of due process may be internationally unlawful if they represent “[l]ack of due process, a tainted background, or even bad faith.”⁹⁷ That is what the Claimants allege here.
38. Moreover, the Claimants explained in their Memorial the international law standard of due process that Panama is bound to protect. The due process guarantee is found both in the American Convention on Human Rights (“ACHR”), which has been incorporated into Panamanian law, and in Panama’s own Constitution.⁹⁸ Article 8(1) of the ACHR provides, “*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil,*

⁹⁴ Borchard, *Minimum Standards* p. 460.

⁹⁵ **CLA-0144**, *Amco v. Indonesia* ¶ 7.47.

⁹⁶ **CLA-0145**, *Bosh v. Ukraine* ¶ 280.

⁹⁷ **CLA-0144**, *Amco v. Indonesia* ¶ 7.47.

⁹⁸ Claimants’ Memorial ¶ 167; **CLA-0078**, American Convention on Human Rights.

labor, fiscal or any other nature.” Implicit in this guarantee is the principle of juridical equality: “*At the international level, this principle means that a decision cannot be made under the rubric of due process without taking into account the arguments of each party.*”⁹⁹

39. The international law standards of due process that were violated by the Supreme Court Judgment are explained in the Memorial and the Expert Reports of Mr. Arjona, and are discussed further below, but in summary:

- (a) The Supreme Court based its finding on a provision of law other than that contained in the claim. This was a violation of Article 991 of the Panamanian Judicial Code, and under international law, it violated BSLS and BSJ’s right to due process because the decision was based on a legal point that they did not have the opportunity to address.¹⁰⁰
- (b) The Supreme Court relied on evidence that was not properly admitted, such that BSLS and BSJ did not have the opportunity properly to respond to it. This was a violation of Articles 792, 856, 857, 871, 877 and 878 of the Panamanian Judicial Code, and under international law, it violated BSLS and BSJ’s right to due process because they were not able to respond to the evidence against them on an equal level.¹⁰¹
- (c) The Supreme Court based its finding on grounds not raised by Muresa in its complaint, which BSLS and BSJ could therefore not respond to. This was a violation of the Panamanian principle of consistency, and under international law,

⁹⁹ **CLA-0146**, Kotuby and Sobota, *General Principles of International Law and Due Process* p. 177.

¹⁰⁰ **CLA-0147**, Principles of Transnational Civil Procedure, Principle 3.1 (“*The court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.*”); Principle 5.4 (“*The parties have the right to submit relevant contentions of fact . . . and to offer supporting evidence.*”).

¹⁰¹ **CLA-0150**, *Wena Hotels v Egypt* ¶ 57 (“*The said provision refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.*”).

it violated BSLS and BSJ's right to due process because the decision was based on findings on which they did not have an opportunity to make arguments.¹⁰²

(d) The Supreme Court did not conduct a reasoned examination of the evidence because it ignored evidence submitted by BSLS and BSJ, and relied on unsupported witness evidence that was contradicted by documentary evidence. This was a violation of Article 781 of the Panamanian Judicial Code, and under international law, it violated BSLS and BSJ's right to a court process free from arbitrariness.¹⁰³

(e) The Supreme Court did not base its determination of the damages on any evidence or assessment whatsoever. This was a violation of Article 990 of the Judicial Code, and under international law, it violated BSLS and BSJ's right to a fair hearing.¹⁰⁴

40. The Respondent's position on the Claimants' corruption allegations is telling. The Claimant acknowledged in its Memorial that specific acts of corruption are difficult to trace and evidence,¹⁰⁵ and the Respondent delightedly concludes that the Claimants' claim therefore fails "*for want of evidence.*"¹⁰⁶ But, as the Claimants explained in their Request for Production of Documents, such evidence is only untraceable by the Claimants. To the extent evidence of corruption exists, it is within Panama's possession, custody, or control, and for that reason, the Tribunal ordered the Respondent to produce non-privileged documents responsive to the Claimants' requests.¹⁰⁷ To date, the Respondent has not provided any documents whatsoever.

¹⁰² **CLA-0146**, Kotuby and Sobota, *General Principles of International Law and Due Process* p. 179 ("Just as when a party is denied the opportunity to marshal the necessary elements of its own case, due process is denied when the decision is based upon evidence and argumentation that a party has been unable to address.").

¹⁰³ **CLA-0151**, Stone Sweet, *Proportionality* pp. 943-944 ("At the heart of due process is the idea that adjudication cannot be considered legitimate if it does not prevent arbitrariness from the standpoint of the parties. Indeed, at this point in time, the rule of law requires that every participant in a court proceeding possess rights to due process.").

¹⁰⁴ **CLA-0152**, *Dombo v. Netherlands* ¶ 33

¹⁰⁵ Claimants' Memorial ¶ 210.

¹⁰⁶ Respondent's Counter-Memorial ¶ 60.

¹⁰⁷ Procedural Order No. 7, Annex A – Claimants' Requests.

41. Because it is so unlikely that a host state would ever provide direct proof of corruption, or that a claimant would be in possession of such evidence itself,¹⁰⁸ tribunals have taken a different approach to the evidentiary standard in such cases. As noted above, the tribunal in *UFG v Egypt* found: “As has long been recognised, corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption.”¹⁰⁹ Likewise, the tribunal in *Metal-Tech v Uzbekistan* stated, “corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.”¹¹⁰ As Constantine Partasides put it, “in determining an appropriate standard of proof, arbitration tribunals should take account not only of the seriousness or likelihood of the allegation, but also the intrinsic difficulty of proving it.”¹¹¹
42. Interestingly, neither in its Counter-Memorial nor in its responses to the Claimants’ Request for Production of Documents does the Respondent attempt to deny the existence of corruption, either generally within the judiciary or specifically in relation to the Supreme Court justices in question. The Tribunal can and should draw adverse inferences from this silence. As Constantine Partasides notes, “once a certain *prima facie* threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate – given the nature of the allegation – for the defendant to sit back and not contribute to the evidentiary exchange on the issue... plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation.”¹¹²
43. The Respondent focuses instead on challenging the recollections of the Bridgestone representatives who attended the meeting with the Panamanian Ambassador, Mr. Gonzalez-Revilla. It is entirely possible that Mr. Gonzalez-Revilla does not recall

¹⁰⁸ **CLA-0153**, Partasides, *Proving Corruption in International Arbitration* ¶ 21 (“How often can we expect a claimant itself to offer the evidence of illegality that will – in all likelihood – consign its claim to failure?”); ¶ 22 (“Not only are admissions against interest unlikely, but in truth those that participate in bribery often exercise great ingenuity to conceal the illegality.”).

¹⁰⁹ **CLA-0137**, *UFG v. Egypt* ¶ 7.52.

¹¹⁰ **CLA-0138**, *Metal-Tech v. Uzbekistan* ¶ 243.

¹¹¹ **CLA-0153**, Partasides, *Proving Corruption in International Arbitration* ¶ 53.

¹¹² **CLA-0153**, Partasides, *Proving Corruption in International Arbitration* ¶¶ 63-66.

saying early on in the meeting, “*You know what this is, right? It’s corruption.*”¹¹³ People tend to recall things that are surprising or peculiar (note that Mr. Akey said he was “*astonished*” by this remark¹¹⁴) but are less likely, particularly several years after the event, to recall something that did not stand out for them.

44. It is also unsurprising that the note prepared of the meeting by Juan Carlos Heilbron does not contain the Ambassador’s admission of corruption. It only contains one sentence describing the position of the Panamanian Embassy in the meeting, and otherwise describes, as would be expected, the issues raised by Bridgestone.¹¹⁵ However, the note is interesting for two other reasons. First, it is inaccurate in that it does not record the presence of Steven Akey of Bridgestone or Charlie Johnson of Akin Gump, and it wrongly records the presence of Yujin McNamara. Ms. McNamara, an attorney at Akin Gump, was party to certain emails between Mr. Heilbron and Akin Gump but did not attend the meeting on 13 March 2015. These errors suggests that Mr. Heilbron’s note may not have been compiled immediately after the meeting when his memory of it was fresh, and may have been produced at a later point, when he needed to refer to his emails to recall the likely participants of the meeting. Second, the note is produced on paper with the heading “*Embassy of Panama United States of America*” and refers to comments that were not made by Mr. Gonzalez-Revilla, but by “*the Embassy.*” Yet the Respondent insists that this was an “*informal and private*” meeting, in which the Ambassador was not acting in any capacity able to bind the State.¹¹⁶
45. In recent weeks, new allegations of bribery and corruption have come to light about the drafting justice, Mr. Oyden Ortega. A Panamanian lawyer, Janio Lescure, admitted to bribing justices on numerous occasions, naming Justice Ortega, specifically, as one of the justices who could be paid to reach a certain decision.¹¹⁷ Mr. Lescure said that there was a “simple formula” in order to procure a favourable judgment: a majority of the

¹¹³ Witness Statement of Steven Akey dated 30 April 2018 ¶ 8; Witness Statement of Jeffrey Lightfoot dated 9 May 2018 ¶ 8.

¹¹⁴ Witness Statement of Steven Akey dated 30 April 2018 ¶ 8; Witness Statement of Jeffrey Lightfoot dated 9 May 2018 ¶ 8.

¹¹⁵ **R-0035** (“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.”).

¹¹⁶ Respondent’s Counter-Memorial ¶ 62.

