BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration between:	
BRIDGESTONE LICENSING SERVICES, INC. and BRIDGESTONE AMERICAS, INC.,	
Claimants,	
and	Case No. ARB/16/34
REPUBLIC OF PANAMA,	
Respondent.	
	Volume 2

ORAL HEARING

Tuesday, July 30, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
Conference Room C 3-100
Washington, D.C.

The hearing in the above-entitled matter commenced on at 9:00 a.m. before:

LORD NICHOLAS PHILLIPS, President of the Tribunal

MR. HORACIO A. GRIGERA NAÓN, Co-Arbitrator

MR. J. CHRISTOPHER THOMAS, QC, Co-Arbitrator

ALSO PRESENT:

On behalf of ICSID:

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Secretary to the Tribunal

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C O N T E N T S

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P R O C E E D I N G S

PRESIDENT PHILLIPS: Good morning, everybody.

Are there any matters of housekeeping to be dealt with before we begin with the Witness?

Doesn't seem that there are.

Very well.

ADÁN ARNULFO ARJONA L., CLAIMANTS' WITNESS, CALLED

PRESIDENT PHILLIPS: Good morning, Mr. Arjona. Is that how you pronounce your name?

Good. Press the button to have your microphone on.

Would you read, please, the Expert Declaration in Spanish to yourself, and if you're happy with it, then read it to all of us.

THE WITNESS: Of course, Mr. President. Good morning.

First of all, I swear upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT PHILLIPS: Thank you.

MR. WILLIAMS: Mr. President, could I ask whether Mr. Arjona could have an assistant sitting

next to him to help him with his bundle to turn the pages? Would that be acceptable?

PRESIDENT PHILLIPS: I think more than acceptable. A very good idea.

MS. SILBERMAN: Mr. President, just one quick question for the sake of good order. Would it be appropriate to have someone from the other side be flipping the pages, just so that we can be sure that there is no appearance of any discussion of questions? And, of course, we would do the same thing reciprocally.

PRESIDENT PHILLIPS: Yes. To be squeaky clean, let us do that.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Arjona, you should have in front of you, then, a binder, and, if you turn to Tab 1 of the bundle, there is an opinion on Panamanian Law, which is, I believe, your First Report. And if you turn to the end of that, could you confirm that that is your signature?

A. Yes, it is my signature.

Q. And if you turn to Tab 2, that should be your Second Report. And again, could you please turn to the back of that and confirm that your signature appears at the end of that Report?

A. Yes, that is my signature.

Q. Lastly, Tab 3, your Third Report. Again, could you please confirm that the signature at the end is yours?

A. Yes, it is my signature.

Q. And do you have any corrections to those Reports?

A. No.

Q. I have a few questions for you, Mr. Arjona, before I hand you over to the Respondent.

In the present ICSID proceeding, of course, you are engaged as an expert witness by BSLS and BSJ. Have you been engaged by Panama to provide expert testimony on Panamanian Law in any other ICSID cases?

A. Yes, in effect, I have had the honor to be designated an expert witness in two cases before ICSID on behalf of Panama.

Q. Yesterday, a question came up about the

status of a document attached to a Coadyuvante Petition to intervene in the civil damages litigation that we've been discussing. Is the effect of such a petition being granted that the document attached to the Coadyuvante Petition becomes evidence in the underlying litigation?

A. Well, Article 603 of the Judicial Code of Panama enshrines the possibility of a third person becoming involved in a proceeding in order to assist with the position of one of the Parties in the dispute. The fact that the person appears as a coadyuvante, or "third party," as per this provision, must be backed by whatever they consider backs up their involvement or their intervention.

The fact that the Court would admit a person as "coadyuvante" or an "interested third party" does not necessarily mean that what that person is bringing forward is going to be considered as evidence because, in my opinion, in order for it to be evidence, it is necessary that the Court, when handing down the Decision, weigh the value of each evidence--of each item put forward as evidence, and determine whether it

meets the requirements for being attributed value in respect of a disputed fact.

Q. If a document goes onto the record in litigation, does it automatically become evidence in the litigation?

A. In my opinion, I believe that not necessarily. In other words, one can include a document in the record, but it must be[1] done in the phases indicated by the law for producing it into the record.

Second, it is important that the element that is incorporated into the record meets the requirements stated by law in order to be considered as evidence of the controverted fact.

Q. So, is it right, Mr. Arjona, that the judge would need to admit a document as evidence in order for it to be evidence?

A. In the admissibility phase, that is correct.

Q. Yesterday, a further question came up about whether a third party intervening by coadyuvante to

[1] The Spanish-language version of this sentence states "[e]s decir, se puede incorporar un documento al expediente, pero tiene, uno, que hacerse dentro de las fases que señala la ley para aportarlo." *See* Spanish Transcript for Day 2 at 13:16-19.

support a party in litigation, whether that third party can advance claims in its own right in the litigation. What is your opinion on that?

A. Article 603 of Panama's Judicial Code allows the incorporation of a third person as a coadyuvante, or "third party," involved, but clearly indicates that the third person is intervening to support one of the parties. That third party or third person cannot make its own claims.

And my opinion is based on the fact that the third person, "coadyuvante," cannot dispose of the facts in litigation, which reveals that this third person is not putting forward his or her own claims. If one could carry out acts that would dispose of the right that is being litigated, it is because one could be putting forward claims in respect of one's own rights.

In this case, Article 603, the third-party intervenor, or "coadyuvante," can only support the party and not engage in acts that are contrary to the party that the third party is assisting.

Q. Mr. Arjona, Panama, the Respondent, has said

that BSLS and BSJ could have tried to have the Supreme Court judgment that we are discussing set aside through making a complaint to the National Assembly, and asking the National Assembly to investigate the judges. Is that a mechanism that could have--could have resulted in the Supreme Court judgment being set aside or quashed?

A. The answer is clearly "no." In the Panamanian system, the possibility of filing complaints against the Justices of the Supreme Court, has as the sole purpose to examine the conduct of the accused judge. In no way can the Assembly quash or annul the judgments of the Supreme Court of Justice which, as the Constitution states, are final, definitive, and binding.

Q. Mr. Arjona, could you please turn to Tab 5 of your bundle, which I think will contain Mr. Lee's Second Report, and Paragraph 25, which in the translation that I'm looking at, is on Page 8. This concerns the Cassation Recourse Procedure, and Mr. Lee says--well, perhaps it's most efficient for you just to read Paragraph 25 to yourself, please.

A. Yes.

(Witness reviews document.)

A. Yes.

Q. And do you agree with what Mr. Lee says there?

A. Yes, I do agree with him.

Q. Would you please turn to Paragraph 84 of Mr. Lee's Report, which on my translation is on Page 27. And again, could you please read Paragraph 84 to yourself.

A. Yes.

(Witness reviews document.)

A. Okay.

Q. And you see there that Mr. Lee quotes part of Article 1169 of the Judicial Code, which is the ground on which Muresa relied in its Cassation Recourse, and that ground was: "breach of substantive rules of law by error of fact as to the existence of the evidence."

What does that ground mean? What is the nature of the error that the lower court would need to make in order for this ground to be satisfied?

A. Okay. Article 1169 of the Judicial Code of

Panama recognizes as a ground for cassation on the merits what is known as error of fact in relation to the existence of the evidence. In order for the error of fact to occur as to the existence of the evidence, well, the Court can engage in this error in two ways: One is to assume that, given evidence is in the record when physically it does not appear in the record, or it may decide ignoring the physical existence of the evidence in the record.

The Supreme Court of Panama, referring to this error of fact as to the existence of the evidence has said that it is practically a sensory problem, one of physical perception of the evidence or item of evidence in the record without the involvement of any element of appreciation or valuing of the evidence.

Q. And, Mr. Arjona, if the Court knows the particular evidence exists, but chooses to ignore it, would that satisfy this ground?

A. In my opinion, it would not because, according to the question--if, according to the question, the Court is aware of the existence yet it attributes no value to it, that is a problem that goes

to another ground, which is error of law in the appreciation of the evidence.

Q. And, Mr. Arjona, could you then turn to Tab 7, which contains Article 1169 from the Judicial Code, and you'll see there that it sets out the grounds for a Cassation Recourse, and it refers then to those grounds being any of the following concepts: "Direct violation, misapplication or misinterpretation of the rule of law, error of fact about the existence of the evidence, and the rule of law in terms of the appreciation of the said evidence."

So, am I right that in your last answer, you were saying that if the Court knows evidence exists but chooses to ignore it or misinterprets it, that that would fall under one of the other grounds specified in 1169, and not under the ground about error of fact about the existence of the evidence?

A. In my opinion, that is right. If the Court is aware of the existence yet reaches the conclusion that that document doesn't merit any evidentiary value, then what you have is the ground of error of law in the appreciation of the evidence.

Q. Which is a different ground from the ground that the Supreme Court found, in this case, was satisfied; correct?

A. In this case, the Judgment of the Court examines a ground relating to error of fact as to the existence of the evidence, which has to do, as I indicated, with a matter of physical perception as to whether the respective evidentiary element exists or does not exist in the record. It does not imply any valuing of such evidence.

Q. And if a ground for Cassation Recourse is asserted, is it open to the Supreme Court to find that one of the different grounds has been satisfied?

A. No, no. It can only recognize the ground that has been invoked by the Party bringing the challenge.

Q. Mr. Arjona, could you please turn to Tab 6 of your bundle, which is the Claimants' Demonstrative Number 4, which we looked at yesterday, at yesterday's hearing. And just to repeat, that the first column sets out the Supreme Court's finding in relation to each of Muresa's grounds for Cassation Recourse, and

the second column sets out what the First Superior Court, the lower court, said on that matter in its Judgment.

Mr. Arjona, do you agree with the finding of the Supreme Court in relation to Motive 1 that the First Superior Court had made an error as to the existence of the Foley & Lardner letter in light of the information contained on that page on Demonstrative Number 4?

A. I don't agree with the assertion made by the Supreme Court with respect to that specific element, which is the Foley letter, and I say this because the mere finding or verification of the text of the Judgment of the Appeals Court evidences that the Appeals Court did have or did realize or was aware of the existence of the Foley letter. Therefore, if the ground is error of fact as to the existence of the evidence, then what is stated in the Judgment of the Court is totally inconsistent with the text of the Judgment on appeal.

Q. And whilst it's a slightly different test, do you agree with the Supreme Court that the First

Superior Court ignored the Foley letter?

A. I don't agree with that affirmation that the Court. In other words, I do not agree on that affirmation by the Supreme Court because, when one reads the Appellate Judgment, one realizes that the Appellate Court mentions the item of evidence, in this case the Foley letter. There is not, in my opinion, any error as to the existence of the evidence.

Q. Mr. Arjona, do you understand how the Supreme Court could possibly have made the finding on this matter that it did?

A. As I indicated in my Reports, I really don't find any logical explanation nor any legal explanation to uphold that affirmation by the Supreme Court.

Q. Mr. Arjona, could you now please turn the page--and there is Motive 2, so Muresa's Motive 2, and this motive was the suggestion by Muresa that the First Superior Court had made an error as to the existence of certificates from Muresa's accountants about sales figures.

Now, those certificates were not themselves mentioned by the First Superior Court, but the First

Superior Court did mention Muresa's accounting experts' reports, and those Reports themselves mentioned the certificates, and based their findings on them.

Looking at what appears in the second column, in terms of what the First Superior Court said in their judgment about those experts' reports, what is your opinion about the Supreme Court's finding that the lower court made an error as to the existence of the certificates?

A. In my opinion, the same situation that I already indicated is repeated. In other words, the Court affirmed that the Appellate Court had ignored those documents; and, in the text of the Judgment on appeal, one observes reasonably that the Court was aware of the existence of those documents. Therefore, I believe it is a clear manifest error as between what the Supreme Court said and what the Judgment on appeal says.

Q. Do you understand how the Supreme Court might have made the finding that it did?

A. I really don't find any logical, well-founded

or legal explanation of how it made that affirmation, which does not correspond at all with the reading of the judgment on appeal.

Q. The third motive down below is the finding of the Supreme Court that the First Superior Court made an error as to the existence of evidence concerning the withdrawal of an appeal in relation to the outcome of the trademark opposition proceeding. As the Respondent indicated in its opening yesterday, that withdrawal was raised at first instance in the damages litigation, but Muresa did not raise with the Appeal Court, the First Superior Court, this issue, and it was not raised in any complaint or claim in the appeal, and was not mentioned to the Appeal Court.

In light of that, what is your opinion as to the Supreme Court's finding that the First Superior Court made an error as to the existence of the evidence concerning the withdrawal of the appeal?

A. Well, on examining what you point out, the conclusion I draw is that the argument made in the Writ of Cassation constitutes what the case law of the Civil Chamber has indicated, which is a new means.

Let me explain.

If the appellant has not introduced the issue or raised the issue that was considered by the Court of Appeals, then the Supreme Court considers that it is not possible to introduce this through a Motion for Cassation. It is said that the reason for this is that on not having raised the issue on appeal, the appellate court was deprived of the opportunity to analyze the argument. And, in that situation, the case law of the Court has considered that one is not allowed to introduce the new debate through the Motion for Cassation.

Q. And, Mr. Arjona, if you turn to Tab 7 of your bundle, which, for the record, is R-138, which are provisions of the Judicial Code, and then, if you turn to the last page of that document, which contains the text of Article 1194 of the Judicial Code--do you see that?

A. Yes.

Q. And, Mr. Arjona, is Article 1194 the basis in law for the answer to your last question?

A. Yes.

Let me clarify something. Article 1194 of the Judicial Code makes reference to the so-called "cassation on form," which has to do with procedural matters. Now, the case law of the Civil Chamber of the Supreme Court has extended by standard way of interpretation the meaning of this. This is not only referred to procedural matters, but it also refers to merits matters, substantial matters, and there are decisions taken, and the most prestigious jurist that has studied cassation in Panama, Mr. Fábrega, indicates so. He says that the Court has interpreted that, when it comes to the merits of the matter, the appellant must have put to the Appellate Court the matter because, otherwise, if this is not raised before the Appellate Court, the matter cannot be taken by a cassation to the Supreme Court.

I just wanted to clarify this because, if we read the letter of 1194 of the Judicial Code, well, here it makes reference to "cassation on form," which has to do with procedural matters. But again, the case law of the Civil Chamber by way of interpretation has considered that that can be extended to arguments

on the merits.

In the specific case that you put a question to me about in connection with the abandonment of the appeal, if that had not been put to the Appellate Court, then this merits issue cannot be put to the Court by a cassation, at least that's my understanding.

Q. Mr. Arjona, if you would turn to Tab 8.

PRESIDENT PHILLIPS: Mr. Williams, you're aware that half an hour has been allowed for direct examination of this Witness and the half an hour has elapsed.

MR. WILLIAMS: Mr. President, I shall stop, then.

MS. SILBERMAN: Mr. President, we're going to hand out some examination binders as well, and we will start with the questions once everyone has their binder.

(Pause.)

CROSS-EXAMINATION

BY MS. SILBERMAN:

Q. Good morning, Mr. Arjona. My name is Mallory

Silberman, and I'm a member of the team representing the State of Panama in this case. I'm going to ask in English, but I'm going to present myself in Spanish, because it is your native language. But if you need a break or if you need for me to repeat a question, please let me know.

A. Thank you very much. You're very kind.

Q. I would like to begin by asking you some questions about your CV.

You attended La Universidad Santa Maria la Antigua; correct?

A. That's correct.

Q. And this school is in Panama?

A. Yes, it is.

Q. And you graduated with a law degree in 1984?

A. That is correct.

Q. Now, following graduation, did you enter private practice?

A. That is correct.

Q. Where did you work?

A. I worked in the law firm Alfaro, Ferrer & Ramírez in Panama.

Q. Is that the AFRA firm?

A. That is correct.

Q. And that is of Panama's most reputable firms; correct?

A. That is correct.

Q. Now, while you were with AFRA, did you ever serve as counsel in an international investment-treaty arbitration?

A. I was not.

Q. Since then, have you ever served as counsel in an investment-treaty arbitration?

A. I have not been a lawyer, as I indicated initially in my statement, in answer to a question posed to me. I have been an expert witness in connection with Panamanian Law at the request of the Republic of Panama in two cases before an ICSID tribunal.

Q. And have you ever served as arbitrator in an international investment-treaty arbitration?

A. I have not.

Q. Did any of your matters involve issues of customary international law?

A. No.

Q. So, your expertise is in Panamanian Law; right?

A. That is correct, yes, and that is why I have been called upon to testify here.

Q. Now, in Panama, the general duties of judges and magistrates are listed in Article 199 of the Judicial Code; correct?

A. Just a clarification: 199 was repealed by a law--I think it's Law Number 53 that provides issues in connection with a judicial career and also regulations connected with ethics in the judiciary. Law 53 reproduces the provisions of 199 of the Judicial Code, but I just wanted to be clear as to this matter, and that is why I made this clarification.

Q. Thank you for that clarification.

When was the article repealed? Do you remember generally what year that might have happened?

A. I think that Law 53 that brought this new system for the judicial career was adopted, I think, in 2017 or 2018.

Q. Okay. So, when you were a Supreme Court justice, the general responsibilities for judges and magistrates, were those contained in Article 199 of the Judicial Code, which was still in force; correct?

A. That is correct, yes.

Q. And you became a justice of the Supreme Court in the Year 2000; is that right?

A. Correct.

Q. And did you always comply with Article 199 of the Judicial Code?

A. Yes, that's correct.

Q. Now, if I understand correctly, there are four Chambers that comprise the Panamanian Supreme Court; correct?

A. That's right.

Q. And each of these Chambers is responsible for a different subject matter; right?

A. That is correct.

Q. So, for example, the First Chamber is responsible for Civil Proceedings; correct?

A. That's correct.

Q. Were you a member of the First Chamber?

A. I was a member of the Third Chamber in connection with administrative-litigation matters.

Q. And so, the Third Chamber decides cases involving administrative law and labor law; correct?

A. That is correct.

Q. Now, you joined the Court in the year 2000, and you were there until 2009; correct?

A. That's right.

Q. And so your time at the Court overlapped with Justice Oydén Ortega Durán; correct?

A. The constitutional mandate of Supreme Court justices is 10 years. When Mr. Ortega was appointed, I was already in the Court, and I was a member of it.

Q. And you also served on the Supreme Court at the same time as Justice Jorge Lee, who is sitting to my right; correct?

A. Yes, indeed.

Mr. Lee occupied the opening that was a result of the death of Justice Rogelio Fábrega Zarak.[2] That happened when I was still a justice in the

[2] The original Spanish-language version of this sentence says "[s]i, en efecto, el abogado Lee ocupó temporalmente la vacante que se produjo por la muerte del magistrado Rogelio Fábrega Zarak, y eso ocurrió cuando yo era todavía magistrado de la Corte Suprema." *See* Spanish Transcript for Day 2 at 33:10-14.

Supreme Court.

Q. Now, I understand that after leaving the Court you returned to private practice; is that correct?

A. That's right. I went back to private practice, and I'm a member of Galindo, Arias & Lopez, a law firm.

Q. And does that firm have a practice group that focuses on intellectual property?

A. Not necessarily. I don't think that we are working in depth in connection with intellectual property matters.

Q. Do you keep up with important decisions that are issued by the Supreme Court?

A. That's right.

Q. How many decisions approximately are issued by the Supreme Court each year?

A. Well, we would have to look into that.

In general terms at this point in time I don't have the exact information as to how many decisions are handed down by all of the Supreme Court, which, as you indicated, is made up of four Chambers.

In connection with the Civil Chamber, I have tried to find out how many decisions are handed down yearly. It is my impression that the average, the yearly average, has been of about 300 to 600 cases that have been solved by the Civil Chamber of the Supreme Court.

Q. And is it common for lawyers to read every single one of the decisions that is issued by the entire court every year?

A. I would say that that depends on the acuity of each one of these professionals. When you are discharging your profession in a responsible manner, I consider that you need to be up to date in connection with the evolution of case law.

Q. Let's go back to the period between 2000 and 2009. During that decade, approximately how many cases did you decide as Supreme Court justice? Several hundred? Several thousand? Just an estimate.

A. I think evidently probably several hundred cases. I not only decided on cases related to the Third Chamber of the Supreme Court, and this is one of or perhaps the one that has the most cases, the

greatest case law, because this Tribunal is the highest tribunal that examines due process or legality, like we call it, in our country. Apart from that, I made decisions as a justice in connection with constitutional matters as a member of the Supreme Court holding its decisions en banc.[3]

And when I was the President of the Supreme Court, I also had to decide on matters heard by the Fourth Chamber, general business.

Q. And what percentage of these cases would you say were civil litigations?

A. Well, I could not decide on civil litigation matters because the matters heard by Third Chamber, my chamber, were matters in connection with administrative litigation. My professional experience, however, before I came into the judgeship of the Supreme Court always had to do with matters related to civil and commercial matters.

Q. Now, you weren't at the Court when the Muresa

[3] The correct Spanish-language version of the answer states: "Creo que evidentemente tienen que ser cientos casos porque no solo resolví los casos de la Sala Tercera de la Corte Suprema, que es una o quizás la más atareada con expedientes por razón de que ese Tribunal es el máximo y único Tribunal de examen de la legalidad en el país."

and Tire Group Judgment was issued, so when did you first become aware of that Judgment?

A. Indeed, I was not a member of the Supreme Court when the Decision was handed down, the Muresa Decision. I studied this Decision on the occasion of these proceedings.

Q. So, that must have been some time in 2018; correct?

A. When I submitted my First Report, yes.

Q. You weren't aware of the Judgment before that time?

A. I was not aware of it because the issue is that, in Panama, the dissemination of the Supreme Court Decisions is not something done in a regular manner. Access to information related to the Decisions is not easy for the lawyers. You can go to the official Web page of the Court and consult it, but oftentimes the Decision is not posted there.

In the specific case of the Muresa Decision, this Decision is not posted on the Web page of the Court.

Q. I see. Let's turn now to some questions

about your reports, your expert reports, in this proceeding. And you submitted three reports on Panamanian Law; correct?

A. That's right.

Q. And you drafted these reports originally in Spanish; right?

A. That's right.

Q. And these reports reflect your independent assessment; is that right?

A. I agree.

Q. So, let's turn to paragraph 8 of your Second Report, which I will pull up on the screen because I'm not sure if the English versions made it into all of the binders.

And I'm sorry, Mr. Arjona, I forgot to ask earlier: Do you read English?

A. I would rather read it in Spanish.

Q. I will have one of my colleagues come help you find the pages. So, this is paragraph 8 of your Second Report.

And do you read English at all?

A. Not for the purposes of my appearance here.

Q. Understandable.

Okay. So, it states here that you "objectively evaluated the points of fact of this case in light of the Panamanian legal system."

Is that correct?

A. That's right.

Q. And these points of fact, were they presented to you by the Claimants?

A. Yes.

Q. Were they facts about the Muresa case?

A. That's right.

Q. And in what format were these presented to you?

A. They were explained to me--and that was not the only thing I took into account, but I looked also at the case file so that I could have a direct idea of the facts.

Q. I see.

So, you did your own research to confirm that the facts were true; is that correct?

A. That's right.

Q. Now, did you review the entire "expediente"

from that case?

A. That's right.

Q. All 5500 pages of it?

A. Yes. I examined the case file for trademark opposition, and also the pre-file that has to do with a civil claim that was put forth by Muresa.

Q. And when did you conduct that review?

A. On the occasion of the preparation of my First Report.

Q. Let's turn to paragraph 5 of your First Report, which is on page 1 in both of the versions. We will pull the English version up on the screen as well. And it states: "In preparing this opinion, I have taken into consideration the legislation in force in the Republic of Panama currently and at the time of the court proceedings in Panama that are the subject of the present arbitration, the documents cited in footnotes, together with such other information relating to the cases as has been provided to me and is indicated in this opinion."

A. Yes.

Q. And then in the last sentence of paragraph 6,

you state: "Throughout this document, I shall cite any other document I have taken into consideration."

Is that correct?

A. Yes.

Q. So, are you saying here that the only documents that you considered for purposes of your conclusions are the documents that you mention in the footnotes of your report?

A. Yes.

Q. Did you consider any documents that aren't mentioned in the footnotes?

A. At the time when I prepared my report, that is exactly what I did. What I stated here, and this in response to your question.

Q. So, I would just like to understand which parts of the "expediente" in particular that you reviewed and you relied upon for purposes of your report. So, I'm going to list some items and ask if you relied upon them. I'm not going to ask you right now about the contents of the document; this is simply to see whether you relied on the documents or not and whether you reviewed them or not. So, if you don't

know or if you don't remember, that answer is perfectly fine.

