

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID ARB. No. ARB/16/34**

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

**Claimants**

**vs.**

**THE REPUBLIC OF PANAMA**

**Respondent**

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**MEMORIAL**

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11 May 2018

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<b>CLA-0062 (ENG)</b>	<i>Miller Brewing Co. v. Coy International Corp.</i> , 230 USPQ 675, 678 (TTAB 1986)	<i>Miller Brewing Co. v. Coy International Corp.</i>
<b>CLA-0063 (ENG)</b>	<i>United States Olympic Committee v. Bata Shoe Co.</i> , 225 USPQ 340, 342 (TTAB 1984)	<i>United States Olympic Committee v. Bata Shoe Co</i>
<b>CLA-0064 (ENG)</b>	<i>Bass Anglers Sportsman Society of America, Inc. v. Bass Pro Lures, Inc, and In re Communications Technology Corp.</i> , 182 USPQ 695, 696 (TTAB 1974)	<i>Bass Anglers Sportsman Society of America, Inc. v. Bass Pro Lures, Inc</i>
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<b>CLA-0111 (ENG)</b>	<i>Century 21 Real Estate Corp. v. Century Life of America</i> , 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)	<i>Century 21 Real Estate Corp. v. Century Life of America</i>
<b>CLA-0112 (ENG)</b>	<i>In re Viterra, Inc.</i> , 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)	<i>In re Viterra, Inc.</i>
<b>CLA-0113 (ENG)</b>	<i>Weider Publications, LLC v. D &amp; D Beauty Care Company, LLC</i> , 109 USPQ2d 1347 (TTAB 2014)	<i>Weider Publications, LLC v. D &amp; D Beauty Care Company, LLC</i>
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<b>CLA-0119 (ENG)</b>	<i>Vaudable v. Montmartre, Inc.</i> , 20 Misc. 2d 757 (NY Co. 1959)	<i>Vaudable v. Montmartre, Inc.</i>
<b>CLA-0120 (ENG)</b>	<i>Fiat Group Automobile S.p.A. v. ISM, Inc.</i> , 94 USPQ 2d 1111 (TTAB 2010)	<i>Fiat Group Automobile S.p.A. v. ISM, Inc.</i>
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<b>CLA-0126 (ENG)</b>	World Intellectual Property Organization, <i>Paris Convention for the Protection of Industrial Property</i> (as amended 28 September 1979)	Paris Convention
<b>CLA-0127 (ENG)</b>	<i>Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana, Inc.</i> , 98 USPQ 2d 1921 (TTAB 2011)	<i>Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana, Inc.</i>
<b>CLA-0128 (ENG)</b>	<i>In the Matter of Application No 2369557A citing Compass Publishing BV v Compass Logistics Ltd</i> [2004] RPC 41	<i>Compass Publishing BV v Compass Logistics Ltd</i>
<b>CLA-0129 (ENG)</b>	<i>Pioneer Hi-Bred Corn Company v Hy-Line Chicks Pty Ltd.</i> , [1978] 2NZLR 50 (CA)	<i>Pioneer Hi-Bred Corn Company v Hy-Line Chicks Pty Ltd</i>
<b>CLA-0130 (ENG)</b>	Report of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, World Intellectual Property Organization (SCT/16/4 September 1, 2006)	WIPO Report dated 1 September 2006

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Final Title	Full Citation	Short Description
<b>CLA-0048 (ENG)</b>	Thomas R. Varner, "An Economic Perspective on Patent Licensing Structure and Provisions", <i>Les Nouvelles</i> (March 2012)	Varner, "An Economic Perspective"
<b>CLA-0049 (ENG)</b>	Russ O'Haver and Brian Finnegan, "Estimating the Effects of Exclusivity and Geographic Market Characteristics on Royalty Rates: Some Preliminary Results," Ernst and Young, LLP (1996)	O'Haver and Finnegan, "Estimating the Effects of Exclusivity "
<b>CLA-0050 (ENG)</b>	"The Economic Impact of Trademark Counterfeiting and Infringement," International Trademark Association (INTA), (April 1998)	INTA, "The Economic Impact"