¹¹⁷ **Exhibit C-0270**, Articles Referencing Claims of Corruption by Justice Ortega made by Panamanian Lawyer Janio Lescure

Supreme Court judges need to be paid off, the amount depending on the size of the bench in any given hearing.¹¹⁸

46. The Claimants have also obtained further information about the alleged corruption by Justices Ortega and Mitchell in the case involving the will of Mr. Wilson Lucom.¹¹⁹ In this case, two witnesses filed statements recording information relevant to the corruption claims. First, in one of the related claims filed in the United States by the executor of Mr. Lucom's estate,¹²⁰ an affidavit was sworn by William Tolbert, in which he described a conversation with a Ms. Edna Ramos Chue, regarding bribes paid to Supreme Court Justices for procuring a certain result in a judgment. She stated that one of the Supreme Court Justices in that case, Alberto Cigarruista, had agreed to a bribe of \$1,000,000 to secure a judgment in favour of Mr. Lucom's wife, and that the other justices (Justices Oyden Ortega and Harley Mitchell) were paid off too.¹²¹
47. Second, in one of the related claims filed in Panama by investors who had partnered with Mr. Lucom, an affidavit was sworn by Jose Rigoberto Acevedo Castillo. Mr. Acevedo Castillo is a Panamanian lawyer who was working at the National Parliament at the time of his statement in May 2015. He stated that while he was working there, he was asked to provide comments on a document from the Panamanian Financial Analysis Unit ("UAF"). This document had caught the attention of UAF because it showed unusual movements in the personal bank accounts of Supreme Court Justices Oyden Ortega, Harley Mitchell, and Alberto Cigarruista at the time of the Supreme Court judgment in the *Lucom* case. Mr. Acevedo Castillo stated that he could not comment on this document because he had previously acted for parties related to Mr. Lucom and was therefore conflicted.¹²²
48. While it is Panama's corrupt behaviour that the Claimants are concerned with in these proceedings, it is of course true that there generally need to be at least two parties involved in corruption—the Supreme Court Judges may have been paid off, but someone had to pay them. Muresa's behaviour in the proceedings suggests that it would

¹¹⁸ **Exhibit C-0270**, Articles Referencing Claims of Corruption by Justice Ortega made by Panamanian Lawyer Janio Lescure

¹¹⁹ Claimants' Memorial ¶¶ 129-130.

¹²⁰ **Exhibit C-0275**, Lucom Appellate Brief.

¹²¹ **Exhibit C-0274**, Affidavit of William Tolbert dated 25 June 2014.

¹²² **Exhibit C-0276**, Affidavit of Jose Rigoberto Acevedo Castillo dated 18 May 2015.

go to any lengths to achieve the result it wanted. Fernan Jesus Luque Gonzalez, manager of Muresa and president of TGFL, gave evidence in the Eleventh Circuit Court that he had received information from “*customs agents*” regarding possible seizure of tires.¹²³ Yet customs agents are prohibited under Panamanian law from disclosing information to one party about another. Therefore, if it is true that Mr. Fernan Luque did receive information from a customs agent, he possibly obtained this information through improper means, such as a bribe, as it is unlikely that a customs agent would freely give such information. It is therefore not hard to imagine that Muresa might also have made payments to Supreme Court Judges to obtain the result it wanted.

49. The Respondent’s next objection is that the Claimants’ various categories of fault “*all amount to an appeal of an unfavorable decision.*”¹²⁴ In support of its argument, the Respondent notes that the Claimants attempted to appeal the Supreme Court Judgment in Panama, and that the Claimants have complained that the Supreme Court Judgment is wrong under Panamanian law. The Claimants do consider that the Supreme Court Judgment errs in its application of Panamanian law, and have made no secret of their attempts to challenge the Supreme Court Judgment in Panama on any applicable basis under Panamanian law; if they had not done so, no doubt they would now be accused of failing to exhaust all domestic remedies. But in *these* proceedings, the Claimants are not attempting to appeal an unfavourable decision. Rather, they are attempting to right an international wrong by Panama.

50. The tribunal in *Mondev v USA* explained the balancing act required by the tribunal: on the one hand, it cannot stand in appeal of a domestic court, but on the other, the protections of the treaty must have meaning:

“The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level

¹²³ **Exhibit C-0161**, Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2) pp. 3, 7.

¹²⁴ Respondent’s Counter-Memorial ¶ 63.

*and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.”*¹²⁵

51. The Respondent cites an annulment case as authority for its proposition that the Tribunal cannot consider Panamanian law in its examination of the Claimants’ denial of justice claim.¹²⁶ However, the *ad hoc* committee in *Duke Energy v Peru* found that *it* could not “*enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law,*” but the tribunal in *Duke Energy v Peru* *had* assessed Peruvian law, and was entitled to have done so.¹²⁷ Similarly, the *ad hoc* committee in *Rumeli v Kazakhstan* held that an *annulment committee* is not a court of appeal. The tribunal in *Rumeli v Kazakhstan*, however, was required to consider the evidence before it, including as to what took place in the Kazakh courts.¹²⁸
52. Finally, from a damages perspective, it is important to note that even if the Tribunal finds in the Claimants’ favor in this arbitration, the Supreme Court Judgment will not be overturned. This means that the impairment to the intellectual property rights owned by the Claimants will continue, and this is one of the factors that increases the estimate of damage to the trademark (there is no end in sight).
53. To recall, the Claimants’ position is that the Supreme Court Judgment constituted a denial of justice because there were fundamental breaches of due process, the decision was arbitrary, there was corruption in the process, and/or the Court was grossly incompetent.¹²⁹ The details of each flaw in the Supreme Court Judgment were set out at paragraphs 166 to 215 of the Memorial, and in Arjona 1 and Arjona 2. A summary of

¹²⁵ **CLA-0073**, *Mondev v. United States* ¶ 127.

¹²⁶ Respondent’s Counter-Memorial ¶ 64, note 183 (citing **RLA-0132**).

¹²⁷ **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, and *Duke Energy International Peru Investments No. 1 Ltd v Republic of Peru*, ICSID Case No. ARB/03/28 (Award, 18 August 2008).

¹²⁸ **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; **CLA-0070**, *Rumeli v. Republic of Kazakhstan*

¹²⁹ Claimants’ Memorial ¶ 165.

the key issues and challenges to those issues by Panama and their expert, Jorge Federico Lee,¹³⁰ is set out below.

54. *First*, Muresa and TGFL commenced proceedings in the Eleventh Civil Circuit Court against BSJ and BSLS under Articles 1644 of the Civil Code, complaining that BSLS and BSJ had filed a trademark opposition action that had caused loss and damage to Muresa and TGFL because, as a result of the opposition action, tires with the RIVERSTONE brand were no longer marketed.¹³¹ However, the Supreme Court decided that BSLS and BSJ were liable because they were reckless and intimidating in filing opposition actions against the RIVERSTONE mark in several countries.¹³² This violates the Panamanian principle of congruence – that a judgment must conform to the subject of the complaint.¹³³ This also violates the international due process principle that parties have a right to a fair hearing and to be able to confront findings made against them.
55. Mr. Lee’s unrealistic conclusion, unsupported by any provision of law or by any case, is first that Article 1644 of the Civil Code necessitates consideration of Article 217 of the Judicial Code, and second that as a general principle, the judge can apply any legal provision it deems relevant without being bound by the provisions invoked by the parties. This is nonsense and there is no provision of Panamanian law (and Mr. Lee cannot cite any) that supports this. It is not simply that the Supreme Court cited a provision of law that had not been raised by the plaintiffs. It is that the Supreme Court determined that BSLS and BSJ had been reckless and acted in bad faith (under Article 217 of the Judicial Code, as Article 1644 of the Civil Code does not refer to reckless or bad faith), but allegations of recklessness and bad faith formed no part of Muresa’s original complaint. For Mr. Arjona, this violation of the principle of consistency is one of the most serious violations of Panamanian law and due process in this case. Under international law, the fact that the Supreme Court made a finding under a provision of law on which one party had not had an opportunity to present its case is a serious violation of the right to a fair hearing.

¹³⁰ Lee Report.

¹³¹ **Exhibit C-0016**, Civil Complaint filed by Muresa Intertrade S.A.

¹³² **Exhibit C-0027**, Judgment of the Supreme Court of Justice, Civil Division.

¹³³ First Arjona Report ¶¶ 30-40; Second Arjona Report, ¶¶ 18-39.

56. The Respondent correctly notes that during the proceedings in the Eleventh Circuit Civil Court, BSJ and BSLS argued that Muresa and TGFL should have brought their claim under Article 217 of the Judicial Code rather than under Article 1644 of the Civil Code.¹³⁴ Therefore, the Respondent says that BSLS cannot now complain that the Supreme Court made its determination under Article 217 of the Judicial Code when that is what BSLS had asked for in the first place.¹³⁵ This misses the point entirely. When Muresa and TGFL commenced proceedings, the appropriate provision of law under which they should have made their complaint was Article 217 of the Judicial Code. The Eleventh Circuit Court decided that this was not the case and that Article 1644 of the Civil Code was appropriate. The due process problem is that the Supreme Court made its determination on a different basis to that in Muresa and TGFL’s complaint. It does not matter what that basis was, or whether BSLS and BSJ had correctly identified this provision of law earlier in the proceedings. The simple fact is that Muresa and TGFL made their complaint under one provision of Panamanian law, and the Supreme Court made its finding on the basis of a totally separate provision of Panamanian law. This is impermissible – and constitutes a violation of BSLS’s due process rights because BSLS and BSJ did not have the opportunity to defend themselves against that provision.
57. *Second*, the Supreme Court based its decision on evidence that was not properly admitted, specifically the letter dated 3 November 2004 from Foley and Lardner (the “**Reservation of Rights Letter**”).¹³⁶ The Respondent’s expert, Mr. Lee, dismisses this argument, saying that the Reservation of Rights Letter was submitted with the expert reports of Muresa and TGFL, and the expert report of the court-appointed expert. Without citing any authority, Mr. Lee says that “*this argument by the Bridgestone Companies is groundless under the Panamanian civil procedural system,*” and that simply including the Reservation of Rights Letter into the expert reports incorporated it into the proceedings and allowed it to be used as evidence.¹³⁷ For the reasons set out at paragraphs 178 to 191 of the Memorial, as well as paragraphs 40 to 50 of the First Arjona Report and paragraphs 40 to 66 of the Second Arjona Report, the Reservation of Rights Letter was not properly admitted into the proceedings. Under Panamanian

¹³⁴ Respondent’s Counter-Memorial ¶ 80.

¹³⁵ Respondent’s Counter-Memorial ¶¶ 81, 85.

¹³⁶ **Exhibit C-0013**, Letter from Foley & Lardner LLP to Sanchelina & Associates, P.A. (3 November 2004) (“Reservation of Rights Letter”).

¹³⁷ Lee Report ¶ 89.

law, the effect is that the Supreme Court Judgment impermissibly relied on evidence that it should not have considered. The effect of this under international law is that the due process rights of the Claimants were violated.