Did you review the Complaint submitted by Muresa and Tire Group in the First Instance Proceeding?

A. I did, indeed. I looked at the file, the trademark file, and also at the civil complaint file.

Q. Did you review the answer that was submitted by Bridgestone Licensing?

A. Yes.

Q. Did you review the answer submitted by Bridgestone Corporation?

A. Yes. I examined the file.

Q. So, that means that you also reviewed the jurisdictional challenge that the Bridgestone Litigants submitted; correct?

A. I did.

Q. And, of course, you also reviewed the documentary evidence?

A. Yes.

Q. And you reviewed the witness testimony?

A. Yes.

Q. It means that you reviewed the expert reports; correct?

A. Yes.

Q. And you reviewed the Coadyuvante Petition submitted by L.V. International; correct?

A. Yes.

Q. You also must have reviewed the documents appended to the Coadyuvante Petition; is that right?

A. Yes.

Q. And you reviewed the Parties' closing arguments in the first instance proceeding?

A. Yes.

Q. And you also reviewed the judgment that was issued by the First Instance Court; correct?

A. Yes.

Q. You also reviewed the appeal by Muresa and Tire Group; right?

A. Excuse me. The appeal of Muresa and Tire Group, are you referring to the civil procedure or to the trademark procedure?

Q. The civil procedure.

A. Yes, of course. The Muresa and Tire Group

appeal within the Civil Proceedings.

Q. Did you review the decision that was issued by the Appellate Court?

A. Yes.

Q. And you reviewed the request for cassation; correct?

A. That's right.

Q. And you reviewed the pleadings that the Bridgestone entities submitted during the course of the Cassation Proceeding; correct?

A. That's right.

Q. But you didn't cite all of these documents in your expert reports; correct?

A. I do not think it is necessary to detail all of the pieces that are part of a file. If I am saying that I reviewed all of the file because I was not going to issue an opinion just on the decision of the Supreme Court without reviewing all of the arguments, everything that happened in the civil claim proceeding.

Q. So, you didn't think it was important to mention the answer submitted by Bridgestone Licensing

in the first instance proceeding; is that correct?

A. I don't understand your question.

Q. In your reports, you don't cite the answer that Bridgestone Licensing submitted in the First Instance Proceeding. Does that mean you didn't consider that document to be important?

A. You cannot conclude that it was not important. I am saying that I reviewed all of the file, and that includes that piece of document.

Q. Okay. But you didn't discuss the answer submitted by Bridgestone Licensing; is that correct?

A. The issue at hand had to do with the decision of the Supreme Court; and, in order to express an opinion on what had happened during the proceeding, I examined all of the evidence provided to that record--to that file. That was important for me to develop a responsible opinion on this issue at hand.

Q. So, the opinion that you reached for purposes of reaching it, it wasn't important what the Bridgestone Litigants argued?

A. Once again, I examined the record that included the Muresa decision.

Q. But not all of the documents were worth citing; correct?

A. That is your opinion.

Q. Well, in that case, it's your opinion. You didn't cite all of these documents. So, I'm asking--

(Overlapping interpretation with speaker.)

A. I have already indicated. I have already indicated that I examined the record responsibly. I would not issue an opinion for the Tribunal without reviewing the record. What you're saying that if I did not cite a document is because I didn't consider it important, what you're saying does not necessarily apply.

Q. Well, then, why didn't you cite those documents? It makes sense that you wouldn't cite them if you didn't consider them important. I'm just trying to figure out why they weren't cited.

A. It is important that I have read the document, the record, and that I have--and that I have an opinion on the issues that I was consulted on.

Q. Were you not consulted about the Bridgestone Litigants' arguments throughout the Civil Proceeding?

That wasn't part of what you were asked to comment upon?

A. I expressed my opinions regarding the issues I was asked to opine on. And once again, I insist, to issue that opinion, I reviewed the record with all of its elements.

Q. In your reports, Mr. Arjona, you don't cite to a single document, a single pleading by the Bridgestone Litigants prior to the Supreme Court Decision. Did you not consider those documents to be relevant or important for purposes of your opinion?

A. Those documents were part of the record, and I did analyze and review them, but the key issue I was asked to opine on had to do with the Decision handed down by the Supreme Court in this case.

Q. Are you saying that it's not important to understand both parties' arguments when you are opining on a decision handed down by the Supreme Court?

A. I have not said what you are saying in your question. I have indicated that the key issue I was asked to opine on was the Decision by the Supreme

Court of Justice in the Muresa Case. And, as it is known, the cassation remedy is a process, a proceeding after the Second Instance Decision; therefore, it was not necessary for me to cite what happened during the First Instance Proceeding. I am just asserting that I did read all of the record starting with the first instance, and whatever happened in the second instance and what happened at the level of the Supreme Court.

Q. Did you cite to the Appellate Court Decision in any of the footnotes in any of your reports?

A. I don't recall precisely if I mentioned that, but I can assure you that I examined the record, and I reviewed in particular the decision by the Appellate Court that was the one that was being questioned through the cassation remedy before the Supreme Court.

Q. Let's turn to paragraph 70 of your first report, which is on page 23 of both the English and Spanish versions. It states: "The consistency requirement is a crucial element for securing a respondent's right to defense. Pertinent in this respect, are the comments formulated on this important principle by Dr. Jorge Fábrega Ponce, Professor of

Procedural Law and author of the Judicial Code of Panama (civil procedure)."

Did I read that correctly?

A. Yes.

Q. Now, underneath that paragraph, there's a quotation, and it states: "CONSISTENCY: A principle under which judgments must be in accordance with the purpose of the proceeding. The decision must adjudicate all causes of action and the defenses formulated by the parties (rule of completeness of the judgment). A judgment is referred to as cifra petita when it fails to rule on one of the levels of the dispute."

Did I read that correctly?

A. I lost you there.

Q. Why don't you take a second to read paragraph 70 of your first report, and the first paragraph of the quotation immediately underneath it.

A. I am at 70, and then I have the quote by Mr. Fábrega and the question.

And the question, what is the question?

Q. In the quotation underneath Paragraph 70, it

states that "CONSISTENCY" is "a principle under which judgments must be in accordance with the purpose of the proceeding. The decision must adjudicate all causes of action and the defenses formulated by the parties (rule of completeness of the Judgment)."

A. Yes.

Q. So, for purposes of your opinion, wouldn't you need to have considered and analyzed the Bridgestone Litigants' submissions from the Civil Proceeding?

A. I already stated, I think, clearly that I did analyze all of the evidence and all of the allegations in this Civil Proceeding.

Q. But did you discuss them in your reports?

A. To be able to develop the report, I had to analyze all of the information on the record. I wouldn't be able to respond to questions without examining what happened during the proceeding. I quoted what was pertinent to the issue at hand.

Q. And the pleadings of the Bridgestone Litigants weren't relevant to the discussion of the principle of consistency?

A. The litigants--Bridgestone Litigants' pleadings, if they were part of the record, they were examined.

Q. Okay. Let's move on to some things slightly different.

I would like to turn to Exhibit R-52, which is the pleading that the Bridgestone Litigants presented in the Cassation Proceeding.

Now, earlier, you were asked some questions by the Claimants about the difference between the basis for cassation for the absence or non-existence of evidence, and the basis for cassation related to the appreciation of evidence.

And appreciation of evidence, you argued, is about the relevance of evidence and the probative value; is that correct?

A. I was asked questions regarding the meaning of factual error as to the existence of evidence. And as part of my explanation, I established a difference with the other motivation[4] that is an error based on

[4] The correct Spanish-language version of the answer states: "causal."

the law in the appreciation of the evidence.

Q. And what would the category of "appreciation of evidence" cover?

A. For the Court to examine the evidence, and after assessing the evidence, assign it evidentiary value so that it proves a specific situation as part of the discussion or litigation.

Q. And do you know whether or not the Bridgestone Litigants presented arguments on the evidentiary value of the materials that were listed in the Cassation Request?

A. The cassation remedy by Muresa was related to the factual error in existence of the evidence.

It is possible that, indeed, as part of the arguments on the merits before the Court decided on the remedy, Bridgestone made observations or presented arguments on each of the pieces of evidence mentioned.

Q. Well, let's turn to the document, which is Exhibit R-52, as I mentioned. And in the Spanish version, we're going to turn to page 5, and in the English--this is on page 5. And we're going to look at the second paragraph.

Now, it states: "In relation to the first evidence that the Appellant considers was not taken into account described in the preceding paragraph," which, for the record, was the Demand Letter, "we must point out that this document has no evidentiary value and, therefore, should not be considered since it is not even a document that comes from any of our clients. And above all, it was not duly submitted to the proceedings; that is to say, it was submitted extemporaneously, and its authenticity was not demonstrated at any moment of the proceedings."

Did I read that correctly?

A. Yes, that's what we read in this quote.

Q. This is an argument by the Bridgestone Litigants in the Cassation Proceeding on the evidentiary value of the Demand Letter; correct?

A. So that we do not have any confusion here. The Court has--the Court had to examine whether there was a factual error on the existence of evidence.

It is perfectly logical for the party--for the opposing party to the cassation remedy presents as part of their arguments or allegations evidence

regarding the value of that--of that so that if the Court considers that there is a factual error on the existence of this evidence, they would assess the evidence as such.[5]

The fact that the opposing party, Bridgestone, has introduced this type of allegation does not mean that the specific issue at hand is not being addressed by the Court because, as we have already indicated, the only objective of the Muresa cassation remedy was for the Court to verify whether there was an error of fact as to the existence of some evidentiary elements.

As stated in the law, if the Court considers that there is grounds for this Decision, the appeal decision is annulled, and it becomes a court that has the responsibility to decide in connection with all of the record and all of the evidence in the record.[6]

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[5] The correct Spanish-language version of the answer states: "Es perfectamente lógico que la parte opositora al recurso de casación adelante en sus alegatos observaciones en cuanto al mérito de esa prueba para el evento de que el Tribunal, si considera fundada la causal de error de hecho en cuanto a la existencia, tenga que entrar a valorar el material probatorio."

[6] The correct Spanish-language version of the answer states: "Como está indicado en la ley, si la Corte llega a considerar que se ha configurado la causal, anula el fallo de apelación y se convierte en tribunal de instancia y tiene la responsabilidad de decidir conforme a todo el expediente y a todo el

Q. Let's turn to paragraph 14 of your first report, which is on page 3 of both the English and Spanish versions.

The first sentence of Paragraph 14 states: "The present expert opinion provides a detailed explanation of the reasons why the Supreme Court Judgment should not be regarded in accordance with Panamanian Law as it concerns an arbitrary and unjust act."

Now, I couldn't tell if this was a description of the assignment that you were given or if it was your own conclusion. Did the Claimants provide this, or is this your independent conclusion?

A. I am not given the conclusions of my opinion. My opinion expresses the opinions, my own opinions, upon reviewing the elements that were considered.

In this case, my opinion, as stated here, the Decision issued by--handed down by the Supreme Court of Justice is an arbitrary act, and unjust and unreasonable, and I explained in my opinion the

material probatorio del expediente."

Decision is arbitrary because when the Tribunal decided that there was an error of fact—and we have seen it was not feasible because the Decision on the appeal referred to all of the evidence that Muresa claimed had been ignored—led to a completely arbitrary situation when deciding the case by only taking into account Muresa's evidence.

And a court cannot decide a case by examining only the evidence provided by one of the parties. In this case, it was clear that Muresa's evidence mentioned in the cassation remedy had to be contrasted with all of the evidence that was included in the record, so that, at the end of the day, a decision, a just decision, could be reached.

This is not something that I say, myself, in isolation, but this was also stated by Judge Mitchell, who introduced a Dissenting Opinion on this Decision.

Judge Mitchell, as part of his vote, indicated something that I agree with; that is, that the Decision by the Court did not contrast Muresa's evidence against the rest of the evidentiary material. I think it is completely unacceptable to decide a case

solely by analyzing the evidence presented by one of the parties; and, because of that reason, I considered that this is an arbitrary and unjust decision.

Q. And what is the basis for your conclusion that the Supreme Court in the Majority Opinion didn't take that evidence into account? Is it because it's not mentioned expressly?

A. Because the text of the Decision easily shows that the Court only refers to Muresa's evidence. It does not, as it should have been--as it should have compare and contrast that evidence against the other evidence on the record. That is not a balanced judicial opinion.

Q. But, Mr. Arjona, you discuss in your report, you didn't cite all of the documents — you didn't cite the Bridgestone Litigants' pleadings and you said, "Well, I still considered them."

Couldn't the same be true of the Supreme Court Judgment?

A. No, you cannot equate both situations. In the case of a decision of a court, it is--they have the legal obligation because I have mentioned--as I

have mentioned already, when the Court considers that a cassation remedy has been justified, it becomes a court, lower court, lower instance court, and as such, it has the obligation to explain to motivate each of the elements of the evidence that are part of the record. It is not possible to assume it, in the case of a tribunal, of a court. They didn't do that, and this is not something that it is difficult to see. You just need to read the Decision. You just need to read the Judgment for you to see that the Supreme Court of Justice decided the case by making reference only to the evidence presented by Muresa.

That, in my opinion, is not judicially correct.

Q. Is it your understanding that the obligations of an expert are different from that of the Court in that respect? That your obligations in this proceeding differ?

A. I have fulfilled my obligations as an expert, and I have already repeated this--reiterated this. My

obligations[7] are the result of studying the material on the record.

In the case of a court, the Court has the legal duty and ethical duty of deciding in justice and also based on the record.

Q. Let's turn to the second sentence in paragraph 14. It states: "The Supreme Court Decision evidences a clear and manifest lack of due process that offends a sense of judicial propriety."

Did I read that correctly?

A. That's correct.

Q. This is your own conclusion in your own words; right?

A. Correct.

Q. This is a phrase that you came up with entirely on your own?

A. That is the expression of my opinion based on the study of issues that have to do with the lack of motivation and also the lack of grounds for a legal decision that can also be found in the writings of the

[7] The correct Spanish-language version of the answer states: ”opiniones.”

other tribunals and treaty[8] writers.

MS. SILBERMAN: Kelby, can you focus in on the Spanish for a second?

BY MS. SILBERMAN:

Q. Are there any typos in the second sentence? For example, should it state "ofende el sentido" or "ofende a un sentido"?

A. Yes. It is---—what I'm trying to say when I say offends the sense of judicial propriety is that a judge that has to decide the case needs to have the responsibility of deciding based on the contents of the record, the proper application of the law, and also being guided by a sense of justice, given the expectations of the parties.

Q. Is it common in Panama to use the word "procedimiento" instead of "proceso" when you're talking about a judicial proceeding?

A. There may be differences, but for these purposes, "proceeding" and "process" are the same. "Proceso" or "procedimiento" in Spanish are the same.

[8] The correct Spanish-language version of the answer states: “tratadistas.”

Q. Let's turn to the third sentence, then. In the third sentence you assert that: "No competent judge seeking to apply Panamanian Law could have arrived at this Decision."

And this Decision was authored by Justice Oydén Ortega Durán; correct?

A. That's what I said in my decision, yes, in my opinion.

Q. And the Decision at issue that you're talking about here, that's the Muresa Judgment; correct?

A. That is the subject of the opinion.

Q. And that Decision was authored by Justice Oydén Ortega Durán; right?

A. Ortega Durán, Judge, he is the one writing for the Court in that Judgment which had the support of Hernán de León, the other justice, and with the dissent of the third member of the Chamber, Harley Mitchell.

Q. And are you saying that the justices that composed the majority are incompetent, (in Spanish) "en el sentido de ser incapaz," (in English) "in the sense of being incapable"?

A. What I said is that no judge who had examined in depth with the responsibility the matter being put before him and in a proper well-founded application of the law could have reached that conclusion.

It is not possible to say that a document like the Foley letter that had not emanated from any of the Parties but rather was a document that was put forward by a third party could not be attributed evidentiary value because Article 871 of the Judicial Code clearly indicates to the judge that he cannot consider it as evidence if the requirements indicated in that provision are not met.

In that case, those requirements had not been met. And I believe that there is a manifest ignoring of Article 871. And it's not a secondary issue, it's an important issue because when reading the Muresa Judgment, one sees that the Court uses that document to argue that it shows recklessness, intimidating acts when, I must recall, that was not a subject matter in the Muresa action.

The Muresa action referred to alleged damages caused by a proceeding that came about in Panama in

relation to the opposition to the registration of the RIVERSTONE trademark.

But that document is used by the Court without meeting basic requirements of the law to say that it demonstrates intimidating acts and that it is the basis for considering that Bridgestone's action was reckless and malicious.

That is the relevance of that occurrence in this judgment.

Q. Let's go back to this incompetence point. You started by saying that no honest judge who had reviewed the "expediente," or no competent judge who had reviewed the "expediente," could come to the conclusion. But Mr. Lee has reviewed the "expediente" and come to the conclusion that there are no problems with the Supreme Court Judgment.

Are you calling him incompetent and dishonest?

A. Those are your words.

Q. I'm asking you.

A. Yes, but it is a question in which you are introducing a totally inappropriate element.

What I have indicated is that it is not proper and competent judicial proceeding, or way to proceed judicially, to repudiate or fail to recognize the clear content of the law, particularly--or the clear text of the law, particularly where the mere nature--or the sole nature of the ground, error of fact, had no possibility whatsoever of being recognized, if one had carefully and responsibly read the judgment on appeal.

Q. So, are you accusing Mr. Lee of not having read the "expediente"?

A. No, Mr. Lee has his opinion because, well, he's being paid by the Republic of Panama for that. I have my opinion, and I respect his view. But I am totally well founded in the view that I have formed as regards how the Supreme Court proceeded in this case.

Q. Are you not being compensated for your time, Mr. Arjona?

A. Yes, just like you.

Q. And you just said that this is Mr. Lee's opinion. So, minds can differ; correct?

A. Evidently, on legal issues or legal

questions, there may be points of view that are at discrepancy with one another.

But here, it is my opinion that a cold reading of the material that is in the record, looking at the Muresa Judgment and looking at it in light of Panamanian Law, well, clearly, in my view, one must conclude that it is a decision that does not answer to a criterion of proper application of the law and a sense of correctness in the Decision.

MS. SILBERMAN: Mr. President, I have some more questions, but I know we are approaching the time when it might be appropriate for a break. So, I wanted to see if now would be a good time for that.

I'm in your hands.

PRESIDENT PHILLIPS: I think we will break a little later so as to divide the morning--

MS. SILBERMAN: Excellent.

PRESIDENT PHILLIPS: Ah. On reflection, we will break for a quarter of an hour now.

(Brief recess.)

PRESIDENT PHILLIPS: Shall we resume?

MS. SILBERMAN: Thank you, Mr. President.

BY MS. SILBERMAN:

Q. Mr. Arjona, I think I just have one more set of questions about this paragraph 14 of your first report, and it's about the fifth sentence.

Now, in the fifth sentence, you assert that, "it is not possible to rule out that in the future these criteria may be used for the resolution of other similar cases." And you're referring here to the criteria in the Supreme Court Judgment in the Muresa case; correct?

A. That's right. That's right.

Q. And when you're talking about, "similar cases," you're only referring to cases in the Panamanian courts; right?

A. That's right.

Q. And, in Panama, is there a system of precedent that would require future courts to follow the Muresa Judgment?

A. On this issue, there is something you must bear in mind. Our system is not the same as a common-law system. It is a civil-law system, also known as "continental-law system."

What does that mean? In the case of Panama, civil liability for reckless procedural actions has been addressed in a stable manner in that the Supreme Court, one could say since 1985, has more than 12 precedents, or 12 decisions, in which it has established the criterion that a party does not engage in reckless conduct if it uses judicial procedures to put forward a claim to uphold what it considers to be its rights.

In this case, an interesting situation is to be found.

On February 1st, 2013, the Civil Chamber of the Court with the decision written by Judge Oydén Ortega in the case of Adip Zayed against Sunbeam Corporation--Adip Zayed, with a "Z" and a "D" at the end, et al., versus Sunbeam--clearly indicated based on a consistent position adopted by the Supreme Court that there is no recklessness when the person simply makes use of the legal actions that the person considers necessary to protect his or her rights. I'm surprised that this stable position that the Supreme Court of Justice has upheld with respect to this

particular issue was completely abandoned with no explanation, with no reasonable explanation in the Muresa case. In the case that I mentioned, the Sunbeam case--

Q. Mr. Arjona . . .

(Overlapping interpretation with speaker.)

A. Let me finish, please.

In the Sunbeam case that I mentioned it was also an intellectual property dispute in which a number of measures were taken against the Respondents. In this case, the Muresa case, I did not observe any precautionary measures or injunctive measures or anything other than simply opposing the registration of the RIVERSTONE mark, and that is the conduct that was put forward in the Civil Proceeding. If we follow the consistent position of the Supreme Court, one could not characterize as "reckless" having filed an opposition action to oppose registration of a trademark if the person who proceeded in that manner thought that they were right.

Q. Mr. Arjona, I apologize for interrupting, it's just that we're on sort of limited time, and the

question that I had asked was just: In Panama, there is no system of precedent that would require future courts to follow the Muresa Judgment; is that correct? I understand that you have stated that there was previously a stable line of cases, but I'm only asking if Panama has a system of precedent that would require future courts as a matter of law to follow the Muresa Judgment.

A. Yes.

Let me answer what you've asked: First, Panamanian Law has a provision that establishes that three uniform judgments on a given legal point constitute what is called "likely doctrine" or "probable doctrine."

Second, in the exercise, professional exercise of the law, it is important to be familiar with the decisions that are handed down by the Supreme Court of Justice because it becomes a reference for the decisions by the lower courts. In that regard, even though we do not have a precedent-based regime, it is true that a decision of the Court does have influence on how lower courts will interpret things.

Q. So, is it your testimony that a Panamanian court would choose affirmatively to rely on a decision that is so manifestly and fundamentally wrong that no competent judge would ever reach it?

A. As I state in my report, the Muresa Decision is recent decision and perhaps it may be used by a lower court that would deem that this is heretofore the opinion of the Court in similar situations.

Q. Let's move to a slightly different topic.

Mr. Arjona, have you reviewed the Claimants' Memorial in this proceeding?

A. I did read the Memorial a few days ago.

Q. In which language did you read it?

A. In Spanish.

Q. There was a Spanish version that was given to you?

A. Yes. I was given a Spanish version.

Q. Okay. Well, we have only been given the English version, so we're going to put that up on the screen, and we will turn to paragraph 210, which is on page 113.

In paragraph 210, Claimants argue: "That the

Supreme Court Judgment is so clearly and manifestly wrong that it could only have been procured through corruption."

Do you agree with that assertion?

A. If you look in my report, I never made such an assertion. I do not know the reasons why it is said that the Ambassador made this statement.