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<b>CLA-0051 (ENG)</b>	American Society of Appraisers (ASA), <i>Business Valuation Standards</i> (2009)	ASA, <i>Business Valuation Standards</i>
<b>CLA-0052 (ENG)</b>	Davidson Heath and Christopher Mace, “What’s a Brand Worth? Trademark Protection, Profits and Strategy.” October 20, 2017	Heath and Mace, "What's a Brand Worth?"
<b>CLA-0053 (ENG)</b>	IFRS 13 Fair Value Measurement International Financial Reporting Standard 13	IFRS 13 Fair Value Measurement
<b>CLA-0054 (ENG)</b>	Russell Parr, <i>Royalty Rates for Licensing Intellectual Property</i> . John Wiley & Sons, 2007, pp. 64-65	Parr, <i>Royalty Rates</i>
<b>CLA-0055 (ENG)</b>	Gordon V. Smith and Russell Parr. <i>Valuation of Intellectual Property and Intangible Assets</i> . Third Edition. John Wiley & Sons, 2000, p. 365	Smith and Parr, <i>Valuation of Intellectual Property</i>
<b>CLA-0056 (ENG)</b>	Gordon V Smith and Susan M. Richey, <i>Trademark Valuation: A Tool for Brand Management</i> . Second Edition, John Wiley & Sons, 2013	Smith and Richey, <i>Trademark Valuation</i>
<b>CLA-0057 (ENG)</b>	Landes & Posner, “The Economics of Trademark Law,” 78 <i>Trademark Rep.</i> 267 (1988)	Landes and Posner, "Economics of Trademark Law"
<b>CLA-0058 (ENG)</b>	J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> , 4th edition, vol. 1 (2016)	McCarthy, <i>Trademarks</i>
<b>CLA-0067 (ENG)</b>	<i>Transparency International, Global Corruption Report 2007</i>	Global Corruption Report 2007
<b>CLA-0068 (ENG)</b>	<i>Transparency International, People and Corruption: Latin America and the Caribbean 2017</i>	People and Corruption - Latin America 2017
<b>CLA-0077 (ENG)</b>	Jan Paulsson, <i>Denial of Justice in International Law</i> , Cambridge University Press (2005)	Paulsson, <i>Denial of Justice</i>
<b>CLA-0084 (ENG)</b>	Alwyn Freeman, <i>The International Responsibility of States for Denial of Justice</i> (1970)	Freeman, <i>International Responsibility</i>
<b>CLA-0085 (ENG)</b>	"Case of the Orient (U.S. v. Mexico)", Award, in <i>III John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party</i> (1898)	"Case of the Orient (U.S. v. Mexico)"
<b>CLA-0090 (ENG)</b>	“Dilution”, International Trademark Association (2018)	"Dilution"



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<b>CLA-0092 (ENG-SPA)</b>	Ureña Carazo, Belén. <i>Fundamental Procedural Rights</i> . Thompson Reuters Aranzadi. Madrid, Spain. First Edition. 2014	Belén, <i>Fundamental Procedural Rights</i>
<b>CLA-0093 (ENG-SPA)</b>	Dulio Arroyo Camacho. <i>5 Years of Jurisprudence in the Chambers (First Civil) y Third (de Contentious-Administrative) of the Supreme Court of Justice of Panama: 1981-1985</i> . Panamá, 1988	Camacho, <i>5 Years of Jurisprudence</i>
<b>CLA-0102 (ENG)</b>	Report of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, World Intellectual Property Organization (SCT/19/3 April 22, 2008)	WIPO Report dated 22 April 2008
<b>CLA-0103 (ENG)</b>	Trade Marks Act 1994, Ch. 26, Part III , <i>Administrative and Other Supplementary Provisions: Powers and Duties of the Registrar</i>	Trade Marks Act 1994, Section 68
<b>CLA-0104 (ENG)</b>	Intellectual Property Office - Costs in Proceedings before the Comptroller (Tribunal Practice Notice 4/2007)	Tribunal Practice Notice 4/2007
<b>CLA-0105 (ENG)</b>	Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark, Article 109 of Regulation (EU)	Article 109 of Regulation EU 2017/1001
<b>CLA-0107 (ENG)</b>	<i>Guidelines for Examination of European Union Trade Mark</i> , Part C, 4.2	EUIPO Guidelines
<b>CLA-0131 (ENG)</b>	Peter Van den Bossche and Werner Zdouc, “The Law and Policy of the World Trade Organization,” (3rd ed.), Cambridge University Press (2013)	Bossche and Zdouc

## EXHIBIT LIST

### Exhibit List

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Exhibit C-0128 (ENG)	Purchase Price Allocation Study, Houlihan Lokey dated November 2015
Exhibit C-0129 (ENG)	Panama Sales from 2011 to 2017
Exhibit C-0130 (ENG)	BATO - BSCR (BS) TM Sulicense dated 1 January 2015
Exhibit C-0131 (ENG)	BFNT - BFCR (BS) TM Sublicense dated 1 January 2002
Exhibit C-0132 (ENG)	BFS - BFCR (FS) Amendment to Tech & TM License 1 January 1996 SIGNED
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Exhibit C-0134 (ENG)	Bloomberg Financial Database
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Exhibit C-0136 (ENG)	Corporate Tax Rates
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Exhibit C-0138 (ENG)	BSCR Income Statement and Budget from 2010 to 2020
Exhibit C-0139 (ENG)	International Property Rights Index - Year 2014
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Exhibit C-0143 (ENG)	Capital IQ Financial Database - Guideline Public Companies
Exhibit C-0144 (ENG)	Capital IQ Financial Database - Guideline Mergers and Acquisitions
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<b>Exhibit C-0146 (ENG-SPA)</b>	Application for Registration and Declaration
<b>Exhibit C-0147 (ENG-SPA)</b>	Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2)
<b>Exhibit C-0148 (ENG-SPA)</b>	Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 1)
<b>Exhibit C-0149 (ENG)</b>	Official Gazette dated 5 August 2003
<b>Exhibit C-0150 (ENG-SPA)</b>	Opposition to Trademark Register of Riverstone dated 5 April 2005
<b>Exhibit C-0151 (ENG-SPA)</b>	Bridgestone Notice of Appeal dated 3 August 2006
<b>Exhibit C-0152 (ENG-SPA)</b>	Bridgestone Withdrawal of Appeal dated 5 September 2006
<b>Exhibit C-0153 (ENG-SPA)</b>	Testimony by Jose Orestes Medina Samaniego dated 21 April 2010
<b>Exhibit C-0154 (ENG-SPA)</b>	Testimony by Domingo Esteban Romero Ceballos dated 21 April 2010
<b>Exhibit C-0155 (ENG-SPA)</b>	Testimony by Gricelda Pineda Castillo dated 22 April 2010
<b>Exhibit C-0156 (ENG-SPA)</b>	Testimony by Aminta Julissa Vega De Barrera dated 23 April 2010
<b>Exhibit C-0157 (ENG-SPA)</b>	Testimony by Aixa Yadira Ramirez De Gonzalez dated 30 April 2010 (part 1)
<b>Exhibit C-0158 (ENG-SPA)</b>	Testimony by Mirna Raquel Moreira Martinez dated 3 May 2010
<b>Exhibit C-0159 (ENG-SPA)</b>	Testimony by Laura Esther Murgas de Bracho dated 5 May 2010
<b>Exhibit C-0160 (ENG-SPA)</b>	Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 1)
<b>Exhibit C-0161 (ENG-SPA)</b>	Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2)
<b>Exhibit C-0162 (ENG-SPA)</b>	Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010
<b>Exhibit C-0163 (ENG-SPA)</b>	Expert report by Vera Luisa Lindo de Gutierrez (Court Expert) dated 24 May 2010