58. The Supreme Court’s finding that the Reservation of Rights Letter was a threatening and reckless action by BSLS and BSJ is irrational and incomprehensible. The letter was not written by or on behalf of BSLS or BSJ. It was not sent to Muresa or TGFL. That the Supreme Court found tortious liability on the part of BSLS and BSJ because of a document that did not come from them is absurd. Mr. Molino highlights the fact that the actions of one company that may be affiliated with another cannot be assumed to be undertaken on behalf of the other. “*The fact that a company has directors in common, and even the same Legal Representative, is not enough for companies to be considered to have an economic connection with each other, that is, it is necessary for it to be demonstrated, by the appropriate means of proof, that there is a substantial relationship between companies, so that the actions of one of them is binding on the other.*”¹³⁸ Ms. Lasso de la Vega Ferrari considers that a reservation of rights letter “*is intended to intimidate the counterpart*”¹³⁹ (a questionable assertion in any case, as noted by Mr. Molino¹⁴⁰), but even she admits that this is only in respect of the “*party to whom it is directed*”.¹⁴¹
59. Third, the Eighth Civil Circuit Court made a finding that BSLS and BSJ had acted “*with evident good faith*”.¹⁴² That finding, which was not appealed (though it could have been, as Mr. Molino notes),¹⁴³ was final and binding, and was res judicata, and yet the Supreme Court Judgment determined that BSLS and BSJ had not acted with good faith, and had acted recklessly. Mr. Lee accepts that the Eighth Civil Circuit Court’s decision is res judicata, but argues that the determination of good faith was not contained in the operative, or dispositive part of the judgment, and so could not give rise to any res judicata. This is obviously untrue: the finding that BSLS and BSJ acted in good faith is found in the very sentence that makes the specific determination that BSLS and BSJ be

¹³⁸ Molino Report ¶ 67.

¹³⁹ Lasso de la Vega Ferrari Report ¶ 89.

¹⁴⁰ Molino Report ¶ 96.

¹⁴¹ Lasso de la Vega Ferrari Report ¶ 89.

¹⁴² **Exhibit C-0014**, Judgment No. 48, Eighth Civil Circuit Court.

¹⁴³ Molino Report ¶ 88.

released from payment of costs.¹⁴⁴ Mr. Lee also argues that no res judicata exists because the parties to the trademark opposition proceedings and the damages litigation were not the same, the subject matter or purpose was not the same, and the cause or reason for the case was not the same. Mr. Arjona refutes these arguments. There was identity of the parties, since TGFL was admitted as a third party into the trademark opposition proceedings, and the Eighth Civil Circuit Court ordered the joinder of TGFL on 31 August 2005 and affirmed this decision on 15 November 2005.¹⁴⁵ But as to subject matter and purpose and the cause or reason for the case, Mr. Lee's approach is wholly unrealistic and formulaic. The finding of good faith on the part of BSLS and BSJ was clear, final and was not appealed (Muresa and TGFL could have appealed this if they had wished to, but they did not).¹⁴⁶ It was not open to the parties to re-litigate this issue, in any court.¹⁴⁷

60. *Fourth*, no analysis of any evidence and no reasons were given for the amount of damages awarded to Muresa. Panamanian law requires an assessment of the amount of damages under Articles 990 and 199 of the Judicial Code. Mr. Lee argues that such analysis was “*implicit*” in the reasons given for determining liability on the part of BSLS and BSJ.¹⁴⁸ No authority is cited by Mr. Lee for this bizarre proposition, and there is none, because it is a cornerstone of Panamanian law that judgments must be substantiated.¹⁴⁹ The fair and equitable treatment standard under Article 10.5 requires transparency and consistency and a decision with no reasoning whatsoever cannot meet that standard.¹⁵⁰
61. *Fifth*, the Supreme Court relied on unreliable evidence and did not consider the overwhelming evidence to the contrary. In particular, the Supreme Court based its decision on the Muresa and TGFL's expert report, although BSLS and BSJ's expert report and the Court's own expert report had made similar findings that contradicted Muresa and TGFL's. The Supreme Court based its decision on the evidence of

¹⁴⁴ **Exhibit C-0014**, Judgment No. 48, Eighth Civil Circuit Court.

¹⁴⁵ **Exhibit C-0183**, Order joining TGFL and LV International on 15 November 2005.

¹⁴⁶ Molino Report ¶ 88.

¹⁴⁷ Second Arjona Report ¶ 93-106.

¹⁴⁸ Lee Report ¶ 161

¹⁴⁹ Second Arjona Report ¶ 68.

¹⁵⁰ **CLA-0154**, *Murphy v. Ecuador* ¶ 206.

witnesses that were employees and officers of Muresa and TGFL, which were not substantiated by any documentary evidence and whose evidence was directly contradicted by the documentary evidence on file. That the Supreme Court was required to review all of this evidence and make its determination on the basis of all of the evidence is not contested by the Parties. Mr. Lee records the list of evidence that Muresa and TGFL asked the Court to review (with none of BSLS and BSJ's evidence), and states, "*The Civil Chamber, after evaluating these reasons in the light of the file, concluded that cause ("causal") was valid. To reach this conclusion, the Civil Chamber had to examine the whole evidence submitted in the proceeding, including evidence that expert Arjona alleges was ignored in the cassation judgment, because such evidence was the only evidence taken into account by the upper instance judgment.*"¹⁵¹ Mr. Lee's conclusion, therefore, is that the Supreme Court was required to examine all of the evidence in order to reach the conclusion, and so it must have done so, because a conclusion was reached. This circular reasoning is not borne out by the text of the Supreme Court Judgment at all.

V. THE FLAWED COURT PROCEEDINGS IN PANAMA

62. The Respondent says that the Tribunal need not even consider the trademark and civil proceedings in Panama because "*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.*"¹⁵² Yet, betraying a certain desperation, the Respondent has devoted 75 pages of its Counter-Memorial to the issues that the Tribunal should apparently ignore, all for the purpose of "*set[ting] the record straight.*"¹⁵³
63. The Claimants will not repeat their description of the proceedings provided in the Memorial at paragraphs 46 to 108, but in the following section will offer clarification of certain points raised by the Respondent, including addressing the alleged inaccuracies in the Claimants' description.
64. At paragraphs 71-72 of the Counter-Memorial, the Respondent states, "*[BSJ] and [BSLS] suddenly withdrew their appeal . . . Claimants fail to mention that by exercising that right [of appeal], a party is automatically subject to the consequences of triggering*

¹⁵¹ Lee Report ¶ 156.

¹⁵² Respondent's Counter-Memorial ¶ 65.

¹⁵³ Respondent's Counter-Memorial ¶ 65.

the challenge mechanism.” The Claimants explicitly referred to the consequences of the withdrawal of the appeal by BSLS and BSJ: they were ordered to pay fifty balboas (US \$50).¹⁵⁴ The Respondent implies that there was something nefarious in BSLS and BSJ’s withdrawal of their appeal, but in fact there is nothing unusual or reprehensible about their conduct. On the contrary, the court and the adverse parties’ time is less likely to be wasted if an appeal is withdrawn at an early stage before any work has been done on it. As Mr. Molino notes, BSLS and BSJ withdrew their appeal at the earliest stage – no time or money would have been spent on this by Muresa at this early stage and that is why the court ordered payment of such a small “*symbolic*” amount of costs.¹⁵⁵

65. At paragraph 78 of the Counter-Memorial, the Respondent accuses the Claimants of “*misrepresent[ing] the content of Muresa’s and [TGFL]’s complaint*” in their description of it at paragraph 48 of the Memorial, which quoted directly from the complaint. This section of the complaint alleged that BSJ and BSLS had caused Muresa and TGFL loss and damage by causing them to “*cease manufacturing*” RIVERSTONE-branded tires “*at the scale it was producing them prior to the claim.*”¹⁵⁶ (emphasis added). There is no misrepresentation by the Claimants here – the Claimants did not say that Muresa and TGFL had “*ceased manufacturing RIVERSTONE-branded products,*” as the Respondent misrepresents. Moreover, Muresa and TGFL did not only complain that sales had ceased, but also that manufacturing had reduced.¹⁵⁷
66. At paragraphs 79-81 and 84-85 of the Counter-Memorial, the Respondent accuses the Claimants of failing to note that BSLS and BSJ first “*invoked*” Article 217 of the Judicial Code. The Respondent considers that because BSLS and BSJ referred to Article 217 of the Judicial Code early on in these proceedings, the Claimants’ complaint that the Supreme Court Judgment could not have been founded on this provision must fail. As described above, this argument is misconceived. BSLS and BSJ did not “*invoke*” Article 217 of the Judicial Code. As the Claimants explained at paragraph 51 of the Memorial (which makes quite clear that BSLS and BSJ referred to Article 217 of the Judicial Code, and does not attempt to hide it), BSLS and BSJ attempted to strike out

¹⁵⁴ Claimant’s Memorial ¶¶ 43-44.

¹⁵⁵ Molino Report ¶ 76.

¹⁵⁶ **Exhibit C-0016**, Civil Complaint filed by Muresa Intertrade S.A. 5.

¹⁵⁷ **Exhibit C-0153**, Testimony by Jose Orestes Medina Samaniego dated 21 April 2010; **Exhibit C-0022**, Muresa and TGFL Appeal to Judgment No. 70.

Muresa and TGFL's claims by arguing that the basis on which Muresa and TGFL had brought its claims was wrong.¹⁵⁸ Under Panamanian law, as Mr. Arjona explains, a court can only make a finding on the basis of the claims submitted.¹⁵⁹ Since Muresa and TGFL did not bring their claims under Article 217 of the Judicial Code, the court could not find BSLS and BSJ liable under that provision. All the court could have done was dismiss Muresa and TGFL's claims and note that the proper basis for such claims would have been Article 217 of the Judicial Code. And that is exactly what BSLS and BSJ asked the Eleventh Circuit Court to do.¹⁶⁰

67. The Respondent makes a similar point at paragraph 109 of the Counter-Memorial in respect of the appeal to the First Superior Court: "*the Bridgestone Defendants specifically requested that Superior Court apply Article 217 of the Judicial Code to the dispute.*" (emphasis in original). This is an entirely misleading statement. BSLS and BSJ did not "*request*" that Article 217 of the Judicial Code be applied to the dispute. They argued, as they had done in the Eleventh Circuit Court, that they had "*always opposed the legal basis of the claimant's claim*" because it was brought on the basis of Article 1644 of the Civil Code.¹⁶¹ Rather than asking the First Superior Court to *apply* Article 217 of the Judicial Code, they were explaining why Muresa and TGFL's claim should be dismissed: it was brought on the wrong basis. Had the Eleventh Circuit Court agreed with BSLS and BSJ that Article 217 of the Judicial Code was the correct basis for the claim, and that Article 1644 of the Civil Code was the wrong basis, it would not then have been open to the Eleventh Circuit Court to find in favor of Muresa and TGFL on the facts of the claim. If they had considered that Article 217 of the Judicial Code was applicable, then the claim would have been dismissed at that stage.