Q. So, does that mean that you disagree with the assertion, if you didn't make it in your report?

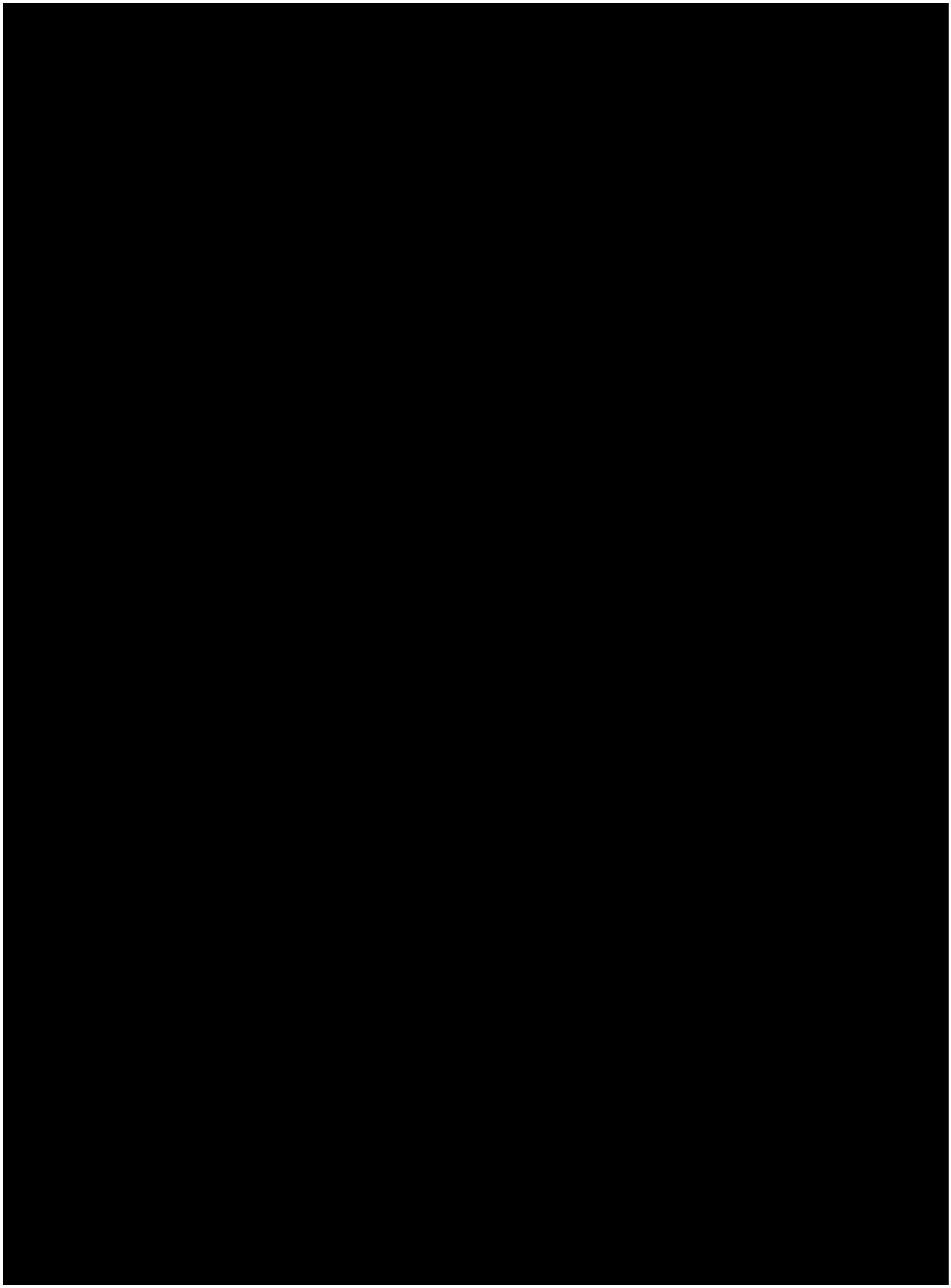
A. I did not make it in my report because this would have been terribly irresponsible of me to make an affirmation to the Tribunal in connection with a matter on which I have no element to rely on.

MS. SILBERMAN: Mr. President, I'd like to ask some questions now about Mr. Arjona's third report, which has been designated "restricted information." So, if we could turn off the feed, and if anyone in the room who is not supposed to be here, can leave.

PRESIDENT PHILLIPS: I don't think I see anyone who--I guess, there are.

SECRETARY TORRES: The feed is now closed.

(End of open session. Attorneys' Eyes Only information follows.)



OPEN SESSION

BY MS. SILBERMAN:

Q. Now, Mr. Arjona, you have had complaints filed against you with the National Assembly; correct?

A. I need to make the following comment. First, during my career as a justice, I have never been denounced for lack of integrity or by other cases. Claims were brought against me, and I need to make the following explanation in that regard.[9]

First, I have been the only justice in the history of the Supreme Court of the nation that has been recognized because of his integrity, this by Transparency International.

Also, the only claim brought against me was a claim organized by individuals that had been impacted because of my constant opposition to decisions handed down by the Supreme Court ordering that drug traffickers be set free, and not letting the public have access to information of the Government, and other sensitive issues. The individuals that were

[9] The Spanish-language version of this sentence says "[d]ebo hacer la siguiente observación. Primero, jamás en mi trayectoria como magistrado he sido denunciado por soborno o faltas a mi—a la integridad." *See* Spanish Transcript for Day 2 at 76:5-76:8.

impacted by these things, because of my opposition to these kind of decisions, brought those claims to the Credentials Commission, and this was fully dismissed. If a justice has a claim brought against him or her, I have to say, unfortunately, that in 1999, Judge Lee was also denounced by the alleged crimes by the Commission because of SUNTRACS.[10] So, I have never had a claim state against me for any of the things that the Supreme Court justices are being attacked on. No doubt has been cast in connection with my integrity when I took on the delicate role as a magistrate of the Supreme Court.

Q. So, Mr. Arjona, I just want to make sure I've followed each of the pieces of what you just said.

So, as a threshold matter, not every single "denuncia" before the National Assembly has to do with corruption; correct?

A. That's right.

Oftentimes, there is this climate of

[10] The correct Spanish-language version of the answer states: "el magistrado Lee, en el año de 1999, también fue denunciado por la comisión de delitos, supuestos delitos, por parte del SUNTRACS."

frivolity when it comes to claims staked against Supreme Court justices.

Now, this has to be looked at on a case-by-case basis. What has happened in the recent past and the accusations of corruption brought against Supreme Court justices, this is regrettable, and that, unfortunately, this has not been addressed in the appropriate manner.

The issue of the processing of the Supreme Court justices by the National Assembly, this has been the subject matter of a constitutional-reform project. And the Government of the Republic has put this project forward in order to address criticisms by the citizenry because the current mechanism of representatives and justices being--staking claims against each other, this is not functional in this regard.[11]

Q. Now, you were granted an award from Transparency International; correct?

[11] The correct Spanish-language version of the answer states: "muchas veces el mecanismo actual de que diputados y magistrados se juzguen recíprocamente no es el mejor sistema funcional en esta materia."

A. That's right.

Q. And, as you mentioned, the complaints against you were dismissed; right?

A. That's right.

Q. And if someone were to argue that the only reason why those complaints were dismissed was because of a non-aggression pact between the branches of government, what would your reaction be?

A. In the specific case--in this specific case, in my case, that's flatly false. I never took action under an agreement such as that. That, evidently, would be completely illegal. I would never act in such a manner. That expression that you used, "non-aggression pact," this is an expression that is used colloquially to try to describe the situation when you have these judgments that are cast between justices and also legislators.

(Overlapping speaker with interpretation.)

Q. My apologies to the interpreters.

Mr. Arjona, if someone were to argue that the dismissed complaints amounted to evidence that you were corrupt, would you be offended?

A. Again, my personal integrity was never put into question. In your statement, well, if the claim had been dismissed, and if there was slander against me, then, obviously, I would have felt offended.

Q. And, Mr. Arjona, you know that this is the Claimants' position, not Panama's position; correct?

A. I don't understand the question.

Q. The questions I've been just been asking you, you know that's the Claimants' position in this case; correct?

A. I don't really understand. What are you asking about specifically?

Q. You stated a moment ago that, in my statement, well, if the claim had been dismissed and there was slander against you, then obviously you would have felt offended, but you read the Claimants' Memorial; correct?

A. I think you're putting two things forth. One thing is what the Memorial says, and the other thing is whether the individual feels offended.

Q. Did you read the Claimants' Memorial?

A. I did.

Q. Did you know that their argument is based on an alleged "non-aggression pact" between the branches of government, their argument in support of corruption?

A. I've already indicated this phrase, "non-aggression pact," is used colloquially in Panama as a manner of expressing this situation that has ensued when representatives and also justices judge each other.

So, that is a phrase that's used colloquially by the people to try to describe these issues from a functional viewpoint.

Q. Thank you, Mr. Arjona. I have no further questions.

MR. WILLIAMS: Mr. Arjona, I have no questions for you, either.

PRESIDENT PHILLIPS: Nor have we. Thank you for your evidence. You're now released.

THE WITNESS: Thank you very much, Mr. President.

(Witness steps down.)

MS. SILBERMAN: Mr. President, before we turn

to the next expert, could we just have a one-minute break for personal reasons?

PRESIDENT PHILLIPS: Take as long as you like.

MS. SILBERMAN: Thank you.

(Brief recess.)

JORGE FEDERICO LEE, RESPONDENT'S WITNESS, CALLED

MS. SILBERMAN: Mr. President and Members of the Tribunal, I would like to introduce you to Mr. Jorge Federico Lee, a former Supreme Court justice in the Civil Chamber of the Supreme Court, who has submitted two expert reports and some witness statements in this arbitration.

PRESIDENT PHILLIPS: Thank you.

Good morning, Mr. Lee. You heard Mr. Arjona make the expert declaration. You have it in front of you. If you are happy, would you make the same, please.

(No microphone.)

SECRETARY TORRES: Mr. Lee, the microphone, please.

THE WITNESS: Good morning, Mr. President.

Good morning, honorable Members of the Tribunal.

I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

DIRECT EXAMINATION

BY MS. SILBERMAN:

Q. Mr. Lee, do you have any updates or amendments to any of the reports or witness statements that you've submitted in this case?

A. I do not have any corrections, nor do I have any additional clarification in connection with the two expert reports that have been--that I have submitted to this Tribunal. I fully ratify all of the contents in these reports.

I would like to let the Tribunal know and also the Parties know that there is a situation that has taken place recently, but after the submission of my second report of 17 June 2019.

A few days before the new administration took office in Panama—this happened on 1st July 2019—and I think it was 26 June 2019—I received a telephone call from a lawyer of the Ministry of Health of Panama.

She indicated to me that the Ministry of Health had been notified of a domestic arbitration, and that she wanted to put my name amongst the potential arbitrators in these arbitral proceedings.

I asked for the name of the Claimant. I looked at the conflict-of-interest matters, and I told her that my name could be considered. That's the last I heard on the matter, until yesterday evening when I was checking my e-mail at the end of yesterday's session, and I saw that I received an e-mail from the Center of Conciliation and Arbitration of Panama. It said that I had been appointed an arbitrator in that arbitration.

The only thing that I know in connection with that arbitration is that this is an arbitration related to construction matters. I would like to express at the outset that if my acceptance of this appointment is objected by Claimants' counsel in this arbitration, I will decline that appointment.

I have nothing further to say on the matter apart from that.

PRESIDENT PHILLIPS: Thank you.

Mr. Williams, have you any comment to make?

MS. SILBERMAN: Mr. President, I did have just one more question on direct.

PRESIDENT PHILLIPS: I beg your pardon.

MS. SILBERMAN: Thank you.

BY MS. SILBERMAN:

Q. Mr. Lee, do you have any reactions to the testimony that Mr. Arjona just gave?

A. I listened carefully to the evidence given by Mr. Adán Arnulfo Arjona, and I disagree with a number of the opinions that he has put forth. Because of time, I'm only going to make reference to two that caught my attention.

First, Arjona, a former Supreme Court justice, indicated that the 28 May 2014 Cassation Decision handed down by the Civil Chamber of the Supreme Court of Justice had not taken into account, or it had been handed down without taking into account, the evidence submitted by the Bridgestone companies that were Respondents in this case. This reflects an incorrect understanding as to how the civil cassation remedy works, and also an incorrect

understanding of cassation, the grounds of cassation. The grounds of cassation in this case have to do with errors of fact in connection with the existence of evidence.

When a cassation is brought, the Judicial Code expressly requests under penalty of inadmissibility of the case that the cassation contain three elements: First, identification of the grounds: In this case, error of fact in connection with the existence of the evidence, and this had a substantial impact on the appealed decision.

Second, that the reasons be expressed that are the basis of the grounds.

And third, that the appellant indicate the provisions that the appellant feels have been violated and that it explain the infraction.

The reasoning by the Civil Cassation Court, this is a complex reasoning because cassation is a very formalistic remedy of an extraordinary nature. Well in connection with this error of fact in connection with the existence of the evidence, in order to determine whether the appellate court took

into account or didn't take into account—that is to say, whether it ignored the evidence of the appellant—it has to examine previously the evidence that were taken into account by the Appellate Court. That's the only way in which the Cassation Court can conclude that these pieces of evidence allegedly not taken into account were, in fact or not, taken into account. So, this is a case of pure logic.

In the Muresa case, the Cassation Court examined the evidence submitted by Bridgestone. Had it not done so—that is to say, if it had not examined the evidence on which the Appellate Court Decision was based—it would have been impossible for it to conclude, as it did in the Civil Chamber, that the Appellate Court had ignored, when issuing its Decision, the evidence of Muresa Intertrade and Tire Group.

The reasoning or the analysis conducted by the Supreme Court when deciding a cassation remedy is based on a single reasoning.

What Mr. Arjona is giving you to understand is that first an analysis is conducted on the

justification for the reasons. An analysis is conducted whether the grounds are founded, and whether the Cassation Court found that the Appellate Court Decision had failed to take into account the evidence that had been submitted by Muresa.

After the Judgment or the Decision is appealed[12] and once it becomes a court of instance, it later on develops a completely new reasoning. That is to say, it issues two judgments and puts them together into writing.

And that is incorrect. The cassation judgment is only one that is the result of a unique[13] reasoning.

Therefore, the motivation or the justification of the Cassation Judgment, which is the one dated March 28th, 2014, it has 15 pages, and it includes the analysis of the reasons, the result--the outcome of analyzing those reasons and after the decision by the Appellate Court was appealed, the substitution judgment is handed down.[14]

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[12] The correct Spanish-language version of the answer states: "casada."

[13] The correct Spanish-language version of the answer states: "única."

[14] The correct Spanish-language version of the answer states: "Por tanto, la

I do not agree, because I also think that this is a misunderstanding of the cassation remedy, I do not agree with the opinion by the former Judge--by former Judge Arjona stating that the grounds for cassation was an error of fact as to the existence of the evidence, and that implies that if the Judgment by the Appellate Court referred to a piece of evidence, that evidence was not ignored. That means that the tribunal, the court had to declare--the Appellate Court should have stated that the evidence did not exist, but that that was not the case. The formula that the jurisprudence of the Civil Chamber has reiterated to explain the reasoning[15] of cassation that has to do with the error of fact as to the existence of evidence is that the--entails that the Appellate Court has literally ignored or completely dismissed the evidence, those pieces of evidence. It is not

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motivación o la fundamentación de la sentencia de casación—que en la sentencia de 28 de mayo de 2014 tiene 15 páginas, está expuesta a lo largo de 15 páginas—consiste en el análisis de los motivos, el resultado del análisis de esos motivos y luego de casada, es decir de revocada, la decisión del tribunal de segunda instancia, ahí mismo, en la misma parte resolutiva emitir la sentencia de reemplazo."

[15] The correct Spanish-language version of the answer states: "causal."

that it has said that the evidence does not exist. But as part of the analysis, that evidence was not taken into account. And that, contrary to what Judge Arjona mentions, is not that would be causes for an error of law as to the appreciation of evidence.

This other reasoning[16] means that, upon analyzing evidence, that evidence was given evidentiary value that was not the proper value to assign it. So, that means that the grounds asserted by Mr. Arjona as something that actually was adequate in that situation had to do with the court that appreciated documentary evidence, for example, and upon analyzing that said I'm convinced that this is evidence that has full value, whereas it would have been adequate to indicate that this is a dubious document, which is not credible. For that reason, I do not agree, based on my experience, on my ten-year experience in the Civil Chamber of the Supreme Court of Panama, I do not agree with this understanding by Mr. Arjona.

[16] The correct Spanish-language version of the answer states: "causal."

That's all.

MS. SILBERMAN: I have no more questions at this time.

PRESIDENT PHILLIPS: Mr. Williams?

MR. WILLIAMS: Mr. President, so the Witness Bundle will now be distributed. Just one moment, please.

(Pause.)

THE WITNESS: (In English) Mr. President, may I make an observation?

I don't see in the bundle my Reports in Spanish. I would prefer to have them in Spanish, if possible.

MS. SILBERMAN: Mr. President, if it's useful, the Spanish versions of the Reports are in the direct bundle that we had given to Mr. Lee.

MR. WILLIAMS: Or it's Tab 2 of the Cross Bundle.

They are there? (in Spanish)

And that, if it's acceptable to everyone, as with Mr. Arjona, someone from our side, then, will sit with Mr. Lee to help him with the bundle.

PRESIDENT PHILLIPS: I'm not sure we need two people to help him with that bundle.

THE WITNESS: (In English) Thank you. Help is welcome.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Lee, good morning.

Thank you for coming here to help the process. I wanted just to start with some questions about your own experience.

I think that in your First Report at Paragraph 10--it may be worth looking that up; that should be then at Tab 2 of your bundle--at Paragraph 10, I think then you outline your experience on the Supreme Court; is that right?

A. That is correct.

Q. And you say in the last sentence there that, between 1996 and 2004, you were an Alternate Justice of the Supreme Court; that's right, isn't it?

A. Correct. In December 1995, as I seem to recall, I was appointed by the executive, and ratified by the National Assembly of Panama as Alternate

Justice of the Supreme Court Civil Chamber for a 10-year period that started on January 2nd, 1996, and it should have concluded on December 31st, 2005. And I took office in January 1996 as Alternate Justice of the Civil Chamber.[17]

In 2004, the Main Justice, Mr. Rogelio Fábrega Sarac died abruptly, and given the regulations in the constitution, I occupied his position up to December 31st, 2005.[18]

MR. WILLIAMS: I should say, Mr. President, that I believe that the screens are not working. I'm sure that we can proceed as we are, but if there is a problem, obviously, we will just have to deal with it at the time.

BY MR. WILLIAMS:

Q. So, Mr. Lee, you were an Alternate Justice for Rogelio Fábrega and that meant, didn't it, that if Justice Fábrega was ill or unavailable when the Supreme Court was sitting, that you stood in for him.

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[17] The Spanish-language version of this sentence states "[d]e tal manera que asumí en enero de 2000 -- de 1996 la posición de magistrado suplente en la Sala Civil." *See* Spanish Transcript for Day 2 at 93:14-16.

[18] The Spanish-language version of this sentence states "[e]n el año 2004 el magistrado principal, el licenciado Rogelio Fábrega Zarak, falleció inesperadamente y por mandato constitucional asumí el puesto hasta el final del período constitucional, que venció el 31 de diciembre de 2005." *See* Spanish Transcript for Day 2 at 93:17-22.

That was your role as an alternate for him, wasn't it?

A. That's correct.

Q. So, that meant that, during the period in which you were his alternate, you sat only occasionally as a Supreme Court Judge, perhaps for a few days here and there; correct?

A. That is correct. In the Panamanian constitutional system, and following the Latin American tradition, the Justices of all levels have Alternate Judges or Justices that are meant to fulfill the duties of the position whenever the Main Justice is unable to do it because of leave of absence, because of a vacation period, or for any other impairment.

Q. When, unfortunately, Justice Fábrega died, as you said, you took his place in 2004 and 2005 until the Court could appoint a permanent replacement; that's right, isn't it?

A. I took his place up to the end of the period enshrined in the constitution that concluded on December 31st, 2005.

SECRETARY TORRES: I might inform that the

live feed for some reason doesn't seem to be working, so if you allow me one minute to make sure that everything technologically is working properly.

(Pause.)

SECRETARY TORRES: Everything is fine now, Mr. President.

PRESIDENT PHILLIPS: Right. Let's carry on.

BY MR. WILLIAMS:

Q. So, it's right, isn't it, that you were never appointed as a permanent Supreme Court Judge to serve a full 10-year term, were you?

A. That's correct. As I explained it, the role of an Alternate Justice is to take the place of the Main Justice in case of his or her absence, and that is what I did starting with the death of Mr. Fábrega Sarac up to December 31st, 2005. That is correct.

Q. And when you said a moment ago, at the end of your direct examination, that you had 10 years' experience in the Supreme Court, it was not, if you like, 10 years full time because throughout the great majority of that period you were only filling in a few days here and there when Justice Fábrega was

unavailable. So it's not quite right, is it, to say that it was a full 10 years' experience that you had in the Supreme Court Chamber?

A. I didn't mean ten-years in a row. As you just said correctly, and as I also indicated, the mission, the purpose of the Alternate Justice is to occupy his or her place during his or her absence.

When you're saying a few days here and there, I think it is incorrect, but it was not during the period I was the Alternate Justice. It was not a full-time appointment, and it was not a permanent appointment.

Q. Mr. Lee, let's now look a little bit at the trademark opposition regime under Panamanian law. Could you please turn to Tab 1, numbered one, of your bundle, which should be Law Number 35, and on Page 21, at least of the translation, there appears Article 107.

And it's right, isn't it, that Article 107 provides the basis then upon which a party may file an opposition to a trademark registration, and it says: "During a two-month period calculated from the day

following that of the publication referred to in the forgoing Article, any person may file opposition to the registration applied for."

That's right, isn't it?

A. My professional practice does not include intellectual property, and I am not in a position to issue an opinion on that subject matter.

Q. So, am I right that you're not in a position to express any view on any question of Panamanian law that relates to intellectual property; is that your evidence?

A. That is correct.

Q. Bear with me, Mr. Lee. I fully have taken that on board, but I would like, if we can, just to look at another article of Law Number 35 in order that we can just run through to see if we can get a common understanding as to what the regime is here, and I would like just to look at Article 91, which is on Page 17, and Article 91 identifies matters which may not be registered as trademarks, so this identifies issues which may found an Opposition Proceeding; would you agree with me?

A. Unfortunately, I need to reiterate that I do not practice in the area of intellectual property, and I am not in a position to issue an opinion in this subject matter--on this subject matter.

Q. Okay. I understand, and I won't pursue this line of questioning any further, but I'm assuming, then, that you're not in a position to express any view as to findings that any of the courts may have reached, including a Supreme Court, in relation to questions of intellectual property; would that be right?

A. Throughout 40 years, I practiced in the area of civil and commercial issues as well as labor law because, for a period of time, I was the Minister of Labor and Social Welfare. I never practiced in the area of intellectual property. The analysis I was asked to conduct in this case as a witness--as an expert, was related to the proper--improper nature or the arbitrary nature of the Judgment of May 28th, 2014, as issued by the Civil Chamber of the Supreme Court of Justice in connection with the civil claim for compensation due to damages resulting from a tort

liability.

Let me reiterate to you that I do not have the professional or academic training required to issue opinions on any area of intellectual property, including the trademark area.

Q. So, for example, you're not in a position to express any view on the finding by the Supreme Court that the opposition action was without any legal basis. That's not something that you are in a position to opine on; is that correct?

A. That is correct.

If the opposition to the application for registration of a trademark is based or not on some--which, in my opinion, would have to do with the similarity or any chance for confusion by the consumer, I do not have any minimum training required to give an opinion on this regard. And I am not also saying that I have that. I do not have that experience or training.

(Pause.)

Q. Mr. Lee, could we turn to the judgment of the Eighth Civil Circuit Court of 21 July 2006, which is

the Judgment in the opposition action, which should be at Tab 9.

Do you have it there, Mr. Lee?

A. It doesn't seem to be here in the binder, but I wouldn't have any issues if you show it on the screen.

SECRETARY TORRES: Mr. Williams, we have some binders we have C-0014 at Tab 9.

MR. WILLIAMS: That is the correct document, C-0014.

SECRETARY TORRES: Okay.

BY MR. WILLIAMS:

Q. So, Mr. Lee, is C-0014, then, the document you have before you?

A. I don't know, but that's the translation to English. And for the sake of accuracy, I would rather use the original text in Spanish.

Q. So, I think you have the Spanish version up on the screen.

A. (In English) Okay, yeah, yeah.

Q. Is that right?

A. (In Spanish) I got it. We found it in the

binder.

Q. Ah, thank you.

And on Page 23, then, of the Judgment, at the bottom, it reads in the English translation, it reads: "Bridgestone Corporation and Bridgestone Licensing Services, Inc. shall be released from payment of attorneys' fees given that this administration of justice deems that it has acted with evident good faith, maintained and held its position in the process, submitted suitable evidence, material, to prove its standing in cause or without abusing the right to litigate, so they will only be compelled to cover the proceeding expense.

MS. SILBERMAN: Mr. Williams, could you provide the page number in Spanish for the Witness so that he could follow along?

MR. WILLIAMS: It's Page 25 and 26.

BY MR. WILLIAMS:

Q. Mr. Lee, do you have that?

A. I have it, thank you.

Q. Mr. Lee, it's right, isn't it, that Panamanian courts typically follow the principle that

the loser pays the costs of the winner; that's right, isn't it?

A. That is the general rule.

Q. And that's under Article 196 of Law 135; that's right, isn't it?

A. The general rule which you referred to is, I believe, set out at Article 1071 of the Judicial Code.

Q. So, we're just pulling this up on the screen, Mr. Lee.

In the English, Article 1071 of the Judicial Code reads: "In any judgment or order, a party against whom it is pronounced, shall be ordered to pay costs unless, in the opinion of the Judge, it has acted with evident good faith which will be expressly justified in the Resolution. In that case of evident good faith, the Judge may condemn only the expenses of the process," and that's what's happened here in this judgment, isn't it?