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<b>Exhibit C-0164 (ENG-SPA)</b>	Concluding Remarks Filed by Muresa in Civil Action dated 4 June 2010
<b>Exhibit C-0165 (ENG-SPA)</b>	Formal Application by Muresa to appeal to the Panama Supreme Court in Cassation dated 1 July 2013
<b>Exhibit C-0166 (ENG-SPA)</b>	Dissenting Opinion by Justice Harley J. Mitchell D. of the Supreme Court Sentence against Bridgestone dated 5 June 2014
<b>Exhibit C-0167 (ENG-SPA)</b>	Supreme Court decision Accepting Murea's application for appeal to Supreme Court dated 4 December 2013
<b>Exhibit C-0168 (ENG-SPA)</b>	Bridgestone's Filing for Clarification and Modification of Sentence dated 16 June 2014
<b>Exhibit C-0169 (ENG-SPA)</b>	Notice of Appeal dated 10 December 2014
<b>Exhibit C-0170 (ENG)</b>	Answer to Notice of Opposition dated 26 January 2004
<b>Exhibit C-0171 (ENG)</b>	Motion to Dismiss for Lack of Standing dated 26 January 2004
<b>Exhibit C-0172 (ENG)</b>	Memorandum in Opposition to Applicant's Motion to Dismiss for Lack of Standing dated 17 February 2004
<b>Exhibit C-0173 (ENG)</b>	Order in Response to LV International's Motion to Dismiss dated 15 March 2004
<b>Exhibit C-0174 (ENG)</b>	Denial Order on LV International's Motion to Dismiss dated 13 April 2004
<b>Exhibit C-0175 (ENG)</b>	USPTO Ordered Judgment against LV International and Registration of the RIVERSTONE dated 13 October 2004
<b>Exhibit C-0176 (ENG-SPA)</b>	Muresa Response dated 20 June 2005
<b>Exhibit C-0177 (ENG-SPA)</b>	Third-party Intervention filed by Ballard & Ballard on behalf of LV International dated 25 August 2005
<b>Exhibit C-0178 (ENG-SPA)</b>	Third-party Intervention filed by Ballard & Ballard on behalf of TGFL dated 26 August 2005
<b>Exhibit C-0179 (ENG)</b>	Commercial Invoice dated 12 March 2003
<b>Exhibit C-0180 (ENG-SPA)</b>	Notice of Appeal filed by Benedetti & Benedetti to Order No. 911 dated 9 September 2005

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<b>Exhibit C-0181 (ENG-SPA)</b>	Appeal to Order No. 911 by Benedetti & Benedetti dated 14 October 2005
<b>Exhibit C-0182 (ENG-SPA)</b>	Opposition to Appeal Filed by Ballard & Ballard dated 20 October 2005
<b>Exhibit C-0183 (ENG-SPA)</b>	Order joining TGFL and LV International on 15 November 2005
<b>Exhibit C-0184 (ENG-SPA)</b>	Order Accepting Withdrawal of Appeal and Ordering Payment of 50 Balboas 8 September 2006
<b>Exhibit C-0185 (ENG-SPA)</b>	Law 35 of 10 May 1996 of the Republic of Panama
<b>Exhibit C-0186 (ENG-SPA)</b>	Nullification Application Filed by Bridgestone Arguing that Muresa Complaint in Violation of Due Process dated 19 August 2009
<b>Exhibit C-0187 (ENG-SPA)</b>	Muresa's Response to Nullification Application dated 14 September 2009
<b>Exhibit C-0188 (ENG-SPA)</b>	Extracts from the Judicial Code of the Republic of Panama
<b>Exhibit C-0189 (ENG-SPA)</b>	List of Evidence Submitted by Muresa dated 9 September 2009
<b>Exhibit C-0190 (ENG-SPA)</b>	List of Evidence Submitted by Muresa dated 1 October 2009
<b>Exhibit C-0191 (ENG-SPA)</b>	List of Counterevidence Presented by Bridgestone dated 6 October 2009
<b>Exhibit C-0192 (ENG-SPA)</b>	Bridgestone Objections to Evidence Submitted by Muresa dated 9 October 2009
<b>Exhibit C-0193 (ENG-SPA)</b>	Decision Accepting Evidence Presented by Muresa 26 January 2010
<b>Exhibit C-0194 (ENG-SPA)</b>	Decision Accepting Counterevidence Presented by Bridgestone 26 January 2017
<b>Exhibit C-0195 (ENG-SPA)</b>	Interrogatory of Manuel Ochoa Sanchez dated 25 May 2010
<b>Exhibit C-0196 (ENG-SPA)</b>	Interrogatory of Vera Luisa Lindo de Gutierrez dated 25 May 2010
<b>Exhibit C-0197 (ENG-SPA)</b>	Interrogatory of Vera Luisa Lindo de Gutierrez dated 26 May 2010
<b>Exhibit C-0198 (ENG-SPA)</b>	Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon

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	dated 26 May 2010
<b>Exhibit C-0199 (ENG-SPA)</b>	Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 27 May 2010
<b>Exhibit C-0200 (ENG-SPA)</b>	Concluding Statement Filed by Bridgestone in Civil Action dated 11 June 2010
<b>Exhibit C-0201 (ENG-SPA)</b>	Decision Denying Bridgestone's Nullification Application dated 6 December 2010
<b>Exhibit C-0202 (ENG-SPA)</b>	Law 57 of September 1978 of the Republic of Panama
<b>Exhibit C-0203 (ENG-SPA)</b>	Order Accepting appeal to Supreme Court dated 26 July 2013
<b>Exhibit C-0204 (ENG-SPA)</b>	Further Briefing by Muresa on Admissibility of Appeal Before the Supreme Court 19 September 2013
<b>Exhibit C-0205 (ENG-SPA)</b>	Extracts from the Civil Code of the Republic of Panama
<b>Exhibit C-0206 (ENG-SPA)</b>	Bridgestone's written arguments before the Supreme Court dated 15 January 2014
<b>Exhibit C-0207 (ENG-SPA)</b>	Muresa's Opposition to Bridgestone's Application for Clarification and Modification of Decision dated 20 June 2014
<b>Exhibit C-0208 (ENG-SPA)</b>	Recourse for Review dated 16 December 2014
<b>Exhibit C-0209 (ENG-SPA)</b>	Extracts from the Constitution of the Republic of Panama
<b>Exhibit C-0210 (ENG-SPA)</b>	Request for Clarification Filed after the Supreme Court Decision on the Motion for Review 29 March 2016
<b>Exhibit C-0211 (ENG-SPA)</b>	Final Decision on Motion to Review 10 March 2016
<b>Exhibit C-0212 (ENG)</b>	Email from Akin Gump to Panamanian Embassy dated 23 December 2014
<b>Exhibit C-0213 (ENG)</b>	Email from J. Lightfoot to J. Heilbron dated 12 January 2015
<b>Exhibit C-0214 (ENG)</b>	Email from J. Heilbron to J. Lightfoot dated 3 March 2015
<b>Exhibit C-0215 (ENG)</b>	Profile of Ambassador Emanuel Gonzalez-Revilla

## EXHIBIT LIST

<b>Exhibit C-0216 (ENG)</b>	Transparency Corruption Perceptions Index 2017
<b>Exhibit C-0217 (ENG)</b>	Corruption Perceptions Index 2005
<b>Exhibit C-0218 (ENG-SPA)</b>	"Alianza Requests Citizen's Audit", <i>Prensa</i> , dated 11 July 2005
<b>Exhibit C-0219 (ENG)</b>	U.S. Panama TPA - Chapter 2
<b>Exhibit C-0220 (ENG)</b>	Transparency International and the U4 Anti-Corruption Resource Centre, Panama: Overview of Corruption Risks in the Judiciary and Prosecution Service (2014)
<b>Exhibit C-0221 (ENG-SPA)</b>	Judgment of the First Civil Chamber of the Supreme Court of Justice dated 11 February 2011
<b>Exhibit C-0222 (ENG-SPA)</b>	Appeal for Reversal, Supreme Court of Panama dated 7 July 1993
<b>Exhibit C-0223 (ENG-SPA)</b>	Decision of the Civil Chamber of the Supreme Court of Justice dated 11 March 2010
<b>Exhibit C-0224 (ENG-SPA)</b>	Decision of the Civil Chamber of the Supreme Court of Justice dated 28 December, 2007
<b>Exhibit C-0225 (ENG-SPA)</b>	Decision of the Civil Chamber of the Supreme Court of Justice dated 23 January 2007.
<b>Exhibit C-0226 (ENG)</b>	Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat it: Executive Summary & Regional Comparative Study (2007)
<b>Exhibit C-0227 (ENG-SPA)</b>	Curriculum Vitae of Dr. Adán Arnulfo Arjona L.
<b>Exhibit C-0228 (ENG)</b>	Export.gov Country Guide - Panama (last updated 14 November 2016)
<b>Exhibit C-0229 (ENG)</b>	MESICIC, <i>Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption - Republic of Panama Final Report</i> dated 17 March 2017