68. The same issue comes up again at paragraph 113 of the Counter-Memorial. The Respondent states (but does not cite any evidence) that the First Superior Court "*based its ruling on both Article 1644 of the Civil Code and Article 217 of the Judicial Code*" (emphasis in original). A careful reading of the judgment makes clear that this is not

¹⁵⁸ **Exhibit C-0186**, Nullification Application Filed by Bridgestone Arguing that Muresa Complaint in Violation of Due Process dated 19 August 2009.

¹⁵⁹ Second Arjona Report ¶¶ 31-39.

¹⁶⁰ Claimants' Memorial ¶¶ 51, 70; **Exhibit C-0186**, Nullification Application Filed by Bridgestone Arguing that Muresa Complaint in Violation of Due Process dated 19 August 2009; **Exhibit C-0201**, Decision Denying Bridgestone's Nullification Application dated 6 December 2010.

¹⁶¹ **Exhibit C-0023**, BSJ and BSLS Opposition to Muresa Appeal p. 4.

true. The First Superior Court determined that Muresa and TGFL, who were making a non-contractual civil liability claim under Article 1644 of the Civil Code, were required under that provision to prove that there were damages, and that such damages were caused by BSJ and BSLS's "*fault or negligence.*"¹⁶² The Court referred to Article 217 of the Judicial Code by analogy to explain what standard of fault or negligence would be applied to BSLS and BSJ's conduct, specifically Muresa and TGFL would have to prove something akin to "*fraud or gross negligence . . . alluded in Article 217 of the Judicial Code.*"¹⁶³ The First Superior Court did not base its finding on Article 217 of the Judicial Code.

69. At paragraph 82 of the Counter-Memorial, the Respondent states, "*although [BSLS] now complains about the fact that the Supreme Court ultimately took the Bridgestone Group's conduct outside of Panama into account, it was [BSLS] that raised the issue of trademark opposition proceedings abroad.*" This statement is again designed to mislead. In these proceedings, the Claimants argue that the Supreme Court should not have relied on the Reservation of Rights Letter, a document written outside of Panama, sent to a recipient outside of Panama, and in relation to proceedings outside of Panama. In its submission of 13 October 2008, BSLS referred to the trademark opposition action it had brought in the United States in order to make the point that it had not acted recklessly in bringing similar proceedings in Panama, as LV International had not opposed this action in the United States.¹⁶⁴ There was no reference to or reliance on the Reservation of Rights Letter in BSLS's submission.
70. At paragraphs 94-97 of the Counter-Memorial, the Respondent describes the evidence of the accounting experts, but only provides details of the report submitted by the accounting experts of Muresa and TGFL. BSLS and BSJ's expert and the expert appointed by the court reached similar conclusions to each other, but these were completely different to those reached by Muresa and TGFL's experts. The findings of all of the experts are set out in the Memorial at paragraphs 60 and 61.¹⁶⁵

¹⁶² **Exhibit C-0024**, Decision by the First Superior Court, p. 11.

¹⁶³ **Exhibit C-0024**, Decision by the First Superior Court p. 15.

¹⁶⁴ **R-0045**.

¹⁶⁵ See also **Exhibit C-0020**, BSJ and BSLS Expert Report; **Exhibit C-0162**, Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010; **Exhibit C-0163**, Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010.

71. At paragraphs 99-100 of the Counter-Memorial, the Respondent discusses the evidence supporting the allegations of fear of seizure referred to by Muresa and TGFL, noting that the fear was based on the Reservation of Rights Letter. While true that this was the argument made by Muresa and TGFL, the point is that no evidence showing any *reasonable* basis for fear was adduced. Anyone can be afraid of anything, but Muresa and TGFL failed to demonstrate any objectively reasonable basis for the fear allegedly felt by their employees. Even had they done so, fearful perceptions or misperceptions do not establish lack of merit or impropriety of BSLS or BSJ's actions to oppose to oppose the RIVERSTONE mark, or the decision by BFS Brands, LLC and Bridgestone/Firestone North American Tire, LLC to send the Reservation of Rights Letter.
72. At paragraph 137 of the Counter-Memorial, the Respondent states that "*the Supreme Court concluded that it would analyze all of the evidence,*" citing to page 15 of the Supreme Court Judgment,¹⁶⁶ but that is not what the Supreme Court concluded. Instead, it stated that it was reaching a conclusion on the basis of the evidence which it had just detailed: certain evidence submitted by Muresa and TGFL. It did not review any of the evidence placed on the record by BSLS and BSJ or the court-appointed expert, which contradicted Muresa's evidence and demonstrated that there had been no loss.¹⁶⁷
73. At paragraph 140-141 of the Counter-Memorial, the Respondent argues that the Supreme Court "*took pains to make clear that its findings were limited to the particular circumstances presented in this case.*" But that is not right. The Supreme Court did say that "*the fact of exercising a judicial initiative for claiming any right*" is not in itself reckless, but they held that it was reckless and intimidating for BSLS and BSJ to have commenced a trademark opposition action when there was evidence that the competitor was already engaged in commercial activity in marketing their own brand.¹⁶⁸ This distinction is key, as the Claimants made clear in their Memorial.¹⁶⁹ Trademark opposition actions are often brought against competitors and potential competitors who have done nothing more than try to register a trademark—but as owners of trademark

¹⁶⁶ **Exhibit C-0027**, Judgment of the Supreme Court of Justice, Civil Division; **R-0034** pp. 12-13.

¹⁶⁷ Claimants' Memorial ¶ 88-93.

¹⁶⁸ **Exhibit C-0027**, Judgment of the Supreme Court of Justice, Civil Division p. 21; Claimants' Memorial ¶ 91.

¹⁶⁹ Claimants' Memorial ¶ 94.

rights, BSLS, BSAM and BSJ are also entitled to oppose trademark registrations even after those marks are already in use by the competitors.¹⁷⁰ Indeed, nothing in Panama's trademark law prevents trademark owners from opposing a potentially confusingly similar mark that is already in use, as long as the trademark application has not been granted yet.

74. At paragraph 147, the Respondent argues that the existence of a dissenting opinion “*demonstrates vigorous debate*” amongst the Justices and does not support the Claimants' claim that there was a denial of justice. On the other hand, of course, the existence of a dissenting opinion does not mean that there was **not** a denial of justice and that the majority opinion (which gave rise to the damages award) is not egregiously flawed, arbitrary and unjust.

VI. BSAM AND BSLS'S CLAIMS UNDER ARTICLES 10.3 AND 10.4

75. In their Memorial, the Claimants noted that the relevant Supreme Court Judgment discriminated against BSLS and BSAM in favour of either Panamanian investors and investments, or investors and investments of non-Parties, contrary to Articles 10.3 and 10.4 of the TPA. In its Counter-Memorial, the Respondent argued that the Claimants had not identified a comparator “*in like circumstances*” to support a claim of discrimination.¹⁷¹ The Claimants agree that this arbitrary, irrational and unjust judgment is indeed unprecedented, and that Panama has treated the Claimants in a way that it has never treated any other Panamanian or foreign investor or investment before or since. Whilst this supports the Claimants' claim for denial of justice, the Claimants' extensive research to date has been unable to identify other instances where a like company or investment has faced similar egregious treatment sufficient to advance a claim of discrimination. It is possible that similar claims are yet to come – Mr. Molino notes that defendants are beginning to include reference to recklessness in trademark opposition actions, language that he had not seen before the Supreme Court Judgment and attributes to it.¹⁷² In these circumstances, the Claimants have decided to withdraw their claims under Article 10.3 and 10.4 of the TPA.

¹⁷⁰ Molino Report ¶¶ 52-54.

¹⁷¹ Respondent's Counter-Memorial ¶¶ 17, 31.

¹⁷² Molino Report, ¶ 98.

VII. BSLS'S DAMAGES OF US \$5,431,000

76. The Parties agree that the applicable standard for damages in this case is that set forth in Article 31 of the Articles on State Responsibility and *The Factory at Chorzów*: all of the consequences of the unlawful act are to be wiped out, reestablishing the position that would have existed if the wrongful act had not been committed.¹⁷³
77. The Respondent argues that the Claimants have not established breach, causation and loss, and cannot therefore claim damages.¹⁷⁴ That is incorrect.
78. The breaches suffered by the Claimants are detailed above and in the Memorial.
79. BSLS's claim for the damages awarded by the Supreme Court Judgment is simple enough to understand, even for the Respondent.¹⁷⁵ It does not appear that the Respondent challenges this claim on the basis of breach or causation; rather, the Respondent argues that BSLS has not proved that it suffered any loss.¹⁷⁶
80. The Respondent's version of events—that BSJ forced BSAM to transfer funds to BSLS to pay the judgment—is not only fantastical but also entirely ignores corporate identity. Each company in the Bridgestone group is a separate corporate entity with its own directors. In the Expedited Objections phase, the Respondent tried, and failed, to argue that BSLS was a mere shell company, with no substantial business activities. It also tried, and failed, to argue that BSLS had abused the process of international arbitration by seeking to engineer a claim, simply by paying the sum that it was ordered by the Panamanian Supreme Court to pay. The Tribunal rejected these arguments,¹⁷⁷ yet the Respondent attempts to reintroduce them by suggesting again that BSLS “orchestrat[ed] international jurisdiction in order to benefit its parent,”¹⁷⁸ and insisting again that BSLS “chose” to pay a judgment debt that it had not been “pressured into” paying or that had yet turned into enforcement proceedings.¹⁷⁹ It is absurd to suggest that parties ordered to make payment by a Supreme Court should wait until enforcement

¹⁷³ Claimants' Memorial, ¶¶ 226-228; Counter-Memorial ¶¶ 163-164; **CLA-0086**, *Factory at Chorzów*; **CLA-0099**, *Draft Articles on State Responsibility*.