A. That is the text of the Judgment handed down by the Eighth Circuit Court in the trademark proceeding.

Q. And that's consistent with Article 1071 of

the Judicial Code, isn't it?

A. It is the result of the application of Article 1071 of the Judicial Code.

Q. And it's right, isn't it, that when a court makes a finding under Article 1071 of evident good faith, and on that basis does not order that costs should follow the event, that's the exact opposite, isn't it, of a finding of liability under Article 217 for the reckless pursuit of litigation; that's right, isn't it?

A. No, it is not. The determination made by the Eighth Circuit Court was done exclusively for the purposes of deciding whether it was or not appropriate to impose costs on the Party that did not prevail; in other words, the examination done of the proceeding was done for the purpose--for the sole purpose of deciding whether one had to apply the general rule of imposing costs on the Party that lost which, in this case, was the Party bringing the opposition, Bridgestone Corporation and Bridgestone Licensing Services. It is not a determination about possible tort liability, in other words, on recklessness or bad

faith that generates tort liability vis-à-vis the Party that has prevailed, for two reasons:

First, because the subject matter of the recklessness was not part of what was at issue in the trademark proceeding. In the trademark proceeding--and I don't need to be an expert; this is elementary--in the Opposition Proceeding to the registration of a trademark, the term "opposition," by definition, means that the subject matter of the proceeding or the purpose of the proceeding is to determine whether the person seeking the registration does or does not have the right to have that trademark registered in their favor, such that the determination by the Eighth Court had to analyze, or entailed analyzing, whether or not costs would be imposed.

The question of recklessness addressed by Article 217 has nothing to do with costs. That is the--or the supposed--or fact or hypothetical fact that it considers is to open the door or determine possible tort liability of a party for a procedural action taken in bad faith that has caused damage to the other party, so there are two totally different

issues.

Q. I accept, of course, Mr. Lee, that Article 1071 relates to the jurisdiction of the Court, not to make a finding requiring the loser to pay the costs, and that Article 217 does not relate to questions of costs. However, it is the case, isn't it, that Article 1071 concerns the finding of the Court as to whether a party has acted with evident good faith, the consequence of that finding being then that the Party does not have to pay the costs of the winner, and Article 217 concerns a finding of the Court that a party has pursued litigation with evident bad faith. They are the opposite, aren't they?

A. They're not because that's like comparing apples and oranges.

In the situation covered by Article 1071, the situation of the analysis of the Judge has to do or has, as the result, or the purpose is to determine whether or not there is an obligation to impose costs.

Now, in 217, the purpose of the discussion is to determine whether or not there was recklessness. That's the subject of the debate as between the

Parties, but 1071 does not open up any debate as between the Parties on costs. It is a determination made by the Judge unilaterally.

And I could add, because it seems to me that it's on point, that even if this determination were to consider the possibility of it being used in a proceeding that is opened up, taking into account Article 217 of the Judicial Code, well, first of all, there would be no res judicata because--well, in the specific case of Muresa, there was not identity of Parties or identity of subject matter nor identity in terms of the relief sought.

But in addition--and I didn't mention this in the Expert Report, but now that you're asking me--in the Panamanian legal system--and, as far as I know, in the vast majority, if not all of the States that follow the civil law codified system, what one finds in common law known as "issue preclusion," does not exist.

So, I reiterate, they are two totally different subject matters. Article 1071 and Article--of the Judicial Code and Article 217 of the

same code serve totally different purposes, and one cannot use one to contrast it to the other.

Q. So, is your evidence, Mr. Lee, that a court could both make a finding under 1071 in relation to the conduct of a Claimant and, therefore, order the unsuccessful party not to pay the costs of the successful party, and, at the same time, make a finding that that party was liable under Article 217? Is that in principle possible?

A. Yes, of course, it is.

Q. Let's turn now to Bridgestone's appeal and the withdrawal of its appeal of the Judgment that we've just been looking at.

Now, the rules concerning the time within which the filing of an appeal is to be made is within the Judicial Code, isn't it? And I think that's Article 1132, which you should find at Tab 11.

MR. WILLIAMS: And for the Transcript, it's R-0138.

THE WITNESS: I'm sorry, I don't have the English language Transcript of the question.

MR. WILLIAMS: It should be in Page 240 in

Spanish.

THE WITNESS: I'm sorry, I don't have your question in English, or if you could please repeat it because it's not being transcribed.

(Pause.)

SECRETARY TORRES: Can we stop a second so that the Court Reporter can check on the Transcript of the Witness, please.

(Pause.)

COURT REPORTER: All right. This is a test signal.

SECRETARY TORRES: It's working properly, Mr. Williams. I think that the Witness is asking that you repeat the question, yes?

BY MR. WILLIAMS:

Q. Mr. Lee, I was just asking if you could please turn up Article 1132 of the Judicial Code, which you should have there in Spanish.

Do you have that, Mr. Lee?

A. Yes, I do.

Q. And we can see there that the Article provides that a Party that believes that it has been

aggrieved has the right to appeal during the notification or within three days following the notification, if it is a judgment in two days if it is in order. That's right, isn't it?

A. That is the Panamanian system.

Q. And "notification" means, doesn't it, the point at which the Parties or their lawyers are provided with the Judgment; that's correct, isn't it?

A. When they are notified of the decision. The translation to English would be "when they're served notice."

Q. And in this case, it's right, isn't it, that BSLS and BSJ was notified on 31 July 2006, which meant that the deadline to appeal was 3 August 2006. That would be right, wouldn't it, under Article 1132?

A. I don't remember the date. I reviewed the record, but I didn't focus on that particular.

Q. I don't think we need to go to the document. Perhaps you can take it from me that BSLS was notified on 31 July; and, if that, on that assumption, that would mean, then, that the deadline to appeal was 3 August 2006, wouldn't it?

A. I don't know. What I can tell you is that it's three business days that begin to be counted beginning the date of notification; therefore, it would--one would not include in the count Saturday or Sunday or any holiday.

Q. Just for the record, the reference, then, to the date of notification is R-0040, and the handwriting on the signature at the end, but, Mr. Lee, I don't think we need to go there.

But, in any event, three business days--and in that time, BSLS's lawyers had to consider their advice in relation to whether to appeal, advise BSLS in the U.S. and BSJ in Japan, obviously with all of the time differences and language issues that that might entail--and then BSLS and BSJ had to decide whether to appeal, give instructions to their Panamanian lawyers, who then had to prepare the necessary papers.

In truth, there was very little time, wasn't there, for BSLS and BSJ to make a considered decision as to whether to appeal; that's right, isn't it?

A. I don't know the internal structure of the

Bridgestone group internationally. The only thing I can tell you are two things. All of those of us who litigate in Panama know that the deadline, meaning it cannot be extended, for filing an appeal against a judgment is three business days.

In addition, every lawyer with--well, all lawyers who litigate and who are responsible always consider the possibility of different scenarios, and prepare ahead of time. They prepare for the scenario of a favorable judgment, and they prepare for the scenario of an unfavorable judgment with pre-established instructions.

I would not understand why a party would have to assume that the Judgment is necessarily going to be favorable and not prepare for a different scenario.

Q. But doesn't a party need to read a Judgment to understand the reasoning of the Court in order to take a view as to whether it is appropriate to appeal? Isn't reading a judgment fundamental to taking a view as to whether to appeal?

A. That is absolutely correct, and that is what we Panamanian lawyers always do.

Q. So, you can't prepare ahead of time in relation to a judgment that you haven't read, can you?

A. The question is not properly focused, and I believe, with all due respect, that it begins from an incorrect understanding of how the civil-procedure system works in Panama.

When a judgment is issued, a judgment of First Instance, and personal notice of it is given to the attorney for the Party, that Party that has received notice of the Judgment has three business days to appeal.

"Appeal" means--"appeal" does not mean file the appellate brief. The appeal can be done in two ways: Writing--you can just write one word, "I appeal," or within the three following days, one can send in a writing that is just one line: "I file an appeal."

Having done that, then there is a second time period that begins to run five days to present arguments that support the appeal.

Moreover, it's possible that on filing a Motion for Cassation with just one line, "I appeal,"

one may announce, or one might request, that evidence be collected on appeal, and this gives one several months before the Party that files the appeal needs to file its brief with the argument explaining its disagreement.

What you say is true: One must read the Judgment that is handed down, but the practice or the inclination of any lawyer who has previously consulted with his or her client is if the Judgment is unfavorable, should I appeal or not?

And almost always the mandate--not always--the instruction received ahead of time is that if the operative part of the Judgment is unfavorable, then appeal, and then you will analyze the Judgment and its reasoning, and that will help you to determine how to found--how to establish the basis of your own appeal.

Q. So, therefore, as I understand it, your evidence is that Parties would typically file a one-line appeal or a two-word appeal saying "I appeal," and then consider the actual text of the Judgment in order to ascertain the basis for the

appeal, the grounds for the appeal, and whether the appeal has strength.

Would that be correct?

A. That's not exactly what I said. What I said was there's an opportunity to appeal with a non-extendible deadline of three days, and there is a second opportunity to present the arguments on which the appeal is based, five days, and there's an alternative opportunity to announce or to request evidence on appeal that has an indeterminate--or in termination that is impossible to determine; that is to say, it depends on the Court.

But, I reiterate, but, at least in my practice, in my professional practice, an experienced litigant considers the possibility or different scenarios, and should be prepared ahead of time.

Q. And if, as you say, that that approach is adopted, so a party takes a decision, if you like, ahead of time, ahead of seeing the Judgment, that if the Judgment is unfavorable, that they will then go ahead and appeal, and then if once they've had an opportunity to read the Judgment and analyze it and

assess what the findings of the Court were, if in those circumstances the Party then subsequently decided before it had substantiated its appeal that actually the prospects of success on the appeal were such that it was not worth continuing, that would be perfectly normal. That would be a perfectly responsible way of conducting litigation, would it not?

A. It's uncommon. I've seen it occur very few times, and one of those few times is this, which I found out about upon serving as an expert. I don't want to refer specifically to the Muresa case, but procedural good faith is gauged, among other things, when one prepares a legal action. That is to say, when one prepares the action, one must gather the facts, and one must formulate and have the conviction when filing the action that the likelihood of obtaining a favorable final and definitive judgment is large, is great; otherwise, one would not begin litigation.

And, without referring to this particular case, I would say from my personal point of view and

based on my training as a lawyer, that if I have filed an action in good faith, genuinely believing that I am right, that I have the legal basis and that the laws and the facts support me, and that the Judgment of First Instance, for whatever reason it may be, is unfavorable, if on beginning the litigation I was convinced that I was right, then I would go forward, and I would try to be heard by an appellate court made up not by a single judge, but rather by a collegial court, and in the case of intellectual property disputes, it is the Third Court of Justice. It's a very respected court, whose members, all of its judges, without any exception, in my opinion, have an unblemished reputation, they have extensive knowledge, and it is presumed that they have more experience and a greater capacity for analysis than a judge of First Instance. It doesn't have to be the case, but that's the system.

So, I don't see why, from my own personal point of view, if the serious and important decision has been made, to begin litigation that is significant in respect of a major trademark as is Bridgestone,

which I know as a consumer, all of the cars--all of the tires on my cars are Bridgestone--would desist in the face of unfavorable Judgment of First Instance rather than awaiting for it--waiting for it to be reviewed by a collegial court made up of judges, who, it is assumed, have more experience and knowledge and, therefore, could understand the position set forth in the Claim opposing registration of the trademark.

Q. As I understand it, your evidence is it that it's more responsible to disregard the substance of the First Instance Decision and just to proceed to an appeal based simply on your own view, than actually to read, take into account what the First Instance Judgment said, and then to reflect as to whether it would be correct to proceed with the appeal; is that your evidence?

A. What I have said, because this is the basic training of every lawyer, I could cite the Expert on procedural law who has the best reputation in Latin America, duardo J. Couture, who in his most famous work the (in Spanish) says--well, he says, more or less, the most important moment in the life of a

litigating lawyer is when he or she decides whether or not to take on a case and file the action, because the Judgment is no more than--because the action is no more than a prophecy of the judgment that one wishes to obtain.[19]

So, what I have meant to say, or wanted to say, is that the fundamental decision made by a Party is whether or not to sue, to proceed with an action; and thelikelihood of success is done at that time when one decides whether or not to being the proceeding, not at the time when the Judgment of the First Instance is handed down.[20]

Because if the analysis was already done at the time of deciding to begin the proceeding, then it seems to me, in the abstract, not in this specific case, it seems to me incomprehensible that given an initial adverse outcome, one would not want to persist

[19] The Spanish-language version of this sentence states "[l]o que yo he dicho, porque esto es la formación básica de todo abogado y puedo citar al procesalista más reputado de América Latina, el uruguayo Eduardo J. Couture, que en su obra más famosa, "Los mandamientos de los abogados", dice: el momento tras -- palabras más, palabras menos, el momento más trascendental en la vida del abogado litigante es cuando decide si tomar, si aceptar o no el caso, y entablar la demanda. Porque la sentencia no es más que una profecía -- no, porque la demanda no es más que una profecía de la sentencia que se desea obtener." *See* Spanish Transcript for Day 2 at 119:2-13.

[20] The Spanish-language version of this sentence states "[d]e manera que lo que he querido decir es que la decisión trascendental que una parte toma es si demanda o no demanda. Y el análisis de la probabilidad de éxito se hace al momento de decidir si se inicia el juicio, no al momento en que se emite la sentencia de primera instancia." *See* Spanish Transcript for Day 2 at 119:13-19.

before a collegial court with judges who are more experienced and more knowledgeable before whom one must assume that one would have a greater likelihood of success if, in my initial analysis, I consider that my position was correct and in keeping with the law.

Q. Let me put it another way around: Do you consider it to be reckless to read a First Instance Judgment and to take it into account in deciding whether to proceed with an appeal?

A. Now, within the context of your question, the answer is clearly "no." It is the responsibility of the lawyer and of the Party to read in detail the Decision issued by the decision-maker.

Q. And, under Article 1087 of the Judicial Code, a party has an express right to withdraw an appeal, doesn't it?

A. That's right.

Q. And it's right, isn't it, then, that BSJ and BSLS did withdraw their appeal, and I can tell you, take it from me, they did so on 5 September 2006, which was within the five-day period within which, then, they were required to substantiate their appeal

if they were to pursue it.

And that meant, didn't it, that Muresa never had anything to respond to in the appeal, did it? They never saw the substantiation and, therefore, Muresa never had to respond.

A. What you're indicating is correct. If the losing party in a trial abandons the appeal, decides not to appeal, there is no need to substantiate any non-conformity. This withdrawal means that they agree with the Decision issued; that is to say, they accept all the "berz" (phonetic) or prejudicial effects that are born of that First Instance Decision.[21]

Q. And the fact, then, that Muresa did not have to reply to the appeal, because it was withdrawn before the time for Muresa to reply, that meant that Muresa did not have to do any work and, therefore, was not going to have incurred any costs or loss as a result of the appeal; that's right, isn't it?

A. Yes, that's right.

Q. And, in this case, then, on 8 September 2006,

[21] The Spanish-language version of this sentence states "[e]l desistimiento implica allanamiento a la decisión emitida. Es decir, someterse a todos los efectos adversos o perjudiciales que emanan de esa sentencia de primera instancia." *See* Spanish Transcript for Day 2 at 121:13-17.

the Third Superior Court issued an order admitting the withdrawal of the appeal and ordering BSLS and BSJ to pay court costs of PAB 50, which is the equivalent of USD 50.

Are you aware of that, Mr. Lee?

A. Yes.

Q. And if the Court thought that BSLS or BSJ had behaved recklessly, negligently, and in bad faith in withdrawing the appeal, then it would have been open to the Court, wouldn't it, to order them to pay Muresa's attorneys' cost, wouldn't it? That would have been open to the Court to do that.

A. When the Third Superior Court handed down this Decision accepting the Bridgestone companies were abandoning the action, it did what it had to do under 1071 of the Judicial Code. It accepted this abandonment, and it allocated costs in an automatic manner.

But this has nothing to do, as I explained, with the possibility that the opposing party has to stake a claim in a different court action for a compensation because of the potential tort liability

derived from acts of the losing party--in this case, Bridgestone--in the trademark action. Point of fact, this occurs quite frequently in Panama.

I'm going to give you a typical example, at least based on my professional experience.

If a company, an employer, dismisses a worker with cause, and the cause is that the worker stole property from the Company, and the worker is absolved, the Labor Court imposes the employer to pay the costs of the proceeding. And as you're saying, the costs supposedly cover work done in law, it’s what we say in Panama, but this is not necessarily to pay the attorneys.

But, in the example I have just put to you, given that the reason for the dismissal was a theft--theft, of course, is a crime in the--and it's included in the Criminal Court of Panama, so when the Labor Court absolved the worker, and it asked the employer to pay the costs, that imposition of costs does not preclude the worker to go to a Civil Court, and file a civil complaint for damages, tort-based, against the employer.

Although the situations are totally different, this is more or less what happened in the case at hand.

Q. My question was whether it would have been open to the Court to order that BSLS and BSJ pay Muresa's attorneys' costs. And I'm not sure what your answer is to that question.

A. (In English) Okay.

(In Spanish) The only thing that the Third Superior Court could do when it accepted the abandonment is to impose the payment of costs. It had the obligation to do so.

Well, obviously, the abandonment could not be considered an act of evident good faith. You filed an action, and you take it to the First Action Court, and then you abandon on appeal. The Third Superior Court had to impose costs.

In Panama, there's lots of discussion in connection with this, but the legal text, the text of the law, says that the purpose of court costs is, amongst other thing, to cover attorney work and the expenses incurred by the Party.

There was discussion as to whether that means that Court costs belong to the lawyer because they constitute a remuneration, but the prevalent position is not; it's that the costs are to be borne by the Party.

As you can see happened in this case, the amounts imposed as costs are symbolic in nature. PAB 50, of course, the attorney product was worth more than that.

Am I answering your question?

Q. I think that it's right, isn't it, that PAB 50 are specifically for court costs, was not an order that BSLS was to pay Muresa's costs. And actually, in truth, I think the reason for that, wasn't it, was that that Muresa hadn't incurred any costs, and no one expected they would have done because the appeal was withdrawn before there was anything for Muresa to do.

And that's the likelihood, isn't it, here?

A. That's a matter of fact. It's a factual matter, and I cannot opine on it.

The imposition of costs, again, has nothing to do--or it does not seek to compensate in full

attorneys' fees, and much less to compensate the winning Party for damages that it suffered by reason of a potential reckless conduct attributable to the losing party in those proceedings.

Q. But, it would have been open to Muresa, wouldn't it, to file a petition asking for reconsideration of that matter, asking for reconsideration, and for the Court to order that BSLS pay Muresa's attorneys' costs in relation to the appeal?

It would have been open to Muresa to do that, wouldn't it?

A. As I explained before, costs and compensation for damages derive from a reckless procedural conduct. Those are two things that are completely different, and they have nothing to do the one with the other.

From an abstract viewpoint, the Judge handing down a judgment, apart from making a decision on the merits as to whether the Claim is pecuniary in nature, monetary in nature, if the Judge imposes monies to be paid, it also imposes costs, expenses.

In practice, in Panama, the amount of the

court costs is established by the Judicial Code. They're symbolic in nature, and the expenses are set by the Clerk of the Court, and they're symbolic in nature as well. They don't take into account attorneys' fees or extraordinary expenses. They are limited to certifications, notarial costs. And in practice, in most of these cases, these amounts are amounts that are lower than amount for costs.

Q. I'm still not sure that you've answered my question, but we're going to move on, and we're going to look at the--

PRESIDENT PHILLIPS: If you are going to move on, I have one question, based on your professional experience, for every hundred claims that fail at First Instance in Panama, about how many go on to appeal?

THE WITNESS: In my professional experience, out of 100, 99.9 percent.

Mr. President, in my experience, my professional experience, I think that I can count with the fingers of one hand cases where after failing at First Instance, the Party--not the lawyer; the

Party--fails to decide to go ahead with the case so that a higher court, with more experienced judges, review the case.

I would consider that higher costs may, in a more likely manner, understand my position because perhaps the Trial Court didn't really understand my position because it wasn't experienced enough.

PRESIDENT PHILLIPS: Thank you.

BY MR. WILLIAMS:

Q. So, Mr. Lee, could we turn to Tab 18 of your bundle, which should contain the Complaint for the civil damages action filed by Muresa.

MR. WILLIAMS: And for the record, that's C-0016.

BY MR. WILLIAMS:

Q. Do you have that, Mr. Lee?

A. I have, yes.

Q. And you will see there that, at the top of Page 2 of the document, Muresa set out their claim, and they say that BSLS/BSJ--I'm sorry, do you the Spanish there?

A. I can read it. It's fine. You can make

reference to the text in English, and I can look for it in Spanish. I have no problem in doing that.

Q. I'm told it's Page 5 in the Spanish, if that would help you.

A. Thank you.

Q. So, at the top there, Muresa state their claim, and they say that: "BSLS/BSJ will be jointly and severally liable to pay damages and losses caused to the plaintiff companies due to its opposition to the Registry of the brand RIVERSTONE."

And then, on Pages 3 to 4 of the document, the Complaint sets out the grounds upon which the Claim is based, and six grounds are given, and the first ground is this: "On April 5, 2005, the defendant companies Bridgestone and Bridgestone Licensing filed complaint opposing the application for Registry."

So that's, I think, the point that we've looked at.

And then grounds two to five concern Muresa's representation and Distribution Agreements with L.V. International and others.

And then ground six says: "As a result of the Complaint set forth by the now defendant Parties, Bridgestone Corporation and Bridgestone Licensing, damages and losses were caused to our principals, given that the product of the brand RIVERSTONE stopped being sold as a consequence of the suit being filed."

So, there is nothing there, is there, that refers to the famous "Foley & Lardner letter"? There's no reference to that, is there?

A. Here, in the complaint filed by Muresa Intertrade and Tire Group of Factories, the BSLS and BSJ, no reference is made to the existence of the Foley letter of 3rd November 2004. No reference is made, either, to "recklessness." There was no need for that to be there.

I will explain why.

In the procedural system in Panama, unlike what happens in the common-law systems and like what happens in international arbitration practice, the Complaint, apart from the data of the Parties and the Claims, the only thing that it has to do is to state the facts. This is called the quaestio facti in legal

scholastic opinion.

The only thing that it needs to contain are objective facts. The Complaint is not an opening statement. No legal allegations can be set there, quaestio iuries. Legal arguments in the civil procedural system in Panama, that happens during the Closing Argument stage, the last stage of the proceedings. I can look for it.

Q. I'm sorry, Mr. Lee, I didn't ask you--I didn't ask you about whether there were any legal arguments put in the Complaint by Muresa. I didn't mention recklessness or any articles which might found liability. I was just talking about the factual points, as you say, which is what is required to be included in the complaint.

And my point, which I asked you to agree with me, was that there's no mention of the Foley & Lardner letter--which is a factual question--there's no mention of that here, is there, in the Complaint?

A. That's absolutely correct. The Complaint does not mention the Foley letter, and as I said, there was no need for it to be mentioned here.

Q. Well, you said, didn't you, that there's no need to mention legal matters; but you did say that it is required to outline factual ones. And the Foley letter is a factual matter, isn't it?

So, if the suggestion is that the Foley letter had consequences for Muresa in terms of whether Muresa, I don't know, stopped or reduced sales of tires and as a result it suffered loss, then that is something that should have been included in the Complaint.

The Complaint identifies the opposition, and it says: "As a result of the opposition, Muresa thereby suffered loss."

Now, if it is the case that the Foley letter is also something that is said to have contributed to that loss or it being a factual matter, that should have been mentioned, shouldn't it, as you said, as a factual question?

A. Not necessarily, no.

And this depends on the way in which Claimants' lawyer wants to stake the Claim. When the Judicial Code expressly requires that the Complaint

indicate, amongst other things, the facts without mentioning arguments, without mentioning the theory behind the case, no requirement is put for all elements or all situations or all facts to be included because that would be impossible. Mention must be made of fundamental facts.

In this case, the fundamental fact seems to be Number 1, which says that Bridgestone, the Bridgestone companies filed an opposition complaint.

And if you go to sixth, there, reference is made to the alleged damages that the conduct of Bridgestone--that is to say, the filing of the Complaint--cost to the Parties because RIVERSTONE tires were no longer sold in the market.

Now, the Judicial Code does not require it--and it doesn't seem reasonable to require it--to have any lawyer to reveal beforehand all of the elements that exist in the Complaint.