## EXHIBIT LIST

<b>Exhibit C-0230 (ENG-SPA)</b>	"Otra denuncia contra un magistrado de la Corte llega a la Asamblea" [Another complaint against a magistrate of the Court arrives at the Assembly], article from <i>La Estrella</i> dated 19 April 2017
<b>Exhibit C-0231 (ENG-SPA)</b>	"Diputados archivan doce denuncias contra magistrados de la Corte" [Deputies file twelve complaints against magistrates of the Court], article from <i>Telemetro</i> dated 26 June 2017
<b>Exhibit C-0232 (ENG-SPA)</b>	"Presentan denuncia contra el magistrado Oydén Ortega" [They're filing a complaint against the magistrate Oydén Ortega] article from <i>La Estrella</i> dated 6 June 2014
<b>Exhibit C-0233</b>	"U.S. Takes Ex-Leader of Panama Into Custody for Possible Extradition", article from <i>the New York Times</i> dated 13 June 2017
<b>Exhibit C-0234 (ENG-SPA)</b>	Complaint Filed by Ricardo Martinelli Against the Justices of the Supreme Court of the Republic of Panama
<b>Exhibit C-0235 (ENG)</b>	"Complaints against judges Harley Mitchell, Oydén Ortega and José Ayú Prado dismissed" article from <i>La Prensa</i> dated 30 September 2015
<b>Exhibit C-0236 (ENG)</b>	Email from J. Lightfoot to J. Heilbron dated 16 March 2015
<b>Exhibit C-0237 (ENG)</b>	WIPO-Administered Treaties Chart
<b>Exhibit C-0238 (ENG)</b>	WIPO Treaties and Contracting Parties Chart
<b>Exhibit C-0239 (ENG)</b>	<i>The IPO Guidelines for Patents and Trademarks Prosecution and Litigation in Latin America</i>
<b>Exhibit C-0240 (ENG)</b>	U.S. Trademark Board Manual of Procedure
<b>Exhibit C-0241 (ENG)</b>	Emails between J. Lightfoot and J. Heilbron dated 4-9 March 2015
<b>Exhibit C-0242 (ENG)</b>	Ladas & Parry, Watch Services



## EXHIBIT LIST

<b>Exhibit C-0243 (ENG)</b>	"Hungry for Justice: Corrupt Courts in Panama Deny Impoverished Children \$50 Million in Inheritance", Council on Hemispheric Affairs
<b>Exhibit C-0244 (ENG-SPA)</b>	History of National Assembly of Panama
<b>Exhibit C-0245 (ENG-SPA)</b>	Extracts from the Criminal Procedure Code of the Republic of Panama
<b>Exhibit C-0246 (ENG)</b>	Lucom Complaint dated 23 September 2011.
<b>Exhibit C-0247 (ENG)</b>	RIVERSTONE trademark application in the U.S. filed by L.V. International, Inc dated 13 August 2002
<b>Exhibit C-0248 (ENG-SPA)</b>	Minutes from Muresa Board Meeting - 2008
<b>Exhibit C-0249 (ENG-SPA)</b>	Minutes from Muresa Board Meeting - 2007
<b>Exhibit C-0250 (ENG-SPA)</b>	Minutes from Muresa Board Meeting - 2006
<b>Exhibit C-0251 (ENG-SPA)</b>	Minutes from Muresa Board Meeting - 2005
<b>Exhibit C-0252 (ENG)</b>	Application for Extension dated 2 September 2003
<b>Exhibit C-0253 (ENG)</b>	Application for Extension dated 6 October 2003
<b>Exhibit C-0254 (ENG)</b>	Lucom Appeal dated 28 August 2013
<b>Exhibit C-0255 (ENG)</b>	WIPO, Well Known Marks
<b>Exhibit C-0256 (ENG-SPA)</b>	Official Panamanian Gazette dated 4 February 2005
<b>Exhibit C-0257 (ENG-SPA)</b>	"Presidente Varela pide a la Justicia apurar el paso en procesos por supuesta corrupción" [President Varela asks Justice to speed up the process in alleged corruption], article from <i>El Economista</i> dated 2 January 2017
<b>Exhibit C-0258 (ENG-SPA)</b>	"Corrupción de Martinelli le costó a Panamá US\$ 100 millones: Varela" [Martinelli's corruption cost him Panama US \$ 100 million: Varela], article from Noticias RCN dated 6 May 2015

## EXHIBIT LIST

<b>Exhibit C-0259 (ENG-SPA)</b>	"Palabras des Presidente de la Republica Juan Carlos Varela Durante El Acto de Toma de Posesion" [Word of the President of the Republic Juan Carlos Varela During the Act of Taking Possession], Ministerio de Relaciones Exteriores dated 24 March 2016
<b>Exhibit C-0260 (ENG)</b>	Office of the United States Trade Representative, Special 301 Report (April 2016)
<b>Exhibit C-0261 (ENG)</b>	National Trade Estimate Report (2016)