¹⁷⁴ Respondent's Counter-Memorial ¶ 165.

¹⁷⁵ Respondent's Counter-Memorial ¶¶ 173, 278.

¹⁷⁶ Respondent's Counter-Memorial ¶ 279.

¹⁷⁷ Decision on Expedited Objections ¶¶ 302, 330.

¹⁷⁸ Respondent's Counter-Memorial ¶ 285.

¹⁷⁹ Respondent's Counter-Memorial ¶ 283.

action be taken against them before paying a judgment debt, and it is remarkable that the Respondent appears to contend that orders of its own Supreme Court are optional. In any case, loss was not incurred on the date when the judgment debt was paid, but on 28 May 2014, when the Supreme Court held BSLS and BSJ jointly and severally liable.¹⁸⁰

81. The Respondent further argues, apparently based on the fact that BSJ is the parent and BSLS the subsidiary, that loss for which the two entities were held jointly liable should have been borne by BSJ.¹⁸¹ But the parent-subsidiary relationship is not the relevant criteria. As the Claimants explained during the Expedited Objections phase, BSLS is the entity in the Bridgestone group tasked with protecting the FIRESTONE trademark. BSAM is the entity in the Bridgestone group tasked with exploiting the FIRESTONE and BRIDGESTONE trademarks in the Americas. When the Supreme Court Judgment was handed down, and after BSLS and BSJ had exhausted all opportunities to overturn the judgment in Panama, BSLS paid the judgment debt because its board considered that settling the liability was in the best interests of the company. Although in subsequent years sales of BRIDGESTONE tires have overtaken sales of FIRESTONE tires in Panama, until around 2016 FIRESTONE tires were consistently the highest selling products and for FIRESTONE, the Americas were the most important region. As the owner of the FIRESTONE trademark, ensuring the security of its asset in Panama was of prime importance to BSLS. As the Claimants have explained, BSLS obtained inter-company financing in order to do this. BSAM was the logical lender to BSLS because BSAM is the main profit center of the Americas and is the entity that would suffer the consequences if there was an enforcement action against the FIRESTONE and BRIDGESTONE trademarks in Panama. Accordingly, on 20 July 2016 BSAM and BSLS entered into a loan agreement for US \$6,000,000.¹⁸² BSLS currently makes quarterly interest payments on this loan.¹⁸³

¹⁸⁰ **CLA-038**, *Mobil Investments Canada Inc. and Murphy Oil Corp. v Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) ¶¶ 469-470.

¹⁸¹ Respondent's Counter-Memorial ¶ 284.

¹⁸² **Exhibit C-0271**, Loan Agreement Between BSLS and BSAM

¹⁸³ **Exhibit C-0273**, Bank Statements for BSLS and BSAM Documenting Loan Interest Payments

82. BSLs paid US \$5,431,000 to Muresa on 19 August 2016, which BSLs has proved through its bank statement showing payment of this sum to Muresa.¹⁸⁴ Yet apparently the Respondent is not convinced that such payment was made, although it has not adduced any evidence to the contrary (such as evidence from Muresa that payment was not made).¹⁸⁵
83. The Tribunal has made clear that although there was “*nothing improper or colorable in BSLs discharging the whole of the judgment debt for which it was jointly liable when it did,*” it does not necessarily follow that the whole of the payment is recoverable as loss sustained by BSLs.¹⁸⁶ The Tribunal likened the position to that of an insurance policy or guarantee: “*Where two related companies are under a joint liability against which one is insured and one is not, it may make sound commercial sense for the one that is insured to discharge the entire liability in the hope that this may be covered by its insurance, whether at the end of the day this proves to be the case or not.*”¹⁸⁷ Whether this “insurance policy” would cover this joint liability depends on the language of the insurance policy itself (here, the TPA) but the TPA is silent on this matter. In the absence of any guidance from the TPA, the Tribunal may look to any agreement made between the parties as to how they would apportion loss. There are no documents that demonstrate any formal agreement between BSLs and BSJ, but the loan agreement between BSLs and BSAM and the evidence of Mr. Kingsbury as to his role in dealing with litigation matters for the Americas shows the approach taken by the Bridgestone Group – BSAM and BSJ are generally responsible for matters in the Americas, not BSJ.¹⁸⁸

VIII. BSAM AND BSLs’S DAMAGES IN EXCESS OF US \$5,431,000

84. In relation to the Claimants’ claims for damages in excess of US \$5,431,000, the Respondent complains that the Claimants have established neither causation nor loss. Before taking each of these in turn, it is worth discussing in more detail the nature of the claims made by the Claimants and the nature of trademarks and trademark licenses,

¹⁸⁴ **Exhibit C-0126**, JP Morgan Chase Bank Statement (31 August 2016).

¹⁸⁵ Respondent’s Counter-Memorial ¶ 284.

¹⁸⁶ Decision on Expedited Objections ¶¶ 329-330.

¹⁸⁷ Decision on Expedited Objections ¶ 330.

¹⁸⁸ **Exhibit C-0271** Loan Agreement between BSAM and BSLs, Third Witness Statement of Thomas Kingsbury dated 11 May 2018 ¶ 2.

and in particular, global marks that have attained well-known status, that inform these claims.

85. Each of the Claimants claim damages for loss to the value of their respective trademark rights caused by the Supreme Court Judgment. BSLS is the owner of the FIRESTONE trademark in Panama and the BSCR Region and licenses the mark to BSAM,¹⁸⁹ while BSAM holds licenses or sublicenses to the FIRESTONE and BRIDGESTONE trademarks, respectively, in the BSCR Region, which includes Panama as well as Costa Rica, Guatemala, the Dominican Republic and Puerto Rico.¹⁹⁰
86. Both Parties agree – in part - on the interests each Claimant has in the trademark investments. BSLS’s interest is in the royalties for the FIRESTONE trademark.¹⁹¹ BSAM’s interest is in profits from sales of products bearing the trademarks in Panama and the BSCR Region.¹⁹² However, in addition, both the trademark owner and its licensee(s) share in the intangible benefits - goodwill (in other words, a symbolic value indicating to consumers both source and consistent quality of goods) and market exclusivity - afforded by the Claimants’ respective rights in the BRIDGESTONE and FIRESTONE marks, and both likewise suffer if those rights are impaired.¹⁹³ In fact, the goodwill and other legal and intangible benefits that are shared among a trademark licensor and its licensee are embodied in a single intangible asset, namely the licensed trademark.¹⁹⁴ In the Expedited Objections phase, the Tribunal also found that both BSAM and BSLS shared in the goodwill of the “FIRESTONE” mark: *“Once the necessary consents were given, and subject to the law of Panama which is considered below, the FIRESTONE Trademark License conferred on BSAM the valuable right to*

¹⁸⁹ **Exhibit C-0007**, Firestone Panamanian Trademark Registration Record; **Exhibit C-0006**, Bridgestone Panamanian Trademark Registration Record.

¹⁹⁰ **Exhibit C-0048**, Agreement to License Trademarks Between BSLS and BSAH; **Exhibit C-0052**, Trademark License Agreement between Bridgestone Corporation and Bridgestone/Firestone North American Tire, LLC (1 December 2001)

¹⁹¹ Respondent’s Counter-Memorial ¶ 168.

¹⁹² Respondent’s Counter-Memorial ¶ 168.

¹⁹³ **CLA-0143** – J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §18.38 at 18-94 (4th Ed. 2016).

¹⁹⁴ **CLA-0143** – J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §18.38 at 18-94 (4th Ed. 2016) (“[U]se of a mark by the licensee strengthens the mark owned by the licensor.”). This is consistent with the Tribunal’s finding that the unitary nature of a trademark is retained in a licensing context: *“The owner of the trademark has to use the trademark to keep it alive, but use by the licensee counts as use by the owner. . . . The right [of the licensee] is a right to use the Panamanian registered trademark in Panama.”* Decision on Expedited Objections ¶ 195.

sell tires bearing the FIRESTONE mark in Panama. In practice, that right was granted to BSAM exclusively. The exercise of that right would inevitably result in BSAM benefitting from the goodwill that attached to the mark, notwithstanding that the FIRESTONE Trademark License provided that BSLS would retain the title to the goodwill.”¹⁹⁵ Therefore, the Respondent’s simplistic focus only on BSLS’s royalty interest, on the one hand, and BSAM’s interest in profits, on the other hand, is flawed, from a trademark damages perspective.

87. The stark difference between the Parties is in their respective approaches to measuring the damage to the trademark rights in this unusual situation where the damage ensues from the Supreme Court Judgment. Naturally, the Respondent’s position, based on its incomplete understanding of the nature and value of trademarks and trademark licenses, is that the Supreme Court Judgment had no effect on BSLS and BSAM’s investments, and so it calculates the loss at zero. But, as the Claimants’ expert Mr. Daniel explains, the Respondent achieves this by ignoring “*commonly accepted, basic tenets of valuation and economics set forth in valuation treatises,*”¹⁹⁶ specifically the concept of unrealized losses (described in detail below). Thus, in measuring damages as a loss in value resulting from legal and economic risk, the Claimants applied a discount rate to the historical and projected future revenues from sales of tires in Panama and the BSCR Region to capture the risk caused by the Supreme Court Judgment.¹⁹⁷ The Respondent, arguing that there is no quantifiable risk to the trademark rights resulting from the Supreme Court Judgment, does not apply any discount to the sales figures.
88. The Respondent further argues that the Claimants did not “*articulate and substantiate separately*” the claims of BSAM and BSLS.¹⁹⁸ That is not right. The loss suffered by each Claimant was included in Mr. Daniel’s First Report, and the details of these claims are clarified further in Mr. Daniel’s Second Report. The Respondent says that the reason the Claimants are unclear about this is that BSAM “*hopes to piggy-back off [BSLS]’s claim and the claims of the ineligible claimant, [BSJ].*”¹⁹⁹ It appears from this that the Respondent’s understanding of the value of the investments held by BSLS and BSAM

¹⁹⁵ Decision on Expedited Objections ¶ 184.

¹⁹⁶ Second Daniel Report ¶ 11.

¹⁹⁷ First Daniel Report ¶¶ 81-91.

¹⁹⁸ Respondent’s Counter-Memorial ¶ 187.