Q. So, Mr. Lee, your understanding is that under Panamanian Law, it is a requirement that a Claimant specify the fundamental fact behind their claim in the Complaint, but questions of fact which are not

fundamental do not need to be mentioned in the Complaint; that's right, isn't it?

A. Yes, that's right.

Q. And so, therefore, we can--we can conclude that Muresa didn't consider that the Foley & Lardner letter was fundamental to their claim; correct?

A. I don't think that stems from the Complaint.

That is, your conclusion is not borne of the text of a complaint.

Q. Because the Complaint does not mention the Foley letter; so, therefore, clearly it was not considered to be a fundamental aspect of the Claim, was it? That's what you just told us.

A. I think there is an issue that has to do with common sense.

The way a complaint is structured means that it has to contain fundamental facts. It does not have to have an exhaustive record of everything that happened and that may substantiate the Claim.

I think that this is a matter of mere common sense. The Complaint is prepared in very general terms, and if there are elements that need to be

contributed to it, this can happen at different stages or the things may come up at different stages. You have the evidentiary stage, you have the allegations stage, and although you didn't ask this, I'm going to say what I said a moment ago.

In the allegations stage, what you do is you take up the arguments, the quaestio iuries. Almost always--not always, but almost always--cases are based on the information that comes from the evidentiary material that is obtained, or that is included in the proceedings, during the development of the proceedings.

Q. And--we will come to it later, but as we all know, in the Supreme Court, by that stage, the Supreme Court appears to have taken the view that the Foley & Lardner letter and the withdrawal of the appeal were fundamental facts to this claim, which founded, in addition to the bringing of the opposition itself, liability.

So that, therefore, I think what you're saying is that Muresa's presentation of the claim and its Complaint, in terms of what it considers there to

be fundamental, is really very different from how the Supreme Court ultimately looked at those matters; that's right, isn't it?

A. That's not what I said. That is not what I said, and that is not what is borne of my explanation.

What I said, and I repeat, is that a complaint is structured on the basis of fundamental facts. When a case, that is somewhat complex, has a medium level of complaint and it gets to the Cassation Court, the case has evolved. There are all types of elements in it.

What the Supreme Court concluded from its Cassation Judgment is that the first motive of the cassation remedy had been proven; that is to say, that when the Appeal Court handed down its Judgment -- well, when it examined the evidence, it ignored the Foley letter. I think that is known as Motive Number 1. And it declared that Motive 3 had been proven.

I have to look for the Judgment.

PRESIDENT PHILLIPS: Well, I think we will give you an hour to do that. But while you look at

the Judgment, please don't discuss this case with anybody over the adjournment.

THE WITNESS: (in English) I will stay here, Mr. President.

PRESIDENT PHILLIPS: Of course, right. And we'll resume at 2:00.

THE WITNESS: At 2:00. Then I will have lunch.

(Whereupon, at 1:02 p.m., the Hearing was adjourned until 2:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT PHILLIPS: I think everyone is ready to go, so shall we continue?

CONTINUED CROSS-EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Lee, so I'd like now to look at the evidence in the civil damages proceeding, and it's right, isn't it, that under Article 1265 of the Judicial Code, evidence is admitted in two stages, and the first stage is the proposal of evidence. And you'll find 1265 at Tab 17.

MR. WILLIAMS: And for the record it's R-0138.

BY MR. WILLIAMS:

Q. Do you have that there, Mr. Lee?

A. I know it by heart.

Q. Okay, good.

But it is correct, isn't it, that evidence is admitted in two stages, and the first stage is the proposal-of-evidence stage?

A. Yes, that is correct, and that's what I explained in my Second Report.

Q. And in the first stage, the proposal-of-evidence stage, then, each Party is able to propose the evidence that they deem appropriate, and then the other Party is able to present counter-evidence, and then there is an opportunity for objections in relation to the evidence or the counter-evidence, and then, lastly, the Court examines the evidence that has been presented; that's correct, isn't it?

A. The fourth stage, that is the examination of the evidence, counter-evidence, on admissibility, is the second stage. Article 1265 of the Judicial Code provides for the administration of evidence, as you have just mentioned, in two stages: The first stage includes the three steps. The first step is the submission to the Court of the evidence. The second stage is the counter evidence, and the third stage is the submission of objections and the admissibility of the evidence.

After that, the Court has to examine the objections and decide on the evidence that would be admissible and the evidence that would not be

admissible; and, in doing so, they move into the fourth stage or steps; that is, the issuance of a resolution ordering the application of the evidence and counter-evidence that have been admitted. In practice, even though there is a standard, this standard requires to do, to act, ideally in 30 days, but in practice, and based on the Circuit Courts and also given the volume of the--or the workload, it usually takes between 18 and 24 months to move from the third stage when objections to admissibility are being presented, to the moment when, in the fourth stage, the First Instance Court issues a resolution ordering the application of the evidence and counter-evidence as admitted.

Q. And the second stage of the evidentiary process is the submission-of-evidence phase in which witness and expert evidence is admitted; that's right, isn't it?

A. The term "submission" would be incorrect, and I will try to explain myself. Article 1265 of the Judicial Code has two large stages, as you mentioned at the beginning. The first one is the proposal of

evidence, and those are Stages 1, 2, and 3. In Panama, as I explained in my Second Report, the Civil Proceeding, even though may seem very strange to common-law practitioners, there is no Oral Hearing. It is done in writing.

So, the first stage that is the presentation of the evidence, Article determines that you have five days for the proposal of evidence, and it says a pleading is presented attaching the documentary evidence and also alleging the witnesses; that is to say, naming the witnesses that are intended to be introduced, and also alleging the Expert Report; that is to say, presenting a questionnaire with the items for the Experts to address, and also with the designation of the Experts.[22]

During the First Stage, upon conclusion of the five days, there are three days that automatically--that are automatically offered for counter-evidence; that is to say, evidentiary presentations to try to counteract what the other

[22] The Spanish-language version of this sentence states "[e]ntonces, la primera etapa, que es presentación de pruebas, el paso 1 del artículo 1265, que son cinco días para proponer pruebas…" *See* Spanish Transcript for Day 2 at 141:1-4.

Party presented. And upon conclusion of those three days, automatically, these are subsequent stages, there are subsequent steps, there is no need for the Tribunal to order them. They act based on the--they act as a matter of law.

Both Parties may present a pleading with objections to the admission of the evidence and counter-evidence of the other Party for any reason related to admissibility, and that is the first stage, up to Stage Number 3 of Article 1265. After that, the first instance judge needs to analyze objections and also needs to review evidence and also counter-evidence, not in terms of its valuation, but in terms of its admissibility or timely presentation. Relevance mainly.

And later on, a resolution is issued stating or indicating the evidence and counter-evidence that has been admitted, and those--and the evidence and counter-evidence that is not admitted, and also indicating the date for receiving the statement, and also for each expert that was accepted or examination that was accepted to be conducted. So, those are the

two stages when the evidence is administered in a Civil Proceeding in Panama.

Q. Mr. Lee, you should have received a copy of the Claimants' Demonstrative Number 5 that we looked at, at the Hearing yesterday, but I think that you should have there a version in Spanish to assist you.

Do you have that there?

A. Yes.

Q. And just looking--and as you know, so this sets out the timeline or the chronology of the civil-damages proceeding first instance, and then looking at the stages of it on Page 1, I think what you've just described in terms of the proposal-of-evidence stage, am I right that that would go up to Line Number 8 on that table? Is that correct?

A. Based on the description that I see here on this list, Stage 1, encompassing 1, 2, and 3 under Article 1265, would conclude at Item 7, Line 7. In the second stage that has to do with the taking or collection of evidence, would start at 8.

Q. Right. And that second stage which starts at

Line 8 concerns the submission of witness evidence from witnesses of fact and expert evidence from expert witnesses; that's right, isn't it?

A. Yes, that's correct.

Q. And, we can see on Page 1 of this document that up to--that on Page 1 at least, none of those items of steps of the litigation or items of evidence, Taking of Evidence, included the Foley letter, the Foley & Lardner letter. We can see that from the penultimate column.

And then turning over on Page 2, we can see at Line Item 18, there is the Petition by L.V. International to intervene which attaches the Foley letter.

Can you see that?

A. Yes.

Q. And, that petition to intervene was a separate process, wasn't it? It wasn't part of the civil damages litigation itself. It was a separate process by which L.V. International wanted to intervene in those proceedings; that's right, isn't it?

A. The characterization is technically incorrect. L.V. International presented a Petition for Coadyuvante, but that is not a separate process. That is a petition to act as a third party in that proceeding, the Muresa proceeding, so this is a separate process but it's within the same proceeding because the third-party intervention, by definition, implies that a third party is interested in participating in the proceeding, and is requesting permission to the Judge to participate in this proceeding; that, in this case, would be Muresa Intertrade and Tire Group proceeding, or Factories, versus Bridgestone companies.[23]

Q. But the attachment to that Petition, to the L.V. International petition, the "attachment" being "the Foley letter," the fact that L.V. International filed that Petition did not mean that, as a result, at that time, as at 11 May 2010, the Foley letter became evidence in the litigation, did it?

[23] The Spanish-language version of this paragraph states "[l]a caracterización es técnicamente incorrecta. L.V. International presentó una solicitud de tercería coadyuvante, pero esa solicitud no es un proceso diferente. Es una petición para intervenir como tercero en ese proceso, en el proceso de Muresa. Entonces, es un acto separado pero no es un proceso distinto…" *See* Spanish Transcript for Day 2 at 144:18-145:3.

A. It only means that L.V. International, when presenting its third-party pleading as a coadyuvante, introduced the evidence that they considered adequate because that is stated under the Judicial Code.

I can't find it, but the Judicial Code requires that the third-party, the coadyuvante, when presenting--submitting the Petition, attaches to that any evidence that is deemed appropriate.

Q. But, at the point that the Petition was filed, where L.V. International was asking the Court to intervene, asking to be joined to the litigation, at that time, as at 11 May, the fact that the Petition attached the Foley letter did not mean, did it, that in that litigation, the Foley letter was then evidence in those proceedings as at 11 May 2010?

A. Not necessarily.

Q. And we can see in the table that, after the L.V. International petition, then the witness testimony of Mr. Jorge Luque González mentions the Foley letter, and we can see that at Line 21 the two accounting experts for Muresa then attached the Foley letter to their Reports.

Now, that was after the end of the proposal-of-evidence stage in the litigation, wasn't it?

A. That's correct.

Q. And under the Judicial Code, documents from abroad written in a language other than Spanish, must be legalized and the translation ratified by translators as one step in order to be admitted in evidence; correct?

A. Not necessarily.

Q. So, is it your evidence that sometimes a translation, a legalized translation, of a foreign-language document needs to be produced in Panamanian litigation and sometimes it does not?

A. That's correct.

Q. And in what circumstances does a foreign-language document in Panamanian litigation not need to be translated and legalized?

A. Authentication, translation, recognition requirements are requirements for the assessment of the document--that is to say, it is possible--it is likely, that a document that is submitted as evidence

that does not meet the requirements is admitted; and, as a matter of fact, it is done frequently--and, in due course, the Judge will take into account the circumstances during which the document was presented to determine whether it has any evidentiary value.[24]

In general, the rules under the Judicial Code in connection with the authentication of documents that are produced abroad, to recognize documents that are presented by third parties, and, also, requirements for translation into Spanish, refer to the documents presented by the Parties as explained in my First or Second Report.[25] I think I did it in my First Report because these are provisions that govern the burden of proof for the Parties. It is likely,[26] as I mentioned in my First Report, that documents that have been included in a different fashion, for

[24] The Spanish-language version of this paragraph states "Los requisitos de autenticación, reconocimiento y traducción son requisitos fundamentalmente de valoración. Es decir, es posible que un documento que se presente como prueba, que no cumpla con esos requisitos, sea admitido -y de hecho lo son frecuentemente- y en su momento el juez tendrá en cuenta las circunstancias en que se presenta el documento para determinar si tiene o no prueba -- si tiene o no peso probatorio." *See* Spanish Transcript for Day 2 at 147:16-148:3

[25] The Spanish-language version of this sentence states "[e]n general, la norma -- las normas del Código Judicial que se refieren a los requisitos de autenticación de documentos provenientes del extranjero, de reconocimiento de documentos presentados por terceros y de traducción al idioma español se refieren a los documentos presentados por las partes -- ¿cómo lo explico? -- no me acuerdo si en mi primer informe o en mi segundo informe, creo que fue en el primero. Porque son normas que regulan la carga de la prueba que tienen las partes." *See* Spanish Transcript for Day 2 at 148:4-14.

[26] The Spanish-language version of this phrase says "[e]s possible." *See* Spanish Transcript for Day 2 at 148:14.

example, are mainly, as we see in this case, documents that have been obtained or provided by experts were included after the expiration of the period for the presentation of evidence. That period for the presentation of evidence is for the Parties to produce evidence.

But Article 973 of the Judicial Code, as I explained in some detail in my First Report, and I think that I go back to that in my Second Report, expressly states that, when the Expert is in the second stage--that is to say, collecting the evidence, we are already in the period for evidence collection, and the Expert has appeared before the Tribunal, and is acting as such, the Expert that by law is not a representative or--is not a representative of the Party that presented that expert, but it is formally an aide to the Tribunal or an assistant to the Tribunal, that is under the Judicial Code has the power to require documents to the Parties, and it also has the power to receive and collect documents produced by third parties, Article 973 provides for documents that are received in that fashion to be

included in the Expert's Report. The Expert that receives, as we saw with Vera Luisa Lindo de Gutiérrez, and as we saw it was the case with the two experts presented by the Claimants, Ms. Psiquies De León and José Antonio Aguilar, based on my recollection, when I read the record file, during the examination of the Experts, they asked Executives from Muresa if there was any document that explained why sales were dropping, and the response was positive. Therefore, a request for that document was presented, and it was provided by Muresa's executives to the Expert--I do not recall the name of those persons--and they are the ones who produced the Foley letter.

The Experts, Madam Expert and also the two Party experts were compelled to include this in their Reports; otherwise, they would have--this would have been a crime.

There is a power to collect evidence during the exercise--doing the work of the Expert, but this is also a legal obligation, and the Criminal Code of Panama, as I mentioned, I think, in my First Report, also states that the Witness, the Expert, the

Interpreter, the translator, who, in the fulfillment of the exercise of his or her duties, omits or does not convey the truth, shall be sanctioned with up to two or four years of imprisonment.

So, if an expert receives information, but fails to include that information in his or her Report, is includeda crime that carries an imprisonment penalty.[27]

Q. My question was--

A. Let me finish. The requirement to translate and legalize a document is not applied to documents received by experts, rather to documents presented by the Parties because those requirements are procedural acts; that is to say, acts that need to be fulfilled by the Parties so that their case prevails, but the Expert, as an assistant to the Tribunal, is not compelled, or does not carry this burden, because he or she is not a party to the proceeding.

Q. Could we turn to Article 877 of the Judicial Code, which you'll find at Tab 17, which deals, then,

[27] The Spanish-language version of this sentence states "[e]s decir, el recibir información un perito y no un incluirla en su informe, en Panamá, se considera un delito sancionado con pena privativa de libertad." *See* Spanish Transcript for Day 2 at 151:4-7.

with translation, and Article 877 provides at the end there that, if the instruments from abroad are written in a language other than Spanish, they will be translated, or their translation by a certified public translator will be requested and the absence thereof by an ad hoc translator, so there is a requirement there, isn't there, for a translation to be undertaken of foreign-language documents?

A. That's correct, and the reason is that Spanish is the official language of the Republic of Panama.

Q. And Article 973, just over the page, states--and I think this is what you were referring to, Mr. Lee--Article 973 says, a little way down, it says: "When, in the course of an investigation, the Experts receive information from third parties that they consider useful for the Report, they shall include it in such report."

Is that the provision that you had in mind?

A. Correct.

Q. But you mentioned that in this case the Experts received the document from Muresa, and that

was not a third party, was it?

A. It was received from Muresa, but Article 973 in the first paragraph states that the Experts shall render their Report in a clear, precise manner, and they are authorized to request clarification from the Parties, and also request information from them, visit places, examine movable and immovable property, carry out drafts, plans in both documents and perform all kinds of experiments.[28] And what I recall from my examination of this record is that Ms. Lindo de Gutiérrez, the Tribunal's expert during the development of the Expert task asked one of Muresa's representatives or executives whether they had a document that would prove the decrease in sales. The answer was affirmative, and the Expert requested the production of that document, and that is when Muresa, the Party Muresa, provided the Tribunal's expert the Foley letter, and when experts work, they were called together, they don't do it separately, so they need to go all together, and I assume--and this is something

[28] The Spanish-language version says "experimentos que estimen convenientes." *See* Spanish Transcript for Day 2 at 153:9.

that we can double-check in the record--that, in that same act, the Experts appointed by Muresa and Tire Group Company received that document, as well as the Expert Ochoa, appointed by Bridgestone companies.

Q. Now, the requirement in Article 973 or the specification there that, if experts receive information from third parties that they consider useful for such report, they should include it in such report.

Now, the Foley letter is said to be a "reckless" act by BSLS, and we will get on to that. That was the suggestion that was made. It has absolutely nothing to do, does it, with the quantification of loss which was the subject of the Expert Reports that we're dealing with, so that, therefore, it simply doesn't fall within Article 973 because this was a document that was irrelevant to those Expert Reports; correct?

A. I have not put that matter to myself. I'd have to study it.

The objective fact is that the Experts, in performing their functions, obtained a document. The

Experts considered it relevant, and they had the obligation to do so, lest they commit an offense that is punished by imprisonment.

Q. But you'll agree with me, won't you, Mr. Lee, that if the Foley letter--I think you said you'd like to re-read it to remind yourself as to what it said, but the Foley letter is said to be relevant to an act of recklessness by BSLS. It does not--it does not provide any information that could be said to assist in the quantification of the damages that Muresa alleged that it had suffered?

A. I read the Foley letter to prepare my Expert Report, but my Expert Report did not include an analysis of the meaning of the Foley letter. It focused primarily on the allegation made in the Memorial by the Bridgestone companies before this Tribunal, and in the opinions of former Judge Arjona, that that document was presented in untimely manner. In other words, that document does not constitute evidence that's been validly incorporated.

I read the Foley letter, but I haven't analyzed it because it was not the subject of what I

was--in other words, I was not charged as expert with analyzing the legal consequences of that note, so, I'm not in a position, with a quick reading, to give an opinion about the contents of the Foley letter.

Q. So, you're not in a position to express any view as to whether the Foley letter was reckless or whether the contents of the Foley letter gave rise to a breach of Panamanian Law?

A. The only thing I can say regarding the Foley letter is what can be drawn from its literal text. I read it, and the literal text contains a warning to an attorney who represents or represented the distributors of RIVERSTONE tires not to market the RIVERSTONE mark tire in any country in the world. And that should they do so, I believe that the text reads: "you shall do so at your own risk."

The consequences of that, or the meaning of that was determined by the Supreme Court of Justice on acknowledging as proven the first ground of the Motion for Cassation, and that determination or finding by the Supreme Court of Justice, well, I don't find any elements of arbitrariness nor any elements that would

suggest a violation of the guarantee of due process, which was the subject of my review. For the fundamental allegation made by the Bridgestone companies in this arbitration proceeding, and the considerations or the opinion put forward by former Justice Arjona, is that the Judgment is arbitrary and constitutes a violation of due process.

So, what I can say is the objective and concrete fact that the Supreme Court of Justice, after examining the Judgment on appeal, as ordered by the Judicial Code and having reviewed the record, declared that the first ground of the Motion for Cassation had been proven, and immediately thereafter found that the provision cited as having been violated, which were three with respect to that ground of error as regards existence of the evidence Article 1644 of the Civil Code, Article 217 of the Judicial Code, and Article 780 of the Judicial Code occurred. That is to say, those provisions were breached, and based on that, it proceeded to strike down the Judgment.

And so, in my review of that Decision by the Supreme Court, I did not find any element of

arbitrariness nor of a violation of the constitutional guarantee of due process.

Q. Mr. Lee, you've told us--and just for the Transcript, it's Page 507, Lines 4 to 6--you've told us that you're not in a position with a quick reading to give an opinion about the contents of the Foley letter. That's what you told us in your evidence. And it must follow from that, therefore, that you're not in a position to express any view as to the findings of the Supreme Court in relation to the contents of that letter. That must be right, mustn't it?

A. I just explained to you the Decision by the Supreme Court, based on my review and my analysis, does not contain any arbitrary element nor any sign of violation of due process, which are the charges that have been leveled, I understand, against the Cassation Judgment in that arbitration procedure, as I read the Complaint Memorial.

Q. But, in relation to the substance of the Foley letter, you're not in a position to express a view as to the Supreme Court's findings, are you,

because you have not considered the substance of the Foley letter. That's what your evidence is.

A. Yes, and I reiterate it.

The Foley letter contains a warning. The Supreme Court determined what the effects are and what that warning means, and I did not find it to be arbitrary, nor that it somehow violated the guarantee of due process. Based upon my reading of the letter and examining it in conjunction with the content of the Decision by the Supreme Court of Justice.

Q. So, you are now able to express a view on the substance of the Foley letter; correct?

A. No.

Let me repeat once again. On seeing the Foley letter--and everything else, not just the Foley letter--my conclusion is that the Judgment of the Supreme Court of Justice does not manifest any arbitrariness nor any violation of the fundamental guarantee of due process.

Q. So, just turning back, then, to the civil-damages proceedings and the chronology of evidence, putting to one side as to the implications

of the attachment of the Foley letter to certain experts' reports that we see at Lines--Row 21 of the Demonstrative Exhibit 4--sorry, 5--it's right, isn't it, that because of the very late stage of the litigation at which that letter first raised its head, that BSLS had no opportunity to present counter-evidence, did it?

A. That understanding is incorrect from the standpoint of the procedural system in Panama.

Let me explain. What is guaranteed in any proceeding is the so-called "right to contradiction." In this case, in the face of the Foley letter, the possible reactions of the Bridgestone companies could have been of two types. Legal issues related to relevance and evidentiary value or factual matters having to do with its authenticity.

Had they been factual issues--for example, the letter is a forgery--what Bridgestone could have done in that situation--and in my understanding that is not case; it's not what's being alleged--it could have made use of Article 473 of the Judicial Code which enables any of the Parties to ask the Tribunal

to make use of its power to declare evidence, or order evidence, sua sponte.

As I indicated in my statement, the characteristic which, in my opinion, is the one that mostly distinguishes the Panamanian Procedural Law system from the procedural-law systems of common-law jurisdictions, is that Panamanian procedure follows the ideology known as "inquisitorial approach," whereas the common-law systems follow what is called the "adversarial system."

Now the adversarial system, it is the Parties who move the process. The Judge's function is to conduct the proceeding and hand down a judgment. But, in the inquisitorial system, and the civil procedure of Panama is eminently inquisitorial, the Judge, not the Parties, plays the key role in the proceeding. And the highest expression of that ideology is, Article 793 of the Judicial Code, which all litigants know by memory, or know by heart, and which states, more or less, in addition to the evidence requested--that is to say the evidence requested by the parties, the Judge of First Instance must

order--not "may," but "must" order--in the principal record in the evidentiary period, that is to say the period during which evidence is being produced, at which is Article 1255, or at the moment of issuing the ruling, the production of all evidence that the Judge considers appropriate or relevant to verify the assertions by the Parties.

So, if, for example, the Bridgestone Companies had had an objection with respect to a factual matter having to do with the Foley letter--for example, I know this is not the case--that a document is a forgery--well, given the seriousness of such an accusation, they could have told the Judge because this is provided for by Article 473, they could have gone before the Judge and said, "Mr. Judge, the Expert has received and included in his Expert Report a document that's a forgery. Please make use of your powers or follow through on your obligation to declare evidence sua sponte to determine whether or not that document is authentic or false, this as regards a factual issue. Now, in terms of legal issues, the objections of relevance or evidentiary value, well,

this in relation to the Foley letter when it was introduced by the Experts. It is true the time for admissibility at Article 1255.3 had lapsed, but the right to a contradiction in respect of legal issues, well, let us suppose that Bridgestone would have had an opportunity to allege that they were irrelevant, and to argue that they lack evidentiary value, or to allege, as they did, that they were introduced in untimely fashion, and are not valid, and this was done--it did so several times. It did so first when cross-examining the Experts. I read it.