## **I. INTRODUCTION**

1. Bridgestone Licensing Services, Inc. (“**BSLS**”) and Bridgestone Americas, Inc. (“**BSAM**”) have suffered an egregious denial of justice. BSLS has been required by a majority decision of the Supreme Court to pay damages to a Panamanian company on grounds that can best be described as bizarre.
2. The Supreme Court found that the invoking of Panama’s own trademark opposition procedure by BSLS and Bridgestone Corporation (“**BSJ**”) was unlawful and in breach of Article 217 of the Judicial Code because the party applying for the trademark, a Panamanian entity called Muresa Intertrade S.A. (“**Muresa**”), was a competitor and so it was foreseeable that it might suffer loss. But the very purpose of trademarks is to distinguish between competing products, so the Supreme Court’s finding was not only wrong in law but also makes no sense. It renders Panama’s trademark system largely meaningless.<sup>1</sup>
3. The Supreme Court also placed emphasis on its finding that a certain reservation of rights letter was reckless and caused Muresa to withdraw tires from sale. But the court appears to have entirely ignored that (a) the letter was not sent by or on behalf of BSLS or BSJ (but rather was sent by lawyers acting for two U.S. Bridgestone entities), (b) was not sent to Muresa, (c) was sent and received in the U.S., (d) related only to U.S. court proceedings and U.S. trademarks and (e) was neither unusual, inappropriate or unlawful. It is simply not possible to understand on what basis the Supreme Court can have found either that the letter was a breach by BSLS or BSJ of Panamanian law or that it caused loss to Muresa.
4. Indeed, the Supreme Court ignored the substantial body of evidence that was on the record that Muresa had not in fact withdrawn tires from sale and its finding to the contrary and that Muresa had suffered loss of USD 5.4 million was based on little more than Muresa’s bare assertions.<sup>2</sup> The undisputed fact that BSLS and BSJ had

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<sup>1</sup> Expert Report of Roberta Jacobs-Meadway dated 11 May 2018 ¶ 40.

<sup>2</sup> The only evidence Muresa adduced for loss was its own unsubstantiated and cursory projections of future sales - see **Exhibit C-0248** - Minutes from Muresa Board Meeting – 2008; **Exhibit C-0249** - Minutes from Muresa Board Meeting - 2007 ; **Exhibit C-0250** - Minutes from Muresa Board Meeting – 2006; **Exhibit C-0251** - Minutes from Muresa Board Meeting – 2005; **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, 2.

nothing whatever to do with what is said to have been the reservation of rights letter was entirely ignored.

5. A former President of Panama's Supreme Court, Mr Adán Arnulfo Arjona L., has analysed the judgment and has provided an expert's report in which he opines that it is "*arbitrary, irrational, and unjust*".<sup>3</sup> He identifies numerous instances in which the Supreme Court gravely violated Panamanian law and the fundamental guarantee of Due Process.
6. Mr Arjona's stark conclusion is this: "*No competent judge seeking to apply Panamanian law could have arrived at this decision.*"<sup>4</sup>
7. It is to be inferred that the Supreme Court's incomprehensible decision could only have been the consequence of incompetence or lack of independence or corruption. And certainly there is ample circumstantial evidence of corruption within the Panamanian establishment and at the time of the relevant Supreme Court judgment within the judiciary in particular. Panama itself has publicly admitted this.<sup>5</sup> Indeed the Chairman of the Supreme Court Judge tribunal which produced the impugned judgment in this case, Justice Oyden Ortega Duran, has been the subject of numerous complaints and requests for investigation for corruption. It appears that Panama has chosen to investigate none of these complaints or requests.
8. Evidence that a particular court judgment has been procured corruptly is always very difficult for the affected litigant to obtain. But, exceptionally, in the present case, such evidence does exist. At a formal meeting to discuss the present dispute with

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<sup>3</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 112.

<sup>4</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 14.

<sup>5</sup> See, e.g. **Exhibit C-0257**- "Presidente Varela pide a la Justicia apurar el paso en procesos por supuesta corrupción" [President Varela asks Justice to speed up the process in alleged corruption], article from El Economista dated 2 January 2017 : President Juan Carlos Varela reportedly said, "*When I took on the role of managing the government, politics in Panama was sick because of corruption . . . we have had to put the house in order . . . [and have] dismantled corruption schemes*"; **Exhibit C-0258** – "Corrupción de Martinelli le costó a Panamá US\$ 100 millones: Varela" [Martinelli's corruption cost him Panama US \$ 100 million: Varela], article from Noticias RCN dated 6 May 2015, regarding corruption by the Martinelli administration, President Varela is quoted as saying that the "*total damage to the state... is approaching 100 million dollars.*" In his inaugural address, President Varela stated: "*Corruption will not be tolerated by our government. Based on this compromise, beginning at this moment we initiate what's most important: Transforming the politics of business and cronyism to the politics of service and vision of the State.*" See **Exhibit C-0259** – "Palabras des Presidente de la Republica Juan Carlos Varela Durante El Acto de Toma de Posesion" [Word of the President of the Republic Juan Carlos Varela During the Act of Taking Possession], Ministerio de Relaciones Exteriores dated 24 March 2016.

representatives of the Bridgestone group (“**Bridgestone**”) at the Panamanian Embassy in Washington, D.C. on 13 March 2015, the Panamanian Ambassador to the United States, Ambassador Gonzalez-Revilla, in the presence of other Panamanian officials, expressly and directly *admitted* that the relevant Supreme Court judgment was indeed the result of corruption. In his capacity as Ambassador to the U.S., he had full representative authority on behalf of Panama and his admission of corruption is Panama’s admission. This is remarkable.