¹⁹⁹ Respondent’s Counter-Memorial ¶ 187.

is flawed. BSAM's investment is the greater of the two, as explained further below. It is curious that the Respondent now seeks to argue that BSLS's investment has the greater value (and would therefore suffer greater loss) when it expended a considerable amount of time and money in these proceedings in attempting to prove that BSLS did nothing at all, earned almost nothing, and was merely a shell company.²⁰⁰

89. Together, the rights of a trademark licensee and a trademark owner represent the total value of all of the rights in the trademarks, both economic and intangible: it can be most easily visualized as a pie, divided into two (or more) slices—one for the trademark owner or licensor, and one for each licensee. If the slices of pie are viewed as the relative distributed economic benefit, the relative size of each of the slices depends on various factors, as described below, and is different in every case.²⁰¹ But the metaphor must extend further, in order to capture the full significance of trademarks. The special dimension of trademarks represented by the generation of goodwill (which is shared equally and indivisibly by the trademark owner and any number of licensees and sublicensees) may be visualized as the top crust overlaying the entire pie, regardless of how it is sliced. In other words, the trademark owner and its licensees and sublicensees each have an undivided interest in the mark's goodwill. In the case of the FIRESTONE trademark, BSLS and BSAM own the whole pie between them, and so for the purposes of claims in respect of the FIRESTONE trademark, it may not matter how the values are divided as between the two, although the Claimants' valuation expert has performed a separate analysis for completeness. In the case of the BRIDGESTONE trademark, only BSAM's slice of the pie in Panama and the BSCR Region forms part of the claims, because ultimate trademark owner is BSJ, which is not a claimant.
90. Mr. Daniel explains how the pie might be divided as between BSAM and BSLS or BSJ, as between a trademark owner and a licensee. The three factors for consideration are:
- (a) Risk: does the licensor or the licensee take on the most risk as to the expected economic benefit of the trademark license? In this case, it is BSAM, because BSAM or its subsidiaries such as Bridgestone Costa Rica, S.A. ("**BSCR**") or Bridgestone American Tire Operations, LLC ("**BATO**") are the entities that bear

²⁰⁰ Decision on Expedited Objections ¶¶ 255-256.

²⁰¹ Second Daniel Report ¶¶ 20-24.

the majority of the costs relating to the trademark license, such as cash, inventory, workforce. As the Respondent pointed out in the Expedited Objections phase, most of these activities were not carried out by BSLS – instead, they were carried out by BSAM.²⁰² Moreover, although BSJ has a greater role in these expenses in other jurisdictions, it does not carry out these activities in the Americas in relation to the BRIDGESTONE mark.

- (b) Expenses: which entity bears the majority of the burden for costs of exploiting the license? Here again, it is BSAM or its subsidiaries, which pay for marketing, sales and most of the administrative expenses for sale of the tires in Panama and the BSCR Region. BSLS and BSJ pay some of the administrative costs of licensing the trademarks, but their input is minimal. This also accords with the Tribunal’s finding that “*BSAM, itself and through its wholly owned subsidiaries, carried out the various activities involved in exploiting those rights.*”²⁰³
- (c) Market power: which entity brings market power to the table? Here, since these are inter-group licenses, this factor does not weigh in favour of either party.

- 91. On balance then, since two out of three factors weigh in favor of BSAM, it is reasonable to conclude that BSAM receives the majority of the economic benefit of the trademarks. As it is not possible to provide a more definitive split under this analysis, Mr. Daniel conservatively opines that BSAM’s benefit is greater than fifty percent.²⁰⁴
- 92. In light of the above, and understanding the role BSAM plays in exploiting the trademarks, Mr. Shopp’s theory that BSAM would benefit from a decrease in royalty rates and thus has suffered no loss makes no sense at all.²⁰⁵
- 93. The Claimants’ damages theory is neither “*tortured*” nor “*flawed*”.²⁰⁶ It is simply this: the Supreme Court Judgment has impaired the trademark rights by imposing legal and economic risk on the rights owners’ enforcement and exclusivity, thereby negatively affecting the value of the trademark rights held by BSAM and BSLS. Such impairment

²⁰² Respondent’s Reply on Expedited Objections ¶¶ 68-78.

²⁰³ Decision on Expedited Objections ¶ 217.

²⁰⁴ Second Daniel Report ¶ 24.

²⁰⁵ Respondent’s Counter-Memorial ¶¶ 27, 188.

²⁰⁶ Respondent’s Counter-Memorial ¶¶ 172.

is not grounded in marketplace confusion, therefore it is inappropriate to look only to the expected effects of marketplace confusion – i.e. diversion of trade and decrease in revenues. Here, the impairment caused by a judicial decision (which consumers of tires would not typically encounter) is most rationally viewed through the eyes of a potential investor, acquirer or licensee of or in the trademark rights at issue.²⁰⁷ Its finding, that simply opposing a trademark application if the applicant is already commercially exploiting its mark (prior to the mark being registered or even applied for) is reckless and can cause damage to the applicant, diminishes the trademark owner and licensee’s rights to oppose confusingly similar marks and to benefit from their already registered trademark rights. Taken to its logical conclusion, this would endorse circumventing the trademark registration system even in civil law countries like Panama that employ a “first-to-file” system – applicants could start using their marks before registration to reduce the risk that registration of such marks would be refused.

94. The Claimants’ damages model does appropriately consider sales. In the immediate aftermath of the Supreme Court Judgment, it is unlikely that BSAM would see any significant dip in sales because consumers are unlikely to be aware of the Supreme Court Judgment, or if they are aware, are unlikely to take it into account in making their purchasing decisions. However, over time, BSAM may see a drop in sales and loss of market share as a result of the Supreme Court Judgment, because the effect of the Supreme Court Judgment is to make it easier for competitors with confusingly similar marks to enter the market, emboldened by the results achieved by Muresa and the chilling effect this result would have on the Claimants to oppose other trademark applications. That drop in sales and loss of market share is the reason why companies like Bridgestone protect their intellectual property so fiercely.
95. Because the full effects of the Supreme Court Judgment cannot yet be felt and for the other reasons articulated above, it makes sense to value the trademark rights as assets that may be acquired or invested in. For the purposes of valuation, it is not relevant whether or not there are any actual acquirers of or investors in these assets. If there were, that may assist in valuing the assets, but the fact that there are currently none does

²⁰⁷ **CLA-0156** Gabriela Salinas, *The International Brand Valuation Manual: A Complete Overview and Analysis of Brand Valuation Techniques, Methodologies and Applications* (2014), p41-42 This manual notes a survey of investment managers that found that they considered a company’s intellectual property to be a major factor in their investment decision.

not mean that the assets have no value, or that their value now is not worth less than it was before the Supreme Court Judgment. As Mr. Daniel explains in his Second Report, this conflicts with the commonly accepted concept of unrealized losses. For example, he provides the following: “*consider an owner who purchased a structurally sound building that one day sustained enough damage to make it structurally unstable and at risk of falling, and this information is known by all interested parties. Mr. Shopp’s analysis of the damage to the Subject Trademarks is analogous to concluding that the damage to the building has not decreased the value of the building because it has not collapsed yet. This example demonstrates that Mr. Shopp’s analysis is flawed and overly simplistic because no prospective buyer would pay the owner the original purchase price for the building with that knowledge.*”²⁰⁸

96. The Supreme Court Judgment created an uncertainty and risk because of the precedent it sets. While the Claimants accept that there is no formal precedent system in Panamanian law as there is in the common law system, in practice judgments almost always cite to previous judgments. Mr. Molino, engaged in the practice of trademark law in Panama, describes the recent phenomenon of trademark applicants alleging “*recklessness*” on the part of those who commence trademark opposition actions. This is something he had never seen before the Supreme Court Judgment, and he surmises that trademark applicants may use this language specifically to be able to line up a damages claim similar to Muresa’s subsequent to the trademark opposition action.²⁰⁹ This fact alone illustrates the real-world impact of the Supreme Court Judgment, which insofar as it remains unexpunged, foments legal and economic risk and uncertainty for the Claimants. The inherent right of the trademark holder is to exclude others from use and registration of a confusingly similar trademark, through such tools as opposition proceedings and litigation. If other competitors have the right to claim damages following a good faith attempt to exercise trademark rights and oppose a competing mark, then some of the right to exclude is lost.
97. The Respondent complains that the Claimants’ claims are full of hypotheticals.²¹⁰ In their Memorial, explaining the uncertainty of the trademark rights following the

²⁰⁸ Second Daniel Report ¶ 39.

²⁰⁹ Molino Report ¶ 98.

²¹⁰ Respondent’s Counter-Memorial ¶ 178.

Supreme Court Judgment, the Claimants said, “*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?*”²¹¹ These questions were not descriptions of the Claimants’ claims. The Claimants are not claiming that a “*hypothetical future buyer*” of the trademark rights “*will be afraid to invest in the brands based on concerns about the future actions of future courts.*”²¹² The Claimants are not claiming loss resulting from competitors filing similar damages claims or future courts granting claims, whether inside Panama or outside Panama. The Claimants are instead seeking to capture the diminution in value of the trademark rights caused by the uncertainty of how broadly these trademark rights are enforceable in the future.

98. The Respondent further complains that the Claimants’ claims fail because they have not shown that they have “*incurred*” loss – there must be evidence of actual injury, rather than “*speculative or uncertain loss.*”²¹³ In support of this, the Respondent asserts that BSLS has not shown any actual loss, listing various categories such as a decrease in sales of FIRESTONE products, or a decrease in the royalty rates charged to licensees.²¹⁴ As explained above, that is not the Claimants’ case. The Claimants are seeking to capture the loss to the trademark and the trademark licenses caused by the cloud of uncertainty as to the strength of the trademark rights. Mr. Daniel’s Second Report outlines in detail the nature of unrealized loss.²¹⁵ The Respondent’s objections to this are thus misconceived.
99. It argues that “*the supposed investors at the heart of [BSLS]’s claim are no more than a figment of its imagination.*”²¹⁶ There are no “*supposed purchasers*”—actual purchasers do not make an asset have value. To put it in tangible terms that may resonate better with some, the fact that a house is not currently for sale does not mean that it does not have value. If that house were to be valued, despite the fact that it is not for sale, the owner would take into account publicly known facts about the house and the

²¹¹ Claimants’ Memorial ¶ 233.