I don't remember the actual text of the question, but I do remember having read it. I examined the cross-examinations that the attorneys for Bridgestone, the Benedetti lawyers put to the questions--to the Experts, they addressed legal issues--they were formulated by Bridgestone in arguments in the Court of First Instance, they were argued--I'm trying to remember by heart--in a brief filed in opposition to the appeal filed by L.V. International to intervene in the proceeding, they were alleged in the brief opposing the appeal by

Muresa Intertrade and Tire Group of Companies against the Judgment of First Instance which was favorable to Bridgestone. It was invoked in the argument before the First Chamber, the Supreme Court of Justice in the argument on admissibility of the Motion for Cassation--well, this is what I'm remembering--in the argument on the merits in relation to the Motion for Cassation. All of this was done, as I recall, very meticulously invoking the purported violation of any number of provisions of the Judicial Code.

So, even though, the incorporation done validly by the Experts of the Foley letter during the collection-of-evidence phase, well, that's what happened. And then after the period ended, or after the time for admissibility objections lapsed, then the Bridgestone lawyers could exercise the right to contradiction and this is what due process entails, allowing the Party, vis-à-vis which evidence is put forward, can--is afforded the opportunity to contradict it.

Now, as far as I recall from my review of the record, there was no objection on factual issues, but

there were many opportunities on which the Bridgestone companies made arguments contradicting the legal issues.

Q. Now, Mr. Lee, the evidential record shows that BSLS and BSJ objected to the admissibility of the Foley letter repeatedly, and those objections were upheld, weren't they?

So, if you look at the Demonstrative 5, the table, the chronology, we set out there that, for example, at Row 23 in the deposition of Manuel Ochoa, that questions were raised about the Foley letter and BSLS and BSJ objected to the Foley letter as inadmissible, and the Court upheld the objection; correct?

A. No. That understanding is incorrect.

One thing is the admissibility of the Foley letter as evidence. It was validly incorporated, and that was so recognized by the First Superior Court of Justice. I think there's a paragraph, I believe I saw it--and this was indicated by the Civil Chamber when saying that all evidence that had come in in the record was validly admitted.

Now, there is a note that must be made, which is that the Civil Chamber of the Supreme Court, when it receives a Motion for Cassation, does not admit evidence. It receives the record as produced on First Instance and on Second Instance or on appeal. There is no work of admitting evidence in examining a Motion for Cassation.

Well, what you are referring to is, when I read that I didn't understand it. What you're referring to is that when the Experts were examined and cross-examined, there were objections to questions relating to the letter, and the Court accepted the objection with respect to the question.

Now, that has nothing to do with-- it is not--it does not constitute a pronouncement regarding the admissibility of the evidence. What that is, is the--well, that's the Tribunal having considered that the question was not admissible. But it does not imply any value judgment nor any decision nor any analysis regarding the admissibility of the document.

I don't remember the details because, as I recall, the record had about 5,000 pages, and I

focused on the main documents, but I did--well, what I can say is that when a trial judge decides on the admissibility of a question, it may decide for any number of reasons:

First of all, because the question is irrelevant--that is to say, it's not related to the point of the proceeding. The question, not the document. It may be structured in such a way that it tends to deceive the witness, may be misleading. And there are other reasons for declaring a question inadmissible.

But, let me repeat. The fact that a judge did not allow a question to be asked does not, in any way, entail a decision regarding the admissibility of the document about which the question is asked, which is what I believe occurred in the case of the cross-examinations of the Experts by the attorneys for Bridgestone.

Indeed, the mere fact that those lawyers have been able to question, typically constitutes an exercise of the right to contradiction which protects the fundamental guarantee of due process.

Q. Could we please turn to Tab 21 of the bundle, which is the testimony of Muresa's expert.

PRESIDENT PHILLIPS: That is C-0198.

MR. WILLIAMS: Correct.

PRESIDENT PHILLIPS: It's very useful that we have these cross references for later.

MR. WILLIAMS: Apologies, I will do my best.

BY MR. WILLIAMS:

Q. So, if we turn to Page 11 of that document, there is, there, a reference to the Reply given by Ms. De León to a question concerning the Foley letter. Ms. De León was one of the Experts referenced at Row 21 of our Demonstrative 5 that we were discussing earlier whose Expert Report attached the Foley letter.

And she says this: "In relation to this question, our purpose, as accounting experts in this case, is to determine the causes that led to the reduction of sales of RIVERSTONE tires. The letter sent by the Foley attorney, we have only taken as a reference, adding it as an annex to our Report and not as evidence."

So, therefore, it is not correct, is it, that

the attachment to the Expert Report of the Foley letter was intended to be evidence because the Expert whose report it is expressly says it was not intended to be evidence; that's right, isn't it?

A. Allow me to read her answer, please.

Mr. President, to read the answer that the Expert Witness provided, I need a couple of minutes. I'm going to have to look back a little bit. I need to look at the question asked as well.

(Witness reviews document.)

A. We have to understand the answer given by Ms. De León, this is the answer of a layperson. She does not know the legal terminology. She says: "In relation to the question, our purpose as accounting experts in this case is to determine the causes that led to the reduction of the sales of RIVERSTONE tires. The letter sent by Foley attorney we have only taken as a reference, adding it as an annex to our Expert Report and not as evidence because we are not trained for this."

This comment has to be looked at from the viewpoint of who is uttering this. This is an

accountant; she's not a lawyer. What she's saying is incorrect.

She says two things that are incorrect. She says that they have taken this only as a reference adding it as an annex and not as evidence. If, when an Expert Witness, when discharging his or her functions takes a document and for whatever reason, it includes the document, because the Expert Witness may decide not to include a document, because when an Expert Witness is discharging her functions has to look at the different items on which the Expert Witness' opinion relies, and that is what accounting expert witnesses do. The Expert Witness cannot weigh the evidence or pre-judge the evidence. The Expert Witness incorporates anything that he or she deems relevant.

Now, she says: We have only taken this reference adding it as an annex and not as evidence from a legal viewpoint, purely speaking, that is incorrect. When an Expert Witness includes a document as an annex, that is part of the evidence provided by the Expert Witness, and the annexes are part and

parcel of the Expert's opinion. It says "we're not trained for this," she says.

Now, she and many other expert witnesses, well, she understands what an Expert Witness does, but they have no knowledge, or, if they have some knowledge, they do it intuitively, of the fact that Article 973 allows them in very broad terms to ask the Party to provide documents or to ask third parties to provide documents. This they should know because if they're not--if they don't do so, they commit a crime. When they are sworn, Articles of the Civil Code in this regard are read to them, so this has to be taken as the understanding of an individual who has no legal training.

Q. The letter was not intended as evidence, was it, because it was completely irrelevant to Ms. De León's calculation of loss.

Now, you've already told us that you're not in a position to express any view as to the substance of the Foley letter.

However--however, an expert who is calculating loss does not need to take into account

what is said to be unlawful acts. They are simply calculating loss, aren't they? She's calculating differences in sales, and the Foley letter has nothing to do with that.

A. Okay. My recollection of my reading of this voluminous case file is Ms. Psiquies De León--I'm sorry, Ms. Linda Gutiérrez, who was the Expert Witness appointed by the Court asks one of the Executives of Muresa's if there was a document or if there was any documentary evidence that would show that there was a reason that brought about a decline in sales, and the Executive from Muresa said yes. Ms. Gutiérrez, not Ms. De León, asked for the document, and the document was provided to her.

As I explained, Ms. Gutiérrez could not be alone. When expert witnesses discharged their functions, they do it together, this to ensure transparency of the analysis. I assume that at that point in time, the same document was provided to everyone. Expert witnesses do not determine the relevance of the document--of the documents, they provide their analysis, and they incorporate the

documents.

Now, when the Expert evidence is provided with its annexes, the Judge may weigh the evidence.

Now, if we were to assume, as a hypothesis, that a document annexed to a report by an expert witness is irrelevant--that is to say, it bears no relationship with the matters discussed--when the Judge is about to decide, the Judge will look at the file. And, if the Judge finds at that point in time that some piece of evidence--for example, an expert witness opinion or a document or the testimony by a witness--if the Judge finds that that is not relevant, the Judge does not take that into account to weigh the evidence.

But, in Panama, and I think in most of the civil-law countries, that is codified, when there are doubts as to the admissibility of an item, the item is admitted under the principle of "favor prohibiciones." This was admitted. Perhaps it's irrelevant. But, in spite of the fact that the period to decide on admissibility has elapsed, the Judge may decide that a piece of evidence is irrelevant. At that time, the

Judge will simply say, "Well, I will ignore this piece of evidence, and I will weigh the other piece of evidence that the Judge considers relevant." I understand what Ms. De León said, I understand this as something expressed by an individual who is quite capable in auditing and accounting matters, but who has no legal training.

Q. So, in addition, the court-appointed expert found that the Foley letter was irrelevant to the calculation of loss; that's right, isn't it?

A. Could you please tell me which document you're looking at? I don't remember this by heart.

Q. It's Document C-196, which is not in your bundle, but we will bring it up on the screen.

And on the screen, then, on this document, the court-appointed expert--this is the evidence of the court-appointed expert--who is saying that: I insisted, and I asked them to provide us with some documentation from that time which stated that they could not sell those tires, that they were afraid of selling them. I also asked him for a document or letter that referred to the reduction of production or

something similar, and the only thing that they were able to provide us with was the letter that I included in my Report, and which I already explained at another list of damaged and obsolete tires which I also wasn't able to take into account since none of those tires were RIVERSTONE tires."

So, what she's saying is that she's not taking it into account because it's irrelevant; that's right, isn't it?

A. This paragraph is precisely the paragraph that I was making reference to in my previous answer. The paragraph says, and I quote "based on that comment, I insisted and I asked them to provide us with some documentation from that time which stated that they could not sell those tires, or that they were afraid of selling them. I also asked him for a document or letter that referred to the reduction of production or something similar, and the only thing that we were provided was the letter that included in my Report."

I think--and I don't have to interpret the Foley letter--that the request by Ms. Lindo de

Gutiérrez was clear. Are there any documents that--evidence that Muresa cannot sell the tires, or is afraid of selling them, and then had submitted a cease-and-desist Foley letter. I think that what was requested, was provided.[29]

Then, she says the only thing that was--that we were provided with was a letter that I included in my Report and which I already explained and another list of damage and obsolete tires which I also wasn't able to take into account, since none of those tires were RIVERSTONE tires. Now, that's a different matter. She did not take into account the list. The other list that she was provided apart from the Foley letter, I assume, and I think this refers to sales of tires of a different brand.

I think what you're showing here, reflects exactly what I just said.

Q. But what she's saying is that she was also not able to take into account the second piece of evidence and, therefore, did not take into account the

[29] The Spanish-language version of this sentence states "[s]in analizar ni emitir opinión me parece que se entregó lo que se pidió." *See* Spanish Transcript for Day 2 at 177:7-9.

first piece of evidence, either, because it's irrelevant. And, the conclusion that the court-appointed expert reached was that no loss had been proved. That's what the court-appointed expert's report said, isn't it?

A. I'm reading this paragraph--I'm sorry, I'm wearing multifocal lenses, but I don't see her saying that the Foley letter is irrelevant. I don't see that.

Now, had she said that, it wasn't her place to say so because the determination of relevance is a determination that can only be made by the Judge. If the Expert Witness thinks that a document is important, it can include it; and if not, he doesn't have to include it. She could not say that any document included was irrelevant.

In the legal sense of the term, as related to the dispute, an accounting expert cannot make that kind of a determination.

PRESIDENT PHILLIPS: Mr. Williams, could you just help me with this part of the case because my understanding is that the Experts were asked to

examine the figures to see if there had been a reduction in sales, and they were also asked if there was a reduction, what was the reason for the reduction. And my understanding was that they then asked why did the sales reduce, and the Foley letter was produced in answer to that question. Is that not a correct understanding?

MR. WILLIAMS: Mr. President, yes, you're right, and the answer of the court-appointed expert was that this is irrelevant, and the court-appointed expert's conclusion was that no loss had been proved.

PRESIDENT PHILLIPS: Yes, thank you, because I did understand that you were suggesting that the only function of these experts was to look at the figures, but what I was suggesting to you is that they were also asked to explain why there had been a reduction, and whether or not this letter was relevant is an answer to that question, may be a matter for debate.

MR. WILLIAMS: Yes, Mr. President.

MS. SILBERMAN: Mr. President, while there has been a quick break, I didn't want to interrupt

Mr. Williams's questioning, but I note that the quotation that's shown on the screen sort of starts midway through, and this is a document that the Claimants don't have in their bundle. Would it be possible to have the document shown to the Expert in full?

MR. WILLIAMS: The answer is yes. I think we were going to move on at this point, but if you would like Mr. Lee to look at the full document now, we can do so.

MS. SILBERMAN: Up to you, Mr. President. I was happy to wait. If you were going to ask more question, I wanted to make sure, at the very least, we had the full quotation in the paragraph.

MR. WILLIAMS: I think we're done with document from our side.

BY MR. WILLIAMS:

Q. I wanted to move on to Tab 22, which is the closing arguments in the Civil Damages Proceedings. And do you have that, Mr. Lee?

A. The Closing Statements?

Q. Yes.

A. Yes, I have them here.

Q. And on Page 2--this is Muresa's Closing Arguments, and on Page 2, it sets out the grounds for the proceedings, and can you see Ground 4 there?

A. I do.

Q. And there's a reference, isn't there, to the Foley & Lardner letter. We can see that's now appeared as Ground 4 in the Closing Arguments for Muresa.

A. That's right.

Q. And that's new, isn't it, because that was not something which had been raised in the Complaint by Muresa, is it?

A. As I explained to you before, the Complaint includes the fundamental facts, it provides the factual context on which the Claim relies. But this Closing Statement is the stage in the procedure in Panama when the Party submits to the Tribunal everything that was obtained during the proceedings their theory of the case--their arguments, and also the legal grounds for their claim.

That is why, in some countries--not in

Panama--the Closing Statement is also called the "statement of matters proved."

So, the Foley letter came up in multiple ways, and it didn't come from the evidence documentation by Claimants. This letter came after the Expert Witness testimony--Expert Witness evidence was developed. And, since it came from there, well, perhaps the Party had not thought about submitting this, and this was then casually introduced, and this piece of evidence favors this party, and the time to include this piece of evidence is the Closing Statements, which, in our procedural system, allows the Party to go deeper and go beyond a mere enumeration of mere facts.

Here, you submit your legal and factual case. And, in my opinion, this is perfectly natural what happened here.

Now, the Party, for whatever reasons, without wanting so--well, I would be surprised if a party finds a piece of evidence that is favorable to them, and did not rely on it.

Q. And, can we turn to Ground 6 in the same

document. So this is Ground 6 in the Muresa Closing Argument, and do you see that, Mr. Lee?

A. Yes, I'm there. I'm looking at it.

Q. And if you just read Ground 6 to yourself.

(Witness reviews document.)

A. I've read it.

Q. And, do you see, halfway down, it says that Muresa had to limit--it says "limiting" the sale of these products.

Do you see that?

A. That's right.

Q. Whereas, if you compare that to the Complaint, the Complaint said that sales stopped. So, there is a fundamental contradiction or inconsistency, isn't there, between the Closing Argument from Muresa saying that sales were limited, and the Complaint at the beginning, which said that sales stopped.

That's inconsistent, isn't it?

A. It is not inconsistent because it's not incompatible. I would characterize this situation by saying that when the statement was presented, Muresa realized that the evidence on file failed to show a

full stop of sales, but only amounted to a limitation or reduction in sales.

So, you adduce something, and you're able to prove less. And, then, whatever we're asking for is granted to one.

I think that this is a typical situation, at least in Panama, and I'm going to give you an example. In this case, the reverse happened.

In Panama, for reasons that are cultural in nature, I think, Claimants, when looking at the reasons to stake a claim, and they have a certain number, the trend is to ask for more money, to include more money in the Complaint because sometimes evidence is admitted, and then they realize a greater amount was to be obtained. And, then, if you asked for less, you'll get less. In this case, five millions were asked.

The Decision of the Court was to give 5,168,000. Usually, facts that are submitted, well, they're submitted in a categorical manner or in an absolute manner. Perhaps, in this case, they said, okay, sales were stopped, and then it was evidenced

that sales were not stopped but limited, so this is within the realm of possibility, and the Court will make a decision on the basis of this.

This was an overstatement. It is not incompatible. The fact was overstated. And, then, in reality, something less happened. It is not incompatible.

In the Complaint, they said, perhaps, they had to stop sales, but then it was shown that there was a reduction in sales. I understand this. I don't know the reasons why they say this. I didn't want to speculate. I read the whole file, . There were explanations in connection with different countries. In this country, yes; in this other country, no.

But, what I think, objectively, is that what the Supreme Court recognized, and what was evidenced, was that there was a reduction in sales, and it is true there was not a full stoppage of the sales. This situation meant that what was invoked in the Complaint was not met.

Q. This is all speculation, isn't it, Mr. Lee?

A. No, because you mentioned a conceptual

situation. Is it incompatible to refer to cessation or a partial sale? No, it isn't, the way we understand both terms as we contrast them, and I didn't want to go into factual issues.

Q. And, if Muresa claimed $5 million on the basis of sales stopping, and, then, changed its story and said, instead, sales were limited, you would expect the damages to change, too, wouldn't you?

A. Could be. Not necessarily, but it could be.

Q. Can we turn now to Tab 24, which is the Closing Arguments from BSJ and BSLS, and I'm looking at Page--and that is Document C-0200, and I'm looking at Page 12 of that document and the third ground.

And BSLS there are raising serious concerns about the admission of the Foley letter through it being exhibited to an expert's report, and they say: "For the Experts for the Claimant, Aguilar and De León, not only was it sufficient to do everything we detailed in the first two points, which invalidate their Report, but they also introduce to the suit illegal evidence which is not suitable in the stage of filing evidence, completely flooring their Expert

Report. We are referring to the letter dated 3 November 2004 from the law firm Foley & Lardner, sent to the American firm, which refers to a matter between BFS Brands and L.V. International."

So it's right, isn't it, that even in their Closing Arguments that BSLS continued to protest that the Foley letter wasn't properly in evidence; that's right, isn't it?

A. That is completely correct and precisely the fact evidences that Bridgestone was able to exercise its right for counter-evidence; that is to say, they introduced evidence for quaestio iuris, and I mentioned before that this was one of the opportunities in which Bridgestone was able to question the Foley letter.

And, in this case, as for the third point in their argument for the conclusion in First Instance, that is Document C-0200, I think that, as I explained in my two Reports, and as I have upheld this morning, this argument that they presented is completely incorrect from my point of view and from a legal point of view because here, they're indicating that the

Expert introduced evidence that were illegal, and they were completely introducing a twist, and they were introducing a defect to their Report.

If the Experts--if the Experts were compelled to introduce that and hadn't they done so, they would have incurred in a crime.

Q. And BFS had no opportunity, did it, to put in witness evidence in response to the Foley letter; that's correct, isn't it?

A. They could have done it if they wanted to because I think that I explained this. The questioning of--or the challenge--the challenge of an evidence could be quaestio factis or quaestio iuris. For the quaestio iuris, you do not need any witnesses.

But if you are going to say that the letter was generated by mistake, was not authorized, these are factual issues, and then you need to produce witnesses; and, in that case, what I would do is to use the power established at Article 473, and this is that something that Bridgestone could have done, but they don't do it because, I assume--and this is my speculation--there was no factual question or

challenge. But, they could have.

And in Panama, in the past, we have seen a situation in which one of the Parties feels that it is serious enough and that it puts it in a situation of defenselessness, they request the Party to resort to the power conferred by Article 793, Article 793 under the Judicial Code. And, I will repeat it because that is the spine, the key, in this inquisitive system.

In addition to the evidence requested by the Parties, the First Instance Judge may also request evidence for all of the other--any other evidence that he or she deems necessary to confirm the assertions by the Parties.

And what I have seen here is that all of the challenges presented by Bridgestone in their closing arguments and also throughout the examination and the cross-examination of the Experts, as well as the subsequent stages, they were referring to legal issues, such as the lack of authentication or the lack of a signature rather than factual issues. And it would have been serious if that document, as presented, was forged or was produced by mistake; so

it would have been a document issued by an unauthorized person.

And, if that case, if this is an issue of facts, the Parties--and this is done by any responsible attorney--could have asked the Judge to exercise his power to request evidence ex officio, but the Judge is not forced to do it, but he or she could have done it.

And once again, this is speculation. I assume there were no issues of fact that could have led Bridgestone to challenge the Foley letter. All of the challenges were of a legal nature, and you said it correctly.

They were stated repeatedly throughout the proceeding up to the Supreme Court of Justice, and they were stated before the Cassation Court. And, my conclusion is that the Cassation Judgment is not arbitrary, or it does not undermine the due-process guarantee, which are the main elements attributed to the Judgment.

My conclusion is that those elements are not there.

Q. And, the Judgment of the Eleventh Circuit Civil Court in the damages claim was that the losses alleged by Muresa had not been proved; that's right, isn't it?

A. Yes.

Q. And, that was on the basis, wasn't it, that the Muresa's accounts for the Years 2006, '7, and '8 did not show loss; that's right, isn't it?

A. Would you tell me where in the Judgment you see that?

Q. Yes.

The Judgment appears in Tab 25, C-0021, and if you turn to Pages 11 to 12, and you will see at bottom of Page 11, the Court found as follows: "In the file, there are certified copies of the Income Tax Return forms of the corporation Muresa for the Years 2006, '7, and '8. In the said statements, it is clearly observed that in 2006, the year in which the trademark opposition action was still pending before the Eighth Civil Circuit Court of the First Judicial Circuit of Panama, the aforesaid corporation declared assets in the amount of $9.7 million, which increased

in 2007 to the sum of 8.399 million."

A. (In English) Mr. Williams, excuse me. Can you make reference to the Spanish version? I can't find it.

Or if you read again the starting line of the paragraph, I now look for it.

Q. I'm looking at the English translation.

A. Yes, but can you give me the first line of the first paragraph that you--

Q. Sure.

A. --want, and I will look for it in the Spanish version.

Q. Yes. It's at the bottom of Page 11, and it's the last paragraph at the bottom of Page 11.

I'm told it's on Page 16 in the same tab, you'll find the Spanish.

A. Okay. How does it start?

Q. It starts: "In the file, there are certified copies."

Do you see that?

A. Okay.

Q. And would you, then, rather than me reading

it out again, would you read to yourself then--

A. One paragraph?

Q. --the paragraph starting "In the file there are certified copies," and read that down, then, to the end of that paragraph, which is just over the page.

(Witness reviews document.)

Q. Do you see that, Mr. Lee--

A. I see.

Q. --the conclusion then--

A. (In Spanish) I read the paragraph.

Q. And do you see, then, the conclusion is that with the documents already described: "The Court finds that the losses alleged by the plaintiff are not shown, especially when its capital progressively increased year after year."

A. Is this in a different paragraph?

Q. Maybe as you look, it's the line.

A. I read the paragraph that ends with 3,616,000 to--

Q. Would you just read the next sentence after that.

A. (In English) Yeah.

Q. And, if you look at the two or three paragraphs after that: "The Court also finds that the Company Muresa knew of the opposition complaint, but nevertheless, that did not prevent Muresa from continuing to sell its tires, and that this reveals there was no restriction for producing, importing, or selling the RIVERSTONE tires."

Do you see that?

A. (In Spanish) I saw that.

Q. And ,that's by reference, then, to evidence at evidentiary levels.

Do you see that?

A. I do not see the reference to the stock, to the inventory.

Q. So, is it--

(Witness reviews document.)

A. Yes.

Q. And, can we turn now, then, to Muresa's appeal to this Decision, and you'll find that at Tab 26, C-0022.

A. (In English) Yeah.

Q. So, on 6 January 2011, Muresa filed their appeal, and you'll see on Page 20 of that document, they argued that the Court had ignored the evidence that BSLS had acted recklessly, and sought to push RIVERSTONE tires out of the market; and there's a reference there to a campaign of prosecution across all countries, intimidating statements through the Foley & Lardner letter.

Do you see that?

A. Would you please tell me where in Spanish? Would you tell me what page you're referring to in the Spanish text?

Q. 20, Page 20, of the Spanish.

And I was referring to the text towards the bottom of that page, and you'll see there it refers to a campaign of prosecution across all countries where it was attempted to register the brand.

A. (In English) Okay.

Q. And, it says: "Veiled threats in the Foley & Lardner letter, intimidating statements."

Do you see that?

A. (In Spanish) Yes.

Q. And there's no mention there, is there, of the withdrawal of the appeal. We discussed earlier the withdrawal of the appeal.

Do you see that there's no reference in Muresa's appeal to that, is there?