9. But the Tribunal need not go as far as to make a positive finding of corruption in order to determine that a denial of justice has occurred. It is sufficient that the Supreme Court’s decision was so clearly improper and discreditable, and that its failure to adhere to Panamanian rules of procedure and standards of due process was so flagrant that it lead to an outcome that was manifestly unjust and shocks a sense of judicial propriety. Mr Arjona’s expert report establishes that this is indeed the case.
10. Such denial of justice by Panama is a breach of its obligations under the Trade Promotion Agreement entered into between the United States of America and the Republic of Panama (the “**TPA**”) to provide fair and equitable treatment to Bridgestone and its intellectual property investments in Panama. In 2017, Panama sought to deny the benefits of the TPA to BSLS and to challenge the jurisdiction of the Tribunal, but those objections were largely rejected in the Tribunal’s Decision on Expedited Objections dated 13 December 2017.
11. Once it is recognized that Panama has breached those obligations, there can be no doubt that BSLS and BSAM have suffered loss as a result. BSLS and BSJ were held jointly and severally liable by the Supreme Court to pay USD 5,431,000 in damages and costs, and BSLS paid these damages in full. Further, the value of BSLS and BSAM’s intellectual property in Panama has been damaged as a result of the Supreme Court’s denial of justice. As noted above, the Supreme Court found that it was unlawful for BSLS and BSJ to oppose a trademark application by an existing competitor and ordered BSLS and BSJ to pay damages. There is a material risk that lower courts will follow that decision, in particular if the parties and/or the facts are similar. Indeed, the fact that Panama adamantly disputes that there has been any denial of justice serves to emphasise the existence of that very risk. Therefore, the exclusivity, or the legal protection, of BSLS’s trademark rights and the consequential

rights of BSAM have been impaired. Quantification of loss and damage to intellectual property has seldom been considered in investor state cases before, and in that regard the Claimants rely on the expert report of Mr Brian Daniel.

12. Panama should now compensate BSLS and BSAM for their losses.
13. It is particularly disappointing that Panama on the one hand has acknowledged that it has a problem with judicial corruption and its Ambassador to the U.S. has acknowledged that the impugned judgment was corrupt, but on the other is refusing to accept responsibility for the consequences where the affected parties are U.S. persons. Had Panama turned a corner, compensation would have been offered, and the present proceedings would not have been necessary.
14. Regrettably, however, Panama has instead chosen to stand behind its incomprehensible Supreme Court judgment. This is troubling not only for BSLS and BSAM, but for all foreign investors in intellectual property in Panama.

## **II. BRIDGESTONE'S BUSINESS AND ITS INTELLECTUAL PROPERTY**

15. The purpose of a trademark is to allow a consumer to identify goods or services that have been satisfactory in the past, and reject competing goods that have been unsatisfactory. This encourages the production of high quality products, and reduces the consumer's costs of shopping and making purchasing decisions.<sup>6</sup> If a manufacturer uses a mark that is confusingly similar to another mark, it can free ride on the goodwill and reputation developed by the manufacturer of the other mark, and if the infringer is not stopped, then the encouragement to develop high quality products is destroyed.<sup>7</sup> Every country has its own system of regulation of trademarks and protection against infringement, but "*the fundamental policies behind trademark protection are common to all developed cultures and cut across all economic systems.*"<sup>8</sup>
16. In common law systems like the United States, trademark law is treated as a form of consumer protection, and is treated as property only insofar as it constitutes the right

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<sup>6</sup> See e.g. CLA-0057 – Landes & Posner, "The Economics of Trademark Law," 78 Trademark Rep. 267 (1988).

<sup>7</sup> CLA-0058 – J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, 4th edition, vol. 1 (2016) 2-7.

<sup>8</sup>*Id.*

to prevent confusion of consumers. The United States Supreme Court noted that, “[t]he hallmark of a protected property interest is the right to exclude others.” “Therefore trademarks “are the property” of the owner because he can exclude others from using them.”<sup>9</sup> The United States trademark holder owns an intangible asset, and “[o]wnership” means that one possesses a right that will be recognized and upheld in the courts.”<sup>10</sup> In practical terms, this means that a registered trademark holder has the right to exclude others from using that mark. “If the law will not protect one’s claim of right to exclude others from using an alleged trademark, then he does not own a “trademark,” for that which all are free to use cannot be a trademark.”<sup>11</sup> In practical terms, this means that the United States trademark holder has the right to (i) oppose registrations of marks that are confusingly similar to its mark for the same classes of products or services; and (ii) to prevent infringers from using marks that are confusingly similar to its mark for the same classes of products or services. Another company is not automatically prohibited from marketing its products under a confusingly similar brand to that of a registered trademark holder. It is for the owner of the trademark to monitor the market for infringement and to seek the assistance of the courts to prevent such infringement.

17. In civil law systems like Panama, there are some conceptual differences related to the acquisition of trademark rights, but the effect is broadly the same – a Panamanian trademark holder likewise has the right to prevent infringers from using a mark that is confusingly similar to it for the same classes of products or services, and has the right to oppose registration of trademarks that are confusingly similar to it for the same classes of products or services.
18. Accordingly, Bridgestone’s strategy for protecting its brand is two-fold. First, it monitors trademark registrations all over the world, and any applications for trademarks for tires and related products (i.e. products that compete with its own) that have the “-STONE” suffix, or are otherwise confusingly similar to BRIDGESTONE and FIRESTONE, are opposed. Second, it monitors markets for tires and related products all over the world, and if it finds tires being marketed under brands with a “-

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<sup>9</sup> **CLA-0059** – *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.* 527 U.S. 666, 673 (1999).

<sup>10</sup> **CLA-0058** – McCarthy, *Trademarks* 2-39.