²¹² Respondent’s Counter-Memorial ¶ 179

²¹³ Respondent’s Counter-Memorial ¶ 193.

²¹⁴ Respondent’s Counter-Memorial ¶ 195.

²¹⁵ Second Daniel Report ¶ 41-48.

²¹⁶ Respondent’s Counter-Memorial ¶ 202.

surrounding area that would impact the value. In the present case, it is not “*speculative*” to suggest that the Supreme Court Judgment would not form part of the value assessment. It is publicly available information that any buyer would know about. In any event, even in the best circumstances it is challenging to identify “comparables” for valuation purposes due to lack of transparency and illiquid markets for intellectual property.²¹⁷ It would be nothing less than astonishing to find a “comparable” transaction involving valuation of impairment of trademark rights resulting from a judicial decision.

100. The Claimants agree with the Respondent that it must demonstrate that the Supreme Court Judgment was the factual and proximate cause of the diminution in value to the Claimants’ trademark rights. The Claimants have done so. The Supreme Court Judgment determined that BSLS and BSJ acted recklessly in bringing a trademark opposition action in circumstances where the trademark applicant was already using its mark.²¹⁸
101. The Respondent argues that the Supreme Court Judgment “*did not adjudicate [BSLS and BSJ’s] intellectual property rights under Panamanian trademark law, nor did its holding affect their ownership of, or license rights for, the trademarks at issue.*”²¹⁹ But this is disingenuous. The Supreme Court may not have been deciding a trademark registration application, but trademarks rights were the subject of the dispute, and the Supreme Court severely penalized the rights owners for the good faith enforcement of those rights.
102. The Respondent further argues that any alleged increase in competition by products bearing confusingly similar marks would be the result of the Eighth Civil Circuit Court’s decision, not the Supreme Court Judgment.²²⁰ But the Eighth Civil Circuit decision simply decided that RIVERSTONE was not confusingly similar to BRIDGESTONE or FIRESTONE for purposes of the trademark opposition proceeding. The fact that Muresa obtained its trademark registration for RIVERSTONE in Panama means that tires with the RIVERSTONE mark may be sold in Panama alongside

²¹⁷ **CLA-0156**, Salinas, *International Brand Valuation Manual*, p43.

²¹⁸ **Exhibit C-0027**, Judgment of the Supreme Court of Justice, Civil Division.

²¹⁹ Respondent’s Counter-Memorial ¶ 212.

²²⁰ Respondent’s Counter-Memorial ¶ 214.

BRIDGESTONE and FIRESTONE tires, and the Bridgestone group cannot prevent this. The effect of the Supreme Court Judgment is to increase the riskiness of trademark enforcement with respect to the BIRDGESTONE and FIRESTONE marks and a diminished scope of protection. As the Claimants have explained, protection of trademark rights is critical to Bridgestone’s strategy and business, and therefore it cannot stop opposing potentially confusingly similar trademark registrations and allow such marks to enter the market. But the economic and legal risks are increased if Bridgestone is subject to damages claims like Muresa’s after asserting its trademark rights. Again, Mr. Molina noted in his report that he has noticed a change in practice following the Supreme Court decision: trademark applicants are now including accusations that the existing trademark holder has behaved recklessly in their defenses to opposition proceedings – this is language that comes directly from the Supreme Court Judgment and would set the applicant up for a damages claim like Muresa’s.²²¹

103. Quantification of loss and damage to intellectual property has rarely been considered in investor-state cases, and indeed as a general matter valuation of intangible property such as trademarks is difficult, as there are no set methods for determining this value. Nevertheless, the analysis put forward by the Claimants’ expert, Mr. Daniel, was declared “*inappropriate and unreliable*” by the Respondent’s expert, and criticized for the following reasons, each of which is wrong.²²²
104. First, the Respondent accuses Mr. Daniel of including the losses incurred by BSJ in his analysis.²²³ That is incorrect. As discussed above and as Mr. Daniel explains in his Second Report, a trademark licensor and licensee share in the goodwill of the licensed trademarks. The consequences of any negative economic impact to the trademark flow to both the licensor and the licensee. In the case of the FIRESTONE trademark, since both the licensor and the licensee are the Claimants in these proceedings, there may be no need to allocate the loss as between them. However, an allocation is necessary for the BRIDGESTONE trademark, because BSJ, the trademark owner and licensor, is not

²²¹ Molino Report ¶ 98.

²²² Expert Report of Matthew D. Shopp dated 14 September 2018 (“First Shopp Report”) ¶ 54.

²²³ Respondent’s Counter-Memorial ¶ 229.

a party to these proceedings. Mr. Daniel has therefore included, in his Second Report, tables showing an allocation between BSLS and BSAM for each of the trademarks.²²⁴

105. Second, the Respondent complains that Mr. Daniel used an *ex-ante* approach, rather than an *ex-post* approach, calculating damages from the date of the Supreme Court Judgment and not the valuation date.²²⁵ Even if it is the case that an *ex-ante* approach is typically used when there is an immediate impact, it is the Claimants' case that there is an immediate impact, in the form of unrealized losses, as described above. Mr. Shopp looked at realized losses to challenge Mr. Daniel's analysis on unrealized losses, which is illogical.²²⁶ However, Mr. Daniel opines in his Second Report that even if he were to adopt an *ex-post* approach, the result would not change, and there is therefore no need to spend time debating which standard should apply.²²⁷ The reason for this is that the Supreme Court Judgment is the reason for the diminution in value to the Claimants' trademark rights. That occurred on 28 May 2014, and nothing has occurred since that date to change that situation. Therefore, whether damages are calculated from the date of the Supreme Court Judgment, or from today looking back to the Supreme Court Judgment, there is no difference.
106. Third, the Respondent complains that Mr. Daniel's analysis assumes loss, even though they allege that the Claimants have not incurred loss.²²⁸ This is an odd argument: Mr. Daniel clearly explains why he considers that the Claimants *have* incurred loss: because the Supreme Court Judgment undermined the economic significance of the trademark rights owned by the Claimants.²²⁹ The Claimants could make the same comment about the Respondent's expert report, that Mr. Shopp assumed that there had been no damage.
107. Fourth, and in a similar vein, the Respondent complains that Mr. Daniel's analysis assumes a "*hypothetical future injury*."²³⁰ Again, the Claimants might say that Mr. Shopp's report is flawed because he assumes that the damages will not continue. In fact, Mr. Shopp's report is problematic for that reason. He reasons that because

²²⁴ Second Daniel Report, p. 2, figure 1.

²²⁵ Respondent's Counter-Memorial ¶ 230.

²²⁶ Second Daniel Report ¶ 45; First Shopp Report ¶ 42.

²²⁷ Second Daniel Report ¶ 39.

²²⁸ Respondent's Counter-Memorial ¶ 232.

²²⁹ First Daniel Report ¶ 39.

²³⁰ Respondent's Counter-Memorial ¶ 234.

competitors not moved quickly enough to register new tire brands, they never will.²³¹ Mr. Molino's experience, showing that trademark applicants are referencing the Supreme Court Judgment in their applications, demonstrates that the Supreme Court Judgment is having an effect on Panamanian trademark practice, and hence for trademark right holders.²³²

108. Fifth, the Respondent notes that the sublicensing agreement between BATO and BSCR concerning the BRIDGESTONE trademark in Costa Rica was concluded on 1 January 2015, after the Supreme Court Judgment, but maintains the same royalty rate as in other FIRESTONE and BRIDGESTONE trademark license agreements. The Respondent argues that the royalty rate would have decreased if the Bridgestone Group had believed that the BRIDGESTONE trademark had declined in value.²³³ However, as the Respondent is aware, as of 1 January 2015, there was still an outstanding challenge to the Supreme Court Judgment in Panama. That challenge was not finally determined until 28 May 2016. Until then, there was still the chance that the Supreme Court Judgment would be reviewed and amended, and so the extent of damage suffered by the Bridgestone Group in relation to its trademark rights in Panama was not yet determined.
109. Sixth, the Respondent argues that Panama “*has not become a riskier country for intellectual property rights.*”²³⁴ The Respondent and its expert, Mr. Shopp, focus on reports from the International Property Rights Index and the Global Competitiveness Index.²³⁵ These reports provide information on many elements of the Panamanian economy, and it is no surprise that both give very low ratings to corruption and judicial independence, citing these as key issues for Panama that present problems for its global competitiveness.²³⁶ That is important because this is the issue that the Claimants are complaining about in these proceedings. Panama has adequate protections in its laws for trademarks and other forms of IP. The Claimants' expert Mr. Molino is clear about that. But the actions of the Supreme Court in this case have undermined these

²³¹ First Shopp Report ¶ 80-82.

²³² Molino Report ¶ 98.

²³³ Respondent's Counter-Memorial ¶¶ 236-237.

²³⁴ Respondent's Counter-Memorial ¶ 238; First Shopp Report ¶¶ 86-87.

²³⁵ First Shopp Report ¶ 87; **Exhibit VP-7; Exhibit VP-8.**

²³⁶ **Exhibit VP-7; Exhibit C-0277** Global Competitiveness Index

protections. This may not yet be seen in reports about the country's intellectual property rights, but the Supreme Court Judgment has already caused changes to the way trademark applicants approach their opposition defenses.²³⁷ This is also the point that the United States made in its Special 301 Report of 2015, when it found, "*Of additional concern is a report that significant punitive damages were imposed on the owner of a trademark registered in Panama in connection with that owner's efforts to oppose the registration and use of a second mark which has been found to be confusingly similar in other markets. While the decision is not necessarily representative of a systemic concern in Panama, the damage award may discourage other legitimate trademark owners from entering the market out of concern that defending their marks will result in punitive action.*"²³⁸

110. As Mr. Daniels explains in his Second Report, it is Mr. Shopp's analysis that is flawed, because not only is it unsupported and directly contradicts commonly accepted basic principles of valuation, but it also relies on only parts of the relevant consideration-set.²³⁹
111. Mr. Daniel explains these errors in his report and addresses the Respondent's argument that his inputs and scenarios were wrong. One complaint made by the Respondent is that Mr. Daniel included sales of tires that were in the Colon Free Trade Zone "*who likely export these tires to consumers in non-Panama markets.*"²⁴⁰ The Respondent alleges that these tires should not form part of any calculation of sales of tires in Panama. The Colon Free Trade Zone is, of course, in Panama.²⁴¹ As the Claimants have explained to the Respondent, Bridgestone does not track (and cannot track) onward sales of its tires.²⁴² It has no way of knowing where any of its tires sold to distributors around the world eventually end up. Therefore, the sales of tires in the Colon Free Trade Zone are included in Panama's accounts because that is where the sales take place.
112. While the Respondent argues that the appropriate basis for damages is an analysis of consumer habits and whether these have changed after the Supreme Court Judgment,

²³⁷ Molino Report ¶ 98.

²³⁸ **Exhibit C-0032**, USTR Special 301 Report 2015.

²³⁹ Second Daniel Report ¶¶ 11, 38.

²⁴⁰ Respondent's Counter-Memorial ¶ 258.

²⁴¹ **Exhibit C-0278**, Web Article, Colon Free Trade Zone, Panama

²⁴² Respondent's Document Production Request.

the Claimants have been clear from the beginning that this is not their claim. Most consumers would not have heard of the Supreme Court Judgment, let alone letting it impact their decision as to which brand of tires to put on their car. Therefore, the appropriate analysis is not whether the consumers of tires are in Panama, but whether the sales of tires take place in Panama such that profits are received by BSCR and are attributed to Panama. Mr. Shopp is simply not right when he declares that royalty payments made on the sale of tires in the Colon Free Trade Zone “do not form part of the [Firestone trademark] in Panama.”²⁴³ They are included in Panama’s accounts because royalties are paid on them.

113. The same point applies to the other exclusions Mr. Shopp purports to make.²⁴⁴ Sales of tires in the BSCR Region are included in BSCR’s accounts and royalties paid on them no matter where the tires end up. The Claimants include in their damages analysis not only impairment of rights in Panama, but also impairment of rights in the BSCR Region. The Claimants’ reasons for doing so are several.
114. *First*, the BRIDGESTONE and FIRESTONE marks are global brands, that have been recognized as “well-known”, and thus entitled to heightened protection under the Paris Convention. Although the Respondent makes much of the territoriality of trademark rights, the Respondent is only half right.²⁴⁵ “Well-known” global brands such as BRIDGESTONE and FIRESTONE enjoy special treaty protections in international enforcement proceedings, and the acquisition or loss of well-known status in one jurisdiction can be used in actions in other jurisdictions against the trademark owner or its licensee.²⁴⁶ Thus damage to the well-known BRIDGESTONE and FIRESTONE marks in Panama (impairment enforceability and exclusivity) has consequences, realized or as yet unrealized, outside of Panama. The question then is: what jurisdictions does the impairment in Panama most likely infect? A rational hypothetical purchaser or investor would look to the BSCR Region, first and foremost because BSAM has treated the BSCR market for purposes of advertising, promotion, accounting and manufacturing under the marks as a consolidated market, entrusted to BSCR. Impairment of trademark exclusivity and enforceability of well-known marks in one

²⁴³ First Shopp Report ¶ 101.

²⁴⁴ First Shopp Report ¶ 106.

²⁴⁵ Respondent’s Counter-Memorial ¶ 184.

²⁴⁶ First Jacobs-Meadway Report ¶ 30.

part of this consolidated market, from BSAM and BSCR's perspective, Thus a purchaser or investor in the BRIDGESTONE and FIRESTONE marks in Panama would likely find not only the trademark rights in Panama to be impaired by the Supreme Court Judgment, but also the trademark rights in the operationally-integrated BSCR Region. Indeed, Muresa's own testimony and the Supreme Court Judgment's reliance on such testimony lends credence to the extension of impacts to the BSCR Region. The testimony of Muresa's Sales Manager which was referenced and relied upon by the Supreme Court illustrates the fluidity of the regional dynamic and shows that consequences of legal action in Panama extend to countries of the BSCR Region: Riverstone was a accepted tire brand in Costa Rica, Guatemala and the Dominican Republic, among others; Muresa, as a result of the opposition adopted a "contingency plan" using lesser known brands that allegedly resulted in losses in the Dominican Republic and "the entire area of Latin America."²⁴⁷ The Respondent's U.S. trademark expert Ms. Jacobson notes that Muresa cut back its sales of RIVERSTONE tires in Panama and neighboring countries to diminish its risk.²⁴⁸ Further, Muresa's Sales Manager's testimony appears to have tied Muresa's damages, which the Supreme Court found compensable, to extraterritorial sales, some in the BSCR region outside Panama: *"Introducing these brands that were not at that time as recognized or well known in the market, forced us to introduce them at a lower price to the detriment of the company's profit margin, in addition to the refusal of many customers to use a product that they did not know, which resulted in them cancelling orders due to the concern that they could be lower quality products."*²⁴⁹ In the circumstances, Claimants' damages claim relative to the BSCR Region is appropriate and fair.

115. The Respondent argues that Mr. Daniel's approach to exclusivity is wrong, leading to an incorrect decrease in the royalty rate.²⁵⁰ The Claimants' position is that the Supreme Court Judgment has (a) created a risk of liability of the Claimants and any other Bridgestone entity that is party to a trademark opposition action to pay damages if they oppose an application for a "-STONE" trademark, and (b) held that it is reckless to oppose a trademark application by an existing competitor. The Supreme Court

²⁴⁷ **Exhibit C-0153**, Testimony by Jose Orestes Medina Samaniego dated 21 April 2010.

²⁴⁸ First Jacobson Report ¶ 18.

²⁴⁹ **Exhibit C-0153**, Testimony by Jose Orestes Medina Samaniego dated 21 April 2010.

²⁵⁰ Respondent's Counter-Memorial, ¶ 269-273.

Judgment therefore impairs the exclusivity of the trademark rights. Mr. Shopp’s definition of exclusivity – “*when another company gains the right to sell the same branded product*”²⁵¹ is not right. Exclusivity, in the context of trademark rights, is the degree to which an owner of trademark rights can exclude similar marks from the market. Strong trademarks are afforded the broadest scope of exclusivity, while famous and “well known” marks enjoy the broadest scope of exclusivity.

116. Mr. Shopp ignores the studies discussing exclusivity put forward by Mr. Daniel and instead provides three alternative studies, which he says shows that “*exclusivity may not result in any significant different in royalty rates.*”²⁵² But that is not what those studies show. As Mr. Daniel explains, one study found that exclusive rights did lead to higher royalty rates, but the results were not statistically significant;²⁵³ the second is inapplicable because it analyzed patent pharmaceutical license agreements, which are different to trademark rights in any case, and also found that exclusive licenses did in fact lead to higher royalty rates, though the results were not statistically significant;²⁵⁴ and the third study is inapplicable because it related to trademark licenses for brand extensions,²⁵⁵ and in those circumstances found that where licensors had to rely on the licensee to protect the brand by using it appropriately, “[*e*]xclusivity [*was*] negatively related to [*the*] royalty rate.”²⁵⁶ The study also found that “*an alternative perspective is that in return for offering exclusivity and a longer term contract, the licensor should expect a higher royalty rate... [which] might indeed be true if brand protection is not a major concern.*”²⁵⁷ The trademark licenses in question are not brand extension trademarks. BSLS and BSJ would not have to rely on BSAM to protect the trademarks

²⁵¹ First Shopp Report ¶ 144.

²⁵² First Shopp Report ¶ 146, Respondent’s Counter-Memorial ¶ 270.

²⁵³ Second Daniel Report ¶ 59; **Exhibit VP-0021**, M. Sakakibara, *An Empirical Analysis of Pricing in Patent Licensing Contracts* (October 2009) pp. 24-25.

²⁵⁴ Second Daniel Report ¶ 60; **Exhibit VP-0022**, E. Silva, *Characteristics of pharmaceutical patent royalty rates*, IAD, 12 October 2016.

²⁵⁵ A brand extension is when a brand name is used on a new product or product category. For example, if Bridgestone wanted to start using BRIDGESTONE for coffee. In a brand extension license, the interests of the trademark owner and the licensee are inherently unaligned. The trademark owner is usually interested in protecting its brand, whereas the brand extension trademark licensee is interested in extending the brand to historically unrelated categories and maximizing its sales.

²⁵⁶ **Exhibit VP-0023**, S. Jayachandran et al., *Brand Licensing: What Drives Royalty Rates?* *Journal of Marketing*, Vol. 77 (September 2013), p. 114.

²⁵⁷ **Exhibit VP-0023**, S. Jayachandran et al., *Brand Licensing: What Drives Royalty Rates?* *Journal of Marketing*, Vol. 77 (September 2013), p. 114.

by using them appropriately because they have aligned interests and strategies with respect to exploitation of the trademarks.

117. In light of the above, Mr. Daniel concludes that his original damages figures were correct, although if Mr. Shopp’s assumptions were applied correctly, these would result in slightly higher numbers than those originally claimed by the Claimants. Mr. Daniel has therefore updated his damages figures to utilize the assumptions suggested by Mr. Shopp.

118. By way of summary, Mr. Daniel’s conclusions as to the range of loss suffered by each of the Claimants is set out below:

Licensor BSLS			
Panama		BSCR Region	
	Low	High	
Bridgestone Trademark	n/a	n/a	n/a
Firestone Trademark	59,311	111,104	1,003,769
Total	\$59,311	\$111,104	\$1,003,769

Licensee BSAM			
Panama		BSCR Region	
	Low	High	
Bridgestone Trademark	\$438,982	\$874,464	\$5,725,293
Firestone Trademark	59,311	111,104	1,003,769
Total	\$498,293	\$985,568	\$6,729,061

Total			
Panama		BSCR Region	
	Low	High	
Bridgestone Trademark	\$438,982	\$874,464	\$5,725,293
Firestone Trademark	118,622	222,208	2,007,537
Total	\$557,604	\$1,096,672	\$7,732,830

IX. CONCLUSION

119. For the reasons set out above and in their Memorial, BSLS and BSAM respectfully reaffirm their request that the Tribunal render an award:

(a) Declaring that Panama has violated its obligations under the TPA;

(b) Ordering Panama to pay damages of between USD 5,988,604 and USD 19,954,541;

- (c) Ordering Panama to pay interest on any amount awarded to BSLS and BSAM;
- (d) Ordering Panama to pay attorney's fees and expenses arising from these proceedings; and
- (e) Granting any further or other relief to BSLS and BSAM that the Arbitral Tribunal shall deem just and proper.

22 March 2019