A. Not in this paragraph.

Q. Are you aware that--or whether Muresa mentioned the withdrawal of the appeal at any time to the Appeal Court?

A. I do not recall.

Q. And, it's right, isn't it, that under the Judicial Code, there are very limited rights for a party to bring in new evidence in an appeal? That's right, isn't it?

A. Quite the contrary. The appeal is a remedy that allows the Appellate Court to carry out a de novo examination, an open examination or review of the whole process, and if one of the Parties recalled some new argument or has come across a new argument or a new approach that could support their case, that could be presented in the appeal.

The appeal is--does not limit, restrict the

Appellant in any way. The Appellant is asking for a full review, and the Appellate Court, when deciding, could even decide based on considerations or arguments or provisions that were not presented by the Appellant Party.

And, this is quite frequent, contrary to what happens with the cassation remedy. This is a very, very limited extraordinary remedy as applied.

Q. But, the Respondent to an appeal--not the Appellant, the Respondent to an appeal--can only bring in new evidence itself if the Appellant brings in new evidence; that's right, isn't it?

A. When you're talking about evidence, are you talking about an evidentiary element, or are you talking about an argument?

Q. I'm talking about evidence.

A. Evidence.

Q. Correct, evidence.

So, my question is, in an appeal--

MS. SILBERMAN: Mr. President, there may be a problem with the translation. I can clarify this disconnect.

Mr. Lee was asking if you were referring to an item of evidence, a piece of proof versus a question about maybe the relevance or the appreciation or something like that.

So I think it was translated just as "evidence" in both instances which may have led to confusion.

MR. WILLIAMS: Thank you. I'm grateful.

BY MR. WILLIAMS:

Q. So, I'm talking about a piece of proof, a piece of evidence, a document, something like that.

A respondent to an appeal can only bring in new evidence--new evidence--if the Appellant presents new evidence. So that, therefore, it is only counter-evidence that a Respondent can bring in in an appeal, isn't it?

A. If we are talking about this in an actual situation, not in this case, either Party could present evidence in the appeal stage.

I do not recall that this was done in this instance, but it is a little bit difficult to understand this in an abstract situation. If you

would like to ask this question as it occurred, it could probably be easier to understand and answer your question.

Q. Okay.

A. Just if you want to.

Q. I was really referring to Article 1275 of the Judicial Code, and in particular, Subparagraph (i) of that provision which specifies, then, that if an appellant presents new evidence, then the Respondent can put in counter-evidence.

A. Article 1275 is a very confusing article, which has led to many problems as to determination of its actual sense because it seems to be an absurd provision, something that is impossible to comply with.

This Article establishes that, in the appellate phase, only the following evidence should be produced, the ones that can be presented as counter-evidence. But, if there is no evidence, there cannot be any counter-evidence.

So, the way the provision is drafted, it seems to be a pathological provision; that is to say,

something that cannot be complied with.

It has been interpreted in the past as the counter-evidence that were argued in First Instance. I have not seen the application of Subparagraph (a) because I do not personally understand it. I'm being very candid about it. Sometimes, I had to see whether I can--sometimes I had to see whether I could use this provision, but no one has ever been--no one has ever been able to explain to me how it works.

But, now, when we look at Subparagraph (e) that are those evidence that were not presented during the first instance, but in the appellate instance, that works.

So, I could tell you that this is a provision that is not widely used because it is impossible to understand; and whatever is not comprehensible or whatever it is confusing, leads to several interpretations.

ARBITRATOR GRIGERA NAÓN: Precisely, because I find this so difficult to understand.

In the systems I know, when you are at the appeal level, you can only--you're only able to

produce new evidence if there are new facts that were unknown in the previous stage of the proceedings because, on the contrary, the procedure never ends.

Isn't that the way things happen in practice in Panama--

Let me finish.

--in which you can only introduce new evidence at the appeal stage in connection with new facts that were unknown before.

Isn't that the way it happens in your country?

THE WITNESS: That is correct. That is correct.

BY MR. WILLIAMS:

Q. So, moving on, then, to the Decision by the First Superior Court, the Appeal Court, it issued--

PRESIDENT PHILLIPS: Would it be a good idea to adjourn now and come to that in 15 minutes or so, at quarter past 4:00?

MR. WILLIAMS: Yes.

PRESIDENT PHILLIPS: And you're still incommunicado.

THE WITNESS: (In English) Of course. I will make my technical stop, first.

(Brief recess.)

PRESIDENT PHILLIPS: All right. Let us resume.

BY MR. WILLIAMS:

Q. And, Mr. Lee, just to complete the point that Mr. Naón raised, I think if you look at Article 1276 of the Judicial Code, it makes the point that evidence from the Respondent is permitted only as counter-evidence in response.

Do you see that?

A. Yes, that is correct, and what I indicated, that Article 265[30] is a confusing provision, is precisely because 266[31] says that contrary evidence filed on appeal should refer to the new evidence before that instance. But Article 265--1265,[32] thank you--makes reference at (a) to counter-proof, and in (b) to proof adduced at trial, and it limits what

[30] The Spanish-language version says "275." *See* Spanish Transcript for Day 2 at 202:2.
[31] The Spanish-language version says "276." *See* Spanish Transcript for Day 2 at 202:3
[32] The Spanish-language version says "275." See Spanish Transcript for Day 2 at 202:6.

could be new evidence to (c) public documents and reports.

So, as I indicated earlier, the provision is a bit confusing, and it lends itself to be interpreted in various ways.

Q. Mr. Lee, can we now turn, then, to the Decision of the First Superior Court, which is at Tab 27 and is Document C-0024. And if you turn to--in the translation, it's on Page 15, and I'm told it's on Page 23 in the Spanish original.

And you'll see there that the Court, at the bottom of the page, found that "recklessness that gives rise to compensation alluded in Article 217 of the Judicial Code is equivalent to gross negligence or fraud, and that from the examination of the evidence and documents, this Court considers that the plaintiff did not meet its obligation, or burden to establish the facts of the case of the legal Rules pleaded as causa petendi because, evidently, it did not demonstrate the referred recklessness, fraud or gross negligence in the defendant's conduct when opposing the registration of the trademark requested by the

plaintiffs before the courts of free competition because it did not evidence that they had committed excesses beyond the exercise of rights that the law itself allows in this type of cases."

Do you see that, Mr. Lee?

A. Yes.

Q. And then, please, can we turn to the next document at Tab 28, which is Muresa's Cassation Recourse Petition. And, in your Second Report, Mr. Lee, you explained that the Cassation Recourse Petition gives rise to a two-stage process, don't you? So, you say, I think at 24, "For the purpose of resolving the Cassation Recourse, the Supreme Court must examine each and every point submitted in the Cassation Recourse, and issue a ruling as to whether the second instance court judgment did violate each of the substantive rules of law cited by the charging Party as having been violated."

And, then, in your Report, you note that the Supreme Court found that the second instance court judgment did violate each of those rules of law as alleged. And on that basis then the Supreme Court

revoked the second instance judgment and effectively issued a replacement.

And, Muresa brought the Cassation Recourse on two grounds, two causes or arguments as to why the judgment of the First Superior Court violated substantive rules of law, and it was only the first of those causes that succeeded, so let's look at that one, and that's at the bottom of Page 1 of the Petition. And, it says: First cause, breach of substantive rules of law by error of fact as to the existence of the evidence which has substantially influenced the operative provisions of the appealed resolution. And, that's under Article 1169 of the Judicial Code which is cited there.

And, the ground, then, of error of fact as to the existence of evidence, that means, doesn't it, that the lower court had mistakenly believed that evidence did exist when it did not, or it mistakenly believed that evidence did not exist, when it did exist. That's the effect of this ground, isn't it?

A. Your understanding is incorrect. I agree with the explanation that former Justice Arjona gave

this morning as regards how the ground of error of fact as to the existence of the evidence might occur. There could be two possibilities. In the Judgment on appeal, something that is not in the record was considered to be evidence or, inversely, something that is in the record, was ignored. The formulation, the formula that the Civil Chamber of the Supreme Court of Justice has used in this second case is that the judgment on appeal has skipped over, missed or ignored in its analysis, some evidence. It's not that it has said that it doesn't exist. No. It's that the evidence being there, it has ignored it in its reasoning or in its--the analysis behind its Decision.

So, I repeat: The formula is ignoring or skipping over, which is not the same as declaring that it does not exist.

Q. Could we then look at Article 1169 of the Judicial Code, which sets out the relevant provision, and that is R-0138, and it's on Page 27 of the English. Do you have that, Mr. Lee?

A. Yes.

Q. And it says, doesn't it, that, "Cassation

Recourse on the merits takes place with regards to the resolutions referred to in Article 1164 when there are grounds to determine the infringement of substantive rules of law by any of the following concepts." And, then, it lists a number of different concepts or grounds; that's right, isn't it?

A. There are five grounds for the infraction or five infractions.

Q. And, the second one here is stated as "misapplication or misinterpretation of the rule of law."

Now, it's that ground, isn't it, that establishes the basis for a Cassation Recourse in relation to circumstances where the Court knew that evidence exists--existed but ignored it, and that stands in contrast to the next one, which is error of fact about the existence of the evidence.

So, there's a distinction, isn't there, between "misinterpretation" on the one hand and "existence," and that's the distinction, isn't it?

A. That's incorrect. Let me explain.

The ground of error of fact as to the

existence of evidence is an evidentiary ground. It refers to the evidence. The ground that you mentioned regarding erroneous interpretation, has to do with an error or mistake, when the Court on appeal applied a rule giving it a meaning or scope different from that which it has, and it is a ground that is not evidentiary in nature, so they are two things that are totally different and unrelated, erroneous interpretation of the provision is an operation that has nothing to do with factual matters. It is entirely legal. What does this provision mean? And invoking this ground means that the appellant is accusing the Judgment on appeal as having applied a provision, a legal provision, but attributing to it some meaning that it doesn't have.

Now, the ground of error of fact as to the existence of the evidence is a ground having to do with a fact, with something in evidence, and I already explained what it entails. Either one rules on the basis on evidence that is not in the record, or one skips over in the analysis that leads to the decision an element of evidence that is in the record.

Q. Mr. Lee, that can't be right, can it because, if you look at the fifth ground, that relates to appreciation of the evidence, so the fifth ground there relates to circumstances where the Court actually has not made a mistake about the existence of evidence, but the Court knows that the evidence exists, but it's made a mistake about the appreciation of it because it's either ignored it or because it's misunderstood it or misinterpreted it, so, therefore, the distinction that you're making is as between the fourth and the fifth grounds, isn't it?

A. No. The thing is that you formulated your prior question in relation to the second ground, which is erroneous interpretation or misinterpretation. Now, you're asking me something totally different. You're asking me about the fourth and the fifth. The fourth is error of fact as to the existence of the evidence. That is the ground that was invoked in the Muresa case, and the Cassation Judgment recognized it. What you are asking me now is something which is totally distinct, and that is the fifth ground, which is error of law in weighing the evidence, and error of

law in weighing the evidence has nothing to do with misinterpretation. It has to do with the evidentiary value. I believe that I explained it this morning.

There is a document, and the Judge or--excuse me, the Appellate Court looks at the document and says "this document seems to me to be clear, precise, compelling and, for me, it has full evidentiary value". And because of that, based on this document, I will rule as follows.

Now, the error of law in appreciation has to do with the weight of the evidence, having attributed a different weight, and what the appellant would say is the Appellate Court violated this ground because it attributed full value to the document, but it so happens that that document has no value.

It was given a mistaken value. I could cite one example that might be typical. There is an expert report. And I think this is a good example. There is an expert report. The judge--it says one thing, and the Court on appeal says this Report seems credible. I find it convincing and, therefore, I attribute to it value as full evidence.

Now, the appellant on cassation who invokes this ground of error of law would say, "Your Honor, this document, or distinguished Members of the Court of Cassation, this document to which you attributed full value as evidence does not have full value as evidence, first of all, because the Experts were not competent.

Second, because the document is not based on scientific principles, but, rather, it is dogmatic, dogmatic in the sense that the Expert states a conclusion, and doesn't support it.

So, that is the ground of law in appreciation of the evidence that did not come up in this case. In this case, the circumstances, from what I read, did not call into question that none of the documents was given evidentiary weight that it should not have. Rather, the Motion for Cassation, what it says in its six motives is that the Judgment on appeal on engaging in the analysis of the Decision did not take account of those elements, the Foley letter, the Decision of the Superior Court that accepted the abandonment or the withdrawal, and the Expert Reports of the Experts

De León, Aguilar, and the Witness Statements are there. But it had nothing to do, I'm sure, with evidentiary value or mistaken evidentiary weight.

Q. Mr. Lee, if a court looks at a piece of evidence, and attributes no weight to it because it considers that it's not relevant or for whatever reason it attributes no weight to it, but actually the appellant believes that a lot of weight should have been attributed to it, in those circumstances, it might be said that the lower court had ignored the evidence, if it ignored a particular document because it considered--it recognized the document, it recognized that the evidence existed, but it put no weight on that document, and this ground, the rule of law in terms of the appreciation of the said evidence would apply, wouldn't it, because--because--because the Court would have, in that instance, have been said to put the wrong weight on it; i.e., it would have recognized the evidence, but it would have attached no weight to it, and, therefore, that's the problem in terms of the rule of law in terms of the appreciation of the evidence, isn't it?

A. Your understanding is mistaken. When evidence is erroneously weighed, whether it be testimonial evidence, documentary evidence, expert witness evidence, and it is assigned to it the incorrect evidentiary weight, that does not mean that you ignore the evidence. If you ignore a piece of evidence, you cannot weigh that piece of evidence. Those two things are incompatible. If the Appellate Court looks at a piece of evidence on file, it looks at it, it mentions that piece of evidence in its judgment, but when analyzing that piece of evidence, it ignores it. That means, by definition, that it could not have weighed that evidence because it ignored it.

Now, if it attached to it an incorrect weight, this means that it did take it into account. In the case of Muresa, or in the Muresa case, rather, at cassation, it was not alleged that there was a case in which the evidence included in the Motion for Cassation, the Superior Court attached to them incorrect values. Apparently, they were ignored only when conducting the analysis for decision-making

purposes.

So, in conclusion, in the Muresa case, we were looking at the fourth ground, and not the second or the fifth.

PRESIDENT PHILLIPS: Mr. Williams, I'm sure you've observed the reasons that are the grounds for the cause; every single one refers to "ignoring," "ignoring," "ignoring." And by reason of ignoring, gave ground or produced that ground of appeal.

MR. WILLIAMS: Yes, yes, Mr. President. Absolutely. The point that we make is that the ground on which Muresa relied for its Cassation Recourse was that there was an error of fact about the existence of evidence, not, we say, that there was a mistake about the weight that was put on the evidence, and we say that the fifth ground at 1169 concerns circumstances where there was no error of fact about the existence of the evidence. The Court recognized that the evidence existed. The Court decided to attach no weight to that evidence. And we say that that falls within the fifth ground.

Now, this is a relevant issue, we say,

because, in looking at the decisions that the Court made as to in terms of assessing those decisions, one needs to look at it by reference to the ground that Muresa relied on. And one can look at it--that we say on any view, of course, there was no error of fact about the existence of evidence, and, equally, one could look at it in terms of the fifth ground that, of course, there was no, we say, misappreciation of the evidence in terms of weight. But the point is that Muresa relied on the fourth ground, and the Court made its Decision specifically on the basis of the fourth ground.

And what you can't do now is say, well, actually, perhaps the Court and Muresa should have relied on the fifth ground, and perhaps the Court should have found it on the basis of the fifth ground because that's not what was done, so that's where we drive at with this.

PRESIDENT PHILLIPS: Yes, what I was trying to point out is that although Muresa expressly relied upon the fourth ground, they seem to have been entirely ad item with Mr. Lee that in order to make

that challenge good, all they had to show was that, and I quote from the first of the reasons, "by not taking this important evidence of the process into consideration, the First Superior Court made an error of fact on the existence of the evidence," equating the two, and that says throughout their challenge.

MR. WILLIAMS: I mean, we say that the approach that the Supreme Court took went wrong in numerous ways, as you know, and the use of the phrase "ignoring" in the Supreme Court Judgment we say is not really apposite.

But in looking at how bad a mistake, we say that the Supreme Court made, it is--the starting point is to understand the ground and the nature of that ground the Supreme Court was seeking to apply.

BY MR. WILLIAMS:

Q. So, I think, at this stage, it would be helpful just to run through them, the analysis of those Cassation Recourse grounds, and, again, you've seen the table, the exhibit--sorry, the Demonstrative Number 4 that was used yesterday, and we will give you now a Spanish version of that demonstrative.

So, Mr. Lee, you're familiar with this table because it was circulated yesterday, and you saw it yesterday, I think; is that right?

A. Yes.

Q. And so you know where I'm going with this. The first column, as you know, lists--sets out what the Supreme Court's findings were in relation to each motive, and then the second column sets out what the First Superior Court said in their judgment.

Do you see that in the table?

A. (In English) Yes, yes, I do.

(In Spanish) Yes.

Q. And, so, the first finding by the First Superior Court in relation to Motive 1 concerns the Foley & Lardner letter, and the finding there is that the First Superior Court totally ignored the Foley letter.

Do you see that?

A. That's right.

Q. And we've set out in the second column there, then, what the First Superior Court said, and each time they mentioned the Foley & Lardner letter, and as

you can see, they mention it on five different occasions and describe it in some detail.

It's not right, is it, that the First Superior Court totally ignored the Foley letter, is it?

A. As I explained this morning, and, again, as I stated this afternoon, the formula applied by the Civil Chamber throughout the decades to explain this motive of error of law as to the existence of the evidence is that the evidence was ignored, or was not taken into account when conducting the decision-making exercise. The fact that they mentioned this piece of evidence does not mean that it was taken into account. What it means here is that they knew it existed, that they saw it. This does not mean that it failed to take it into account.

The grounds come about when at the time the judge conducts an analysis of the evidence, well, what is it that the Court takes into account and what is it that it doesn't take into account to weigh the evidence? Here, they talked about totally ignored. I don't know why they say "totally." This is something

that shouldn't be there. It's whether it ignored or did not take into account the piece of evidence, and that was the opinion the Supreme Court of Justice, and I understand that these things can be debatable, but I don't think that this is something shocking or arbitrary or that it creates a situation of denial of justice.

Just to be clear, again, the fact that the appellate judgment mentions the piece of evidence does not mean that that piece of evidence was taken into account when conducting a decision-making analysis.

Q. But on the plain words of 1169, error of fact about the existence of the evidence, I mean, that is an error as to the existence, as to whether evidence exists. It's not by reference to weight or by appreciation. The plain words say: "error of fact about the existence." That's right, isn't it?

A. Again, your question involves an aspect that's completely foreign to this ground. You, again, made reference to the weighing of the evidence. That is the fifth ground, and I did not mention anything in connection with the weighing of the evidence. I said

that the Supreme Court of Justice in the Civil Chamber, throughout decades, has said that this ground comes about when the Appellate Court does not take into account a piece of evidence that was in the file to make a decision and not to attach probative value to it. It's not that it took into account the piece of evidence. If it had taken the piece of evidence into account, it would have weighed the evidence correctly or incorrectly, and then the fifth ground would come into play.

I'm going to make an effort to try to state this briefly. A Motion for Cassation is a way to bring about a challenge, and this is common in civil law-codified jurisdictions. This started in France at the end of the 18th Century. The only purpose of it was to ensure that judges applied the law in a consistent manner. This was then disseminated to all of the civil law-codified countries under the Code of Napoleon. Each country that incorporated into its legal system this special legal concept, it is not known in the common law, and this legal concept is cassation, well, each of these countries evolved in

connection with cassation. For example, the cassation remedy in Panama comes from Colombia, and I assume Colombia took it from France. And then France, Colombia, and Panama developed their cassation remedy in a different manner because a cassation remedy is very technical, is very formalistic.

It is quite ritual. It's like a mass, if you will. It's a legal concept, it is very formalistic, it is very difficult to handle, and it evolved not on the basis of the provisions of the Judicial Code, but rather it is based on case law where the Supreme Court said, "Okay, this ground means this" or "this ground is to be interpreted in such a manner." It's not like you're saying, Mr. Williams, where the ground means, or, at least, I think that's how you understand it, that error of fact in connection with existence of the evidence means in this case that the Appellate Court, in order to have made a mistake, should have declared that the piece of evidence was nexistent--or non-existent.

As I explained today--and as I'm explaining now--the formula used by the Supreme Court to explain

this ground is that a piece of evidence was ignored or not taken into account at the time when the Decision was made; that is to say, it was set aside. And those were the six motives that were given in the cassation remedy. The Cassation Court is obligated to look into each motive. And that is the reasoning of the Judgment. When Mr. Arjona says in his Report that the Cassation Judgment of the Supreme Court of Justice is not mistaken, that opinion is technically incorrect because the analysis of each one of the motives brings about the reasoning. An explanation is given as to why each of these motives is recognized.

I think what they're doing here is to show the six motives, and then on the second column of this CD talks about the portions of the Judgment on appeal that is deemed, and the evidence that is deemed ignored. This does not mean that the Supreme Court made an error in judgment, a judicial error, when deciding that a piece of evidence had been ignored. And as I explained, the fact that, in the Judgment, an appeal, a piece of evidence is mentioned does not mean that this ground error of fact in the existence of the

evidence was non-existent. This has nothing to do with the weighing of the evidence.

Q. So, really, Mr. Lee, what we're saying is that the word "existence" that we read there in 1169 is not really how this provision is interpreted. And instead, it should use a different word, perhaps the word "ignoring" or a word to that effect; is that right?

A. Now, this is a matter of interpretation. What is the legal meaning of this contract,[33] of this phrase? "Error of evidence, error of fact in the existence or inexistence of the evidence"? In Panama, one becomes fluent on cassation matters when one reads the opinions of the First Chamber of the Supreme Court and sees how it interprets and substantiates a cassation remedy.

As I said, for many decades, at least for the past 40 years that I have been a lawyer, the Court has said that the fourth ground is created when a piece of evidence is ignored or not taken into account for

[33] The Spanish-language version of this phrase says "[e]s un asunto de cuál es el significado jurídico de la construcción del sintagma." *See* Spanish Transcript for Day 2 at 223:16-18.

decision-making purposes. The answer to your question is not that the provision is ill structured or incorrectly structured. One has to wonder what the meaning of this construct is, and the meaning has been given to us by the Supreme Court.

Q. And you mentioned, Mr. Lee, decades and decades of case law on this issue, and you don't cite any of that case law in your Report, do you?

A. Obviously, I do not.

The question that you're asking me about the meaning of this construct, error of fact, as to the existence of the evidence, and the interpretation that you attach to it, and the confusion that exists because of the mix up of this with Ground 5, that was not in your Memorial, I think, and when I examined this, I focused on providing my opinion on the fundamental aspects of the Memorial prepared by Bridgestone for this arbitration, and I focused on the main ideas put forth in Mr. Arjona's Report.
I would like to summarize, in the Memorial, they said that the Supreme Court Judgment is arbitrary, and it violates due process. And in the Report of

Mr. Arjona, it said that this judgment is inconsistent, it violates res judicata, and the--and that the Foley letter was not validly included.

So, this issue that you're putting to me now, well, it was impossible for me to touch upon this because I do not recall whether this was dealt with. If it was there, I didn't realize then.

Q. Mr. Lee, so, are you able, then, to identify the leading case which establishes this case law that you mentioned that has been continuing for decades? What is the leading Panamanian case that establishes the practice that you have been describing?

A. Panama has a civil system that is coded. It is not a common law, we do not have leading cases. The concept of leading does not exist in civil case countries. I may have understood wrong what you said that--

Q. You said case law, Mr. Lee?

A. In Panama, I think that former Judge Arjona clearly explained this. There is no precedent-based system, and if the Supreme Court hands down three decisions in a uniform fashion, that creates probable

doctrine, which is not binding, which is not mandatory. I think that, in my First Report I mentioned that, given that assumption, the criterion that is used by the Court is persuasive. That is the expression that I used because I didn't want to say that it is a probable doctrine that when translated into English, might be a little bit difficult to understand. But when you're asking me to identify a leading case that is impossible in our system, there is no leading case. That concept is completely foreign--

Q. Mr. Lee, could you identify any case, any case, please, where the interpretation of 1169 for which you are contending has been adopted by the Supreme Court?

A. I don't know this by heart, but if you allow me to have two hours, I can call my office, and I can ask them to look in the various books, and I can give you several, but I do not have any information here, so I am not a jukebox, I don't know all of this, but I cannot produce it right now. I don't know it by heart.