<sup>11</sup> **CLA-0060** – *In re Deister Concentrator Co.*, 289 F.2d 496, 501 n.5, 1; see also ¶¶ 16:3 – 16:10.

STONE” suffix, or that are otherwise confusingly similar to BRIDGESTONE or FIRESTONE, it first asks the company marketing the brand in correspondence to desist from marketing their tires under the confusingly similar brand, and if that fails, it tries to obtain an injunction to prevent the sale of those tires. Both aspects of trademark protection are necessary.

19. The FIRESTONE trademark was first registered in Panama on 20 December 1921.<sup>12</sup> The BRIDGESTONE trademark was first registered in Panama on 11 October 1966.<sup>13</sup>

### **III. RIVERSTONE AND THE LUQUE GROUP**

20. On 6 May 2002, Muresa filed a trademark application in Panama for the RIVERSTONE mark for tires for trucks, cars and heavy equipment, and tubes and pneumatic tires.<sup>14</sup> The contact on the registration was stated to be Eggis Eden Luque.
21. On 13 August 2002, L.V. International, Inc. (“**LV International**”), a company incorporated in Florida, filed a trademark application with the United States Patent and Trademark Office (“**USPTO**”) to register the RIVERSTONE mark for tires.<sup>15</sup> The president of LV International was stated in the application to be Jorge Luque.<sup>16</sup>
22. Muresa and LV International are both companies within the same group, known as the Luque Group,<sup>17</sup> though little is known about this group. Bridgestone’s knowledge of the relationship of the companies within it comes from witness testimony of employees of these companies adduced in the trademark opposition proceedings in Panama, explained further below.
23. As explained by the manager of LV International, Jorge Alberto Luque Gonzalez, the owner of the RIVERSTONE brand is Muresa.<sup>18</sup> Muresa and LV International had an

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<sup>12</sup> **Exhibit C-0007** – Firestone Panamanian Trademark Registration Record.

<sup>13</sup> **Exhibit C-0006** – Bridgestone Panamanian Trademark Registration Record.

<sup>14</sup> **Exhibit C-0146** – Application for Registration and Declaration.

<sup>15</sup> **Exhibit C-0009** – Riverstone U.S. Trademark Application.

<sup>16</sup> *Id.*

<sup>17</sup> See **Exhibit C-0147** – Testimony by Jorge Alberto Luque Gonzalez, 14 May 2010, (part 2), at 4: “*Question #4: Will the witness state how you can recognize accounting documents of the MURESA and TIRE GROUP company when you have stated that you are the manager of LV International? REPLY: Because these are within the same group of companies and when we had meetings we had to review the accounting reports.*”

<sup>18</sup> **Exhibit C-0148** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010, (part 1), at 3.



agreement “for the registration and distribution of the RIVERSTONE brand,”<sup>19</sup> pursuant to which LV International made applications to register RIVERSTONE trademark in various countries including the United States. The Tire Group of Factories Ltd., Inc. (“TGFL”), a corporation registered in Shanghai, China, is also part of the Luque Group.<sup>20</sup> TGFL was the “intermediary company” responsible for “production and sale of RIVERSTONE tires in China, Africa and Asia” and for delivery of tires bought in China to the United States.<sup>21</sup>

24. Muresa, LV International and TGFL have filed trademark registration applications for RIVERSTONE in a number of other jurisdictions. As set out at Appendix A to the Third Witness Statement of Thomas Kingsbury dated 11 May 2018, Bridgestone has filed trademark opposition actions or actions for cancellation against all of these, with the following results:
- a. Argentina: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2006, who won. The RIVERSTONE trademark registration was refused.
  - b. Brazil: a trademark cancellation action was filed by Bridgestone entities in 2013 against the RIVERSTONE mark, which had expired and was cancelled.
  - c. China: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2006, which was unsuccessful. Cancellation proceedings were filed in 2014 by Bridgestone entities which were unsuccessful, and further opposition proceedings were filed in 2016 but were unsuccessful. Invalidation proceedings were filed by Bridgestone entities in 2017, and that application is pending.
  - d. Colombia: a cancellation action was prepared by Bridgestone entities in 2014 but not filed, because the evidence was deemed insufficient. The

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<sup>19</sup> *Id.*

<sup>20</sup> **Exhibit C-0147** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010, (part 2), at 4.

<sup>21</sup> **Exhibit C-0148** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010, (part 1), at 4.

RIVERSTONE trademark registration expired in October 2017, as no renewal petition was filed.

- e. Costa Rica: a trademark cancellation action was filed against the RIVERSTONE trademark by Bridgestone entities in 2015, which were successful.
- f. Ecuador: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2006, which were unsuccessful.
- g. European Union: the RIVERSTONE trademark registration was revoked in 2014, following an application by Bridgestone entities to cancel the registration.
- h. Indonesia: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2007, which was unsuccessful. However, the trademark has since expired.
- i. Philippines: a trademark opposition action was filed against the RIVERSTONE trademark by Bridgestone entities in 2006, which were successful. The RIVERSTONE trademark registration was refused.
- j. South Africa: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities. The applicant withdrew the application.
- k. South Korea: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2006. BSLs and BSJ lost the action, but applied for cancellation of the trademark based on lack of use in 2014, and succeeded.
- l. United States: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2003, as described in paragraphs 27 to 31 below. LV International withdrew its application and the trademark was not registered.

- m