Q. This is a practice which has been going on for decades and decades, you can't think of a Supreme Court--because, presumably, every single Supreme Court Decision on a Cassation Recourse on this ground is going to adopt the formulation for which you contend, isn't it? Every single decision.

A. They will use that approach, but you're asking me to point out one case. In the common-law system, based on my restricted understanding of that system, cases are identified based on the name of the Parties, but that is not the case in Panama. In Panama, the judgments are identified with a date. And every year, as I stated in my Report, the Civil Chamber issues 400-500 decisions a year, and there is no way for someone to recall by heart a date.

For example, this case in Panama would not be known as the Muresa Case or Bridgestone versus Muresa. It would be the Judgment of May 28th, 2014, so we need to look for it. And as the former Judge Arjona said this morning, and I already stated in my Second Report, this case--this case--this Muresa Case was not even published in the Digital Judicial Registry of the

Court, so my answer is "no." Right now I cannot show you, at this point in time, that criterion because it is impossible to do this by heart. But once again, I can produce it, if I have the opportunity to search my own library, but there are. And you don't need to believe me. There are cases.

Q. As you sit here at the moment, you're unable to identify a decision that supports your view at the moment, as you sit there?

A. No attorney in Panama--no attorney in Panama would be able to do so. I don't know of anyone who has such an ability to memorize this information.

Q. Can we turn, then, to the Supreme Court Judgment itself, which is at Tab 30, which is at R-0034. And in the English, if we turn to the bottom of Page 15--do you have that, Mr. Lee?

A. (In English) In Spanish?

Q. It's at Page 19 of the Spanish.

A. (In Spanish) Yes.

Q. And do you see there at the bottom of the page it sets out some findings in relation to the famous "Foley letter," and it says the Appellants

complained in the present Cassation Recourse, and the contents of and it gives a reference to show it, that the plaintiffs' legal representatives stated in an intimidating manner that Opposition Proceedings were going to be filed in various countries against the registration of the RIVERSTONE brand, tire brand. And they also added without any legal basis, at least under Panamanian Law, that the plaintiffs should abstain from selling the product. This is an obviously intimidating and reckless conduct.

Do you see that, Mr. Lee?

A. I'm reading it.

(Witness reviews document.)

A. Yes.

Q. And then let's just compare that with the letter itself, and you will find the letter at Tab 33 of the same bundle, and that's reference C-0013.

A. I got it.

Q. So, you see that the letter is dated November 3, 2004, Mr. Lee?

A. That's correct.

Q. So, that's sent six months before the BSLS

commenced its trademark opposition action, isn't it? They commenced the action on 5 April 2005.

A. If you say so.

Q. And the letter is sent in the context of a successful opposition action in the U.S. by BFS Brands and Bridgestone/Firestone North American Tire, LLC to a trademark application by L.V. International, isn't it?

A. That's from the documents that I analyzed, yes.

Q. And you can see that from the heading. It's got the heading there of a case.

A. Correct.

Q. And the letter sent by a U.S. law firm called Foley & Lardner, and it's sent on behalf of their clients, isn't it?

A. That's clear.

Q. And their clients, then, are BFS Brands and you can see that from the heading "BFS Brands, LLC and it's Bridgestone/Firestone North American Tire, isn't it?

A. That's correct.

Q. And there is no mention in this letter, is there, of BSLS or BSJ, is there?

A. I think that that is wrong.

In spite of the fact that the reference in this letter is to BSLS Brands, the text of the letter leads you to understand that Foley or it clearly shows that Foley is acting on behalf of Bridgestone/Firestone, and that is what we see in the second paragraph whereby it states (in English) "that Bridgestone/Firestone objects not only to any registration of RIVERSTONE mark for tires by your clients, but also to any use of the market."

Clearly, Foley is talking on behalf of Firestone, and I think that we see the same in the third paragraph because they're introducing a warning--let me see. In the third paragraph, (in English) "Bridgestone/Firestone objects to and does not condone the use of registration anywhere in the world of the mark RIVERSTONE for tires sold."

So, the meaning of a text of a document is not derived from the title, the heading, rather from the message, and the message I understand is that

Foley is speaking on behalf of Bridgestone Corporation rather than BSLS, which is just a mere reference.

Q. So, my question to you, was that there's no suggestion that the letter being sent on behalf of BSLS and BSJ, and I think in your answer what you're saying is that you think that the letter is being sent on behalf of BSJ but not BSLS; is that right?

A. The reading of this document is a message from Bridgestone/Firestone. I don't know who Foley was representing. I do not know--I did not participate directly in these circumstances. I reviewed the documents on file for the Civil Proceeding. The Civil Proceeding in Panama. But once again, any person who reads this understands that this is a message from Bridgestone/Firestone, and maybe from BSLS Brands, but the message is a message stating that Bridgestone/Firestone objects to the use of tires with the Firestone--rather, RIVERSTONE brand.

Q. On what basis, then, do you consider that that means that the letter was sent on behalf of BSLS, which is a specific corporate entity, isn't it?

A. I understand, or I recall that, once again, I

did not focus on that. I read the file as it was given to me. And once again, for my analysis, I focused on the Foley letter, clearly, but one could say that if this letter was sent as a result of proceeding in that Foley--I don't recall if Foley was representing BSLS Brands or something, so one may say that this letter was sent by Foley on behalf of BSLS Brands, but the letter text is a message from Bridgestone/Firestone.

If I read it again without the previous context, and I received it and read it first-hand without any background, I would understand that this is a message from Bridgestone/Firestone.

Q. And, so far as you're concerned, the words "Bridgestone/Firestone," that's shorthand, is it, for BSLS and BSJ; is that your view?

A. I'm not aware--I'm not aware of the structure of the Bridgestone group, and I know as part of general information, but not as a result of this proceeding, that the parent company is Bridgestone Corporation, as I may be wrong. So--and this is my own personal knowledge: Whenever I see that a message

is referring to Bridgestone/Firestone, I would understand that, I would link this necessarily with the parent company and with the rest of the group, which once again I don't know how it is internationally structured.

Q. So there is no concrete basis, then, for any view that this is sent on behalf of BSLS, it's a speculation that perhaps Foley might be acting for other companies; is that right?

A. I have no way of knowing that. Those who were part of the process would be aware of this. This aspect regarding which you're asking me questions is something that is unknown to me because it was not the subject of my Report.

Q. So, can we just flip back for a moment to the Supreme Court Judgment, the paragraph we were looking at a moment ago, which is Tab 30, R-0034, Page 15 in the English and Page 19 in the Spanish, and there the Supreme Court has found that the plaintiffs' legal representatives.

Now, this is--the Supreme Court, of course, is looking at this in the context of the Muresa

litigation, so the Supreme Court have--seem to have made a bit of a mistake here, when they say "the plaintiffs' legal representatives," they mean Muresa's legal representatives, but that can't mean that's Muresa's legal representatives?

A. I'm sorry, but I am lost.

Q. So, it's Tab 30.

A. I am there.

Q. So, it's a paragraph we were looking at earlier, and it says the "appellants complained"--the appellants being Muresa, the "appellants complained in present Cassation Recourse, that the plaintiffs' legal representatives stated," so who were the plaintiffs? Who are the plaintiffs here?

A. It is clear that this is a mistake, that this is a lapse. This was a mistake, but it is obvious that this was a mistake. This is a lapse, but it is understood, as you just mentioned, that this is repairing--that this is referring to the Respondent.

Q. I mean, I think that must be right, and you can see at the bottom of that paragraph in the sentence, they also added without any legal basis, at

least under Panamanian Law, that the plaintiffs should obtain from selling a product, and that must mean Muresa, mustn't it?

A. It is obvious when one reads something that this was a lapse, that is this happens. I know at least in my case because of my age, but this is something that happens to me frequently, but it is understood. As you properly said, it doesn't make any sense to be referring to plaintiffs, to Claimants, if they clearly wanted to refer to the Respondent, and I don't think this is a typo. It doesn't seem to be a typo, it seems to be just a mistake. I'm writing something, I wanted to say one thing, but I put something else, but it is understood. It is understood.

Q. So, then, if the Supreme Court ends up finding that it was BSLS and BSJ's legal representatives, they're making a finding of fact that Foley & Lardner sent the letter and that Foley & Lardner were the legal representatives of BSLS and BSJ, so that's a finding of fact that the Supreme Court has made, and there is no basis for that other

than speculation, is there?

A. I assume that it was taken as an assumption, and I will explain. Clearly, only the Judge that drafted this knows what he was thinking, but the way--the reasoning is explained, at least in the Civil Chamber, is that one looks at the basic facts in search for the evidence, and also trying to determine those proven facts, and there are some other facts that seem to be obvious and that are not questioned and which were not under discussion. And one takes them as certain; that is, the system that we call "critical Chamber," the system of the critical Chamber in the evidentiary analysis implies that the Judge, any judge, may resort to the rules of logic and resorts to experience.

So, if there is something that seems to be obvious and which has not been questioned, is taken as good. Whenever it is a fact that is a controversial fact, it needs to be proven.

As I recall, because that was not the focus of my analysis, as I recall, there is no--there was no dispute as to who Foley was representing. It might be

that there was a dispute, but I do not recall that.

But I would assume that whenever there is a letter, I read the letter, and what I see in the text would be taken as something good. And also based on my understanding mainly, if there is no discussion regarding that peripheral or secondary fact, because I think that you're asking me about Foley, and who they represented. I don't know.

Q. And could you, then, just turn back within the Supreme Court Judgment at Tab 30 to Page 4 on the English, which is the page with the heading "Cassation Recourse" on it.

Do you see that?

A. (In English) I have it.

(In Spanish) I have it.

Q. And there the Court sets out, it quotes Muresa's own motives for the Cassation Recourse, and the first motive of Muresa states that this letter--and I'll read the relevant part. It says: "Where counsel for transnational BFS Brands, LLC, threatened and warned L.V. International Inc."

Now--so Muresa, which is the Appellant in

these proceedings before the Supreme Court, Muresa has expressly told the Supreme Court that Foley & Lardner were counsel for transnational BFS Brands. And you indicated earlier that it was open to the Supreme Court to make a finding of fact in the event that there was no dispute or if matters appeared to be obvious to it.

But here, you've here the Party, and, indeed, the Parties whose evidence the Supreme Court has accepted in its entirety, that Party, Muresa, is telling the Supreme Court that Foley & Lardner were counsel for transnational BFS Brands. It does not say, as the Supreme Court found, they were BSLS and BSJ's legal representatives, does it?

That's correct, isn't it?

A. What you're saying is correct as to the fact that this text is a literal transcription of the "Cassation Recourse."

Q. And the letter, as Muresa says, has threatened and warned L.V. International, didn't it. So the assertion that Muresa makes is it was a threat and a warning to L.V. International. It was not,

therefore, on Muresa's case, a threat and a warning to Muresa, was it?

A. The text of the Foley letter--could you find it for me?

Q. The Foley letter is at Tab 33, C-0013.

A. The text of the Foley letter is directed to an attorney Jesús Sanchelima, in reference to litigation BFS Brands v. L.V. International. But the message has to do with, I believe--I think it's evident--with the issue of the sale of tires with the BRIDGESTONE trademark.

Now, if you're asking me what is the relationship such that the Supreme Court has considered that this document provides support for determining responsibility or liability of Bridgestone Corporation and Bridgestone Licensing Services against Muresa, I would tell you--because I believe I saw it-- the effect of that was that the sale of RIVERSTONE mark tires, which are the basis of the damages, diminished considerably. L.V. International was--I don't know now--a distributor of RIVERSTONE tires.

So, it seems to me that if what you're asking me is whether the text of the Foley letter, which I said and I maintained that it seems to me that it is a message from Bridgestone/Firestone to L.V., does it support or not or is it the basis for the Decision of the Supreme Court of Justice, my answer is "yes" because one could reasonably interpret it as the cause of the diminution in the sales of RIVERSTONE tires of L.V. International, which was a distributor of the RIVERSTONE tires, if that is your question.

Q. Well, my question was that on Muresa's own case, this threatened and warned L.V. International; and, therefore, the question I put to you was that, therefore, it did not threaten and warn Muresa. That was my question.

And if you look at the Foley letter, as you say, it's directed to attorneys acting in the U.S. for L.V. International. I don't think that there is any suggestion that those attorneys were acting for Muresa.

And the last paragraph of the letter halfway down, it's specific to "you and your client should

know," so it's very specific that this relates to L.V. International and its attorneys in the U.S.

How can you consider that this is a threat directed to Muresa, please?

A. If what you're asking me is to get into the Head of the Justices who drafted the Decision and constituted the Majority in this case, I would say that it seems obvious to me, because even though the note is directed to an attorney, another attorney, regarding, my understanding, the outcome of a lawsuit in the United States, the last part, as I recall, of the Foley letter, even though as you just said, it occurred in the context of a situation that occurred in the territory of the United States of America, the Foley letter goes beyond that and says textually--and I quote (in English): "You and your client should know that Bridgestone/Firestone objects to and does not condone the use of registration anywhere in the world of the mark RIVERSTONE for tires."

(In Spanish) That is obviously a threat. I would understand it as such. If I were the Judge writing for the Court, I would understand the threat

not only to L.V. International and the Tire Group and Muresa. It seems to me if I were doing the analysis on behalf of the Supreme Court, which is what I believe you're asking me to do, is that this would be the immediate cause of the diminution in sales of the RIVERSTONE tire by Muresa, the Tire Group, and its distributor L.V. International.

So, I think it could reasonably be used to support a decision along the lines as the Supreme Court of Panama did in the Judgment of cassation of 28 May 2014.

Q. So, the Supreme Court reasonably could find that a letter, which is not written on behalf of BSLS or BSJ and is not sent to Muresa or directed to them, could give rise to--or could be said to amount to reckless conduct by BSLS and BSJ, giving rise to liability. That's your view?

A. Yes, of course. When one acts through a strawman or through a proxy, it is one who is acting. When one acts through an agent, it is one who is acting.

Q. That's speculation, isn't it?

A. It's not the formal aspect of a document that describes the true nature of an act. The Act is the Act. It's not how it is made to look.

Q. And just looking, then, further at what the Supreme Court found about this letter, so going back, again, to the paragraph we were looking at before in the Supreme Court Judgment, which is on Page 15 of the English, the Judgment found that the plaintiffs' legal representatives--and we think, don't we, that means BSLS and BSJ's legal representatives, and then it says: "Stated in an intimidating manner that Opposition Proceedings were going to be filed in various countries against the registration of the RIVERSTONE tire brand."

So, that's the--that's another finding of fact that the Supreme Court has made here.

A. Could you tell me the page number in Spanish, please?

Q. Sorry. Yes.

We've looked at it lots of times. It's Page 19 on the Spanish, and the part--and it's the same paragraph we've looked at. And it says that:

"The plaintiffs' legal representatives stated in an intimidating manner, Opposition Proceedings were going to be filed in various countries against the registration of the RIVERSTONE tire brand."

That's what it says, isn't it?

A. The Judgment, yes, of course.

Q. And that's simply wrong, isn't it? That's not what the letter says.

Let's have another look at the letter.

A. I don't need to look at it again.

Let's see.

Your assertion or conclusion that that is simply wrong is not correct. The thing is, when one understands a document, there's no need to transcribe it literally.

What I recall, what strikes me about the Foley letter, is that if you keep selling, (in English) "you do it at your own peril," (in Spanish) or something like that, that is what I understand as giving rise to an understanding that in an intimidating manner, they said they would file Opposition Proceedings in several countries against

registration of the RIVERSTONE tire brand. Because it seems to me that the text of the Foley letter is categorical, and it meets, I believe, the purpose for which it was written. It was written with a message with an extremely clear text, and I will then understand it, and I will say it as I understand it.

But I have never seen, when I'm going to explain something, that another person comes to tell me, "I will transcribe it textually," and with quotes.

Q. Well, let's look at what it says.

So the factual finding--the Supreme Court made a finding of fact, and the finding of fact in this regard was that BSLS and BSJ's legal representatives stated, and I'm quoting, "that Opposition Proceedings were going to be filed in various countries against the registration of the RIVERSTONE brand."

Now, the letter simply does not say that, does it? The letter says: "Without undertaking a country-by-country analysis at this time, and without making any specific demand at this time directed to use of the RIVERSTONE mark in any particular foreign

country, you and your client should know that Bridgestone/Firestone objects to and does not condone the use or registration anywhere in the world of the mark RIVERSTONE for tires."

That does not say that Opposition Proceedings were going to be filed in various countries against the registration of the RIVERSTONE brand.

It does say that, does it?

A. It doesn't say it literally, but if you're asking me to get into the head of Muresa, I assume that Mr. Sanchelima--I assume that Mr. Sanchelima forwarded that letter to his client, L.V. I assume that L.V. would forward it to Muresa.

And if the specific action within which this letter was sent, this threat, this proposition that Bridgestone/Firestone objects to the use of the RIVERSTONE mark in any country of the world, and that if it is used, it does so at its own peril, quite frankly, I would understand that that means that if I'm Muresa, they're going to do the same thing as they did to me in the United States of America: Force me to enter litigation, and to be sued, and to put up

with the weight and the cost--or to bear the cost and the weight of litigation against Bridgestone Corporation in every country worldwide.

That's how I would understand it. It seems to me that it is a question of simple common sense.

I repeat: In Panama, analyses are done where the training of lawyers in Panama is done with many standards, legal standards. And one of these is known as "la sana critica," or "healthy criticism." It means that in order to understand something, to weigh evidence, one makes use of what is called "maximum experience."

"Maximum experience" means draw on one's own experience or knowledge that one has picked up in day-to-day life in the way one reasons.

If, in the United States, Bridgestone Corporation filed an Opposition Proceeding and subjected L.V. International to a proceeding, very costly, I imagine, and then in the letter, the Foley letter, they tell the lawyer for L.V., which, as I understand, is a distributor of the RIVERSTONE tire, of whose brand Muresa is the owner, what I would

understand is that if I continue to sell RIVERSTONE tires anywhere in the world, the same thing is going to happen to me as happened in the United States of America, land that is the basis or the conclusion that is reached by the Supreme Court.

And look, seldom have I seen, when a court drafts a decision, a textual quote of the text that are in evidence. It's not that it's never done--sometimes it is done, particularly in the case of a witness statement. When a witness says--well, when part of a witness statement is particularly hard-hitting and compelling, it might be quoted, and put in quotes, but seldom have I seen that done when one explains the grounds or the reasoning for a judgment.

And in this case what was done was to say, what was the understanding of the Foley letter; and, in my view, it's absolutely correct. And if I put myself in the head of the Judge who was writing for the Court, I would have understood exactly this. And I would not have understood that that warning was directed solely to L.V. International. When they tell

me "in any country of the world," well, I understand that as being directed to all of those who market RIVERSTONE-brand tires. In other words, the entire group of companies and also Muresa Intertrade.

Q. And then going back to this paragraph we've been looking at in the Supreme Court Judgment, the next sentence reads: "They also added," so "they" being what is said to BSLS and BSJ's legal representatives, "They also added, without any legal basis, at least under Panamanian Law, that the plaintiffs should"--the "plaintiffs," so that's Muresa, "that Muresa should abstain from selling the product."

Now, the letter does not say, does it, that "Muresa should stop selling the product." It doesn't say that, does it?

A. I think it is simply a question of common sense. If I receive a communication from a law firm that tells me that I should refrain from using trademark for tires, what I'm being told is I should not sell.

Q. But the letter does not say that Muresa

should abstain from selling the product, does it?

A. Well, this takes us back to the same point. If the letter is directed in the name of Bridgestone/Firestone to L.V. International, which is Muresa's distributor, and it distributes RIVERSTONE tires in certain countries of the world, in certain countries, I don't remember at this time which ones, but doesn't tell them to refrain from selling in those countries, but rather what it says is "should refrain from using" (in English) "for use of the RIVERSTONE mark in other countries, please also take notice that Bridgestone/Firestone position that L.V. International should refrain from use of the RIVERSTONE mark for tires is not limited to the United States. You and your client should know that Bridgestone/Riverstone objects to and does not condone the use of registration anywhere in the world of the mark RIVERSTONE for tires."

(In Spanish) So the message is crystal-clear. What I'm saying is--I'm not telling this just to L.V. International. I'm telling this to everyone, when knowing that L.V. International is the

distributor of RIVERSTONE tires in certain countries. And if I tell you "don't register, don't use the mark in any country of the world," well, it seems to me that it's obvious that it is telling the Tire Group of Factories[34] not to sell tires because it's telling me "don't use the RIVERSTONE mark."

And the tire that I produce, I am marketing with the RIVERSTONE brand, well, what I'm being told, in other words, is "don't sell the RIVERSTONE tire."

And the message, even though it is formally directed at the recipient, the formal recipient is written as L.V. International. The ultimate recipient, it's clear, it appears to me to be clear, is the owner of the mark, who is the one who suffers the greatest--I think is the one who suffers the greatest damage because it's the owner of the mark.

Not only does the distributor suffer damages when a product is not sold or when its sales diminish, then all of the economic agencies who were involved in the chain of marketing all suffer, including the

[34] The Spanish-language version says "le está diciendo a The Tire Group of Factories y a Muresa…" *See* Spanish Transcript for Day 2 at 25:20-21.

manufacturer.

Q. So, in order for the Supreme Court to make a finding that the sending of this letter was obviously reckless conduct by BSLS and BSJ in breach of Panamanian Law, in truth, requires speculation and numerous jumps of logic in order for them to be attributed to this Act, which is said to have resulted in loss to Muresa, doesn't it?

A. Your characterization is absolutely incorrect. You're talking about speculation illogical aspects.

I haven't finished, I'm sorry.

The work of a judge in resolving a dispute issuing a decision on the merits is to reason, it is to carry out a mental operation; and that reasoning follows the logical rules, which are universal. The rules of logic are universal. They are abstract and universal. One draws on the maxims of experience, which are the lessons one takes from day-to-day life, and must rest on the technical knowledge that is properly established.

And that's not speculation. That's part of a

process, that reasoning that the trier or the judge engages in that cannot be characterized as speculation.

If there's a probative element, all of the evidence first has to be taken into account. It has to be analyzed. And subsequently, in a subsequent stage, it needs to be weighed. And after that--well, note, the mental operation of a judge is complex, but it is just one. And after the weighing comes--and I know this is a little bit strange for common-law practitioners, but then comes the stage of fitting the facts proven under the hypothetical of a legal provision. In legal language in the civil-law system this is called "subsuming," the facts proven are subsumed in a provision of law. That's not speculation. That is precisely the analytical work that is performed by a judge.

And I reiterate: It seems to me that the work done by the First Chamber of the Supreme Court of Justice in the Cassation Judgment of 28 May 2014 was done properly. It is in keeping with the technique of cassation, it is in keeping with the law, but it is in

keeping with, and it respects, the guarantees of due process, and it is reasonable.

Q. And--I'm conscious of the time--and this letter, which was sent in the U.S., to a recipient in the U.S., and, as we discussed about who sent it and who it was addressed to--on what basis does Panamanian Law apply to determine that this is a wrongful act?

So, what is the analysis by reference to Panamanian conflict-of-law rules to assess that Panamanian Law, and in particular Article 217, should apply in assessing whether this letter itself was an unlawful act?

A. The determination that had to be done and was done in this case was whether the Respondent companies, Bridgestone Corporation and Bridgestone Licensing Services, had engaged in reckless conduct or conduct characterized by bad faith related to the Opposition Proceeding to oppose the registration of the RIVERSTONE mark in Panama.

So that letter was an element for determining whether or not there was recklessness or bad faith, and the conclusion that there was. It's not that

Panamanian Law was applied to the letter. The letter was one of the elements that led the Supreme Court to conclude that there was intimidating conduct on the part of the Respondent companies that had impact on Muresa.

And if I put myself in the mind of the Judge who wrote the Decision for the Court, perhaps I would have understood to the extent that that letter warns that one should not make use of the RIVERSTONE mark in any country of the world; and that if it were to do so, one would run a risk, and the risk is clear. The risk is being subject to or to put up--or to have to bear the consequences of an overwhelming judicial action by a very well-known company worldwide that owns a very recognized trademark, widely recognized worldwide, perhaps I would have reached the same conclusion as the Civil Chamber of the Supreme Court of Justice reached.

MR. WILLIAMS: Mr. President, I think we should probably end for the day. I'm afraid we haven't quite finished with Mr. Lee.

PRESIDENT PHILLIPS: Very well. We shall

adjourn until 9:00 tomorrow.

Mr. Lee, you will have the pleasure of being forbidden to discuss this case over the adjournment.

(Whereupon, at 6:02 p.m., the Hearing was adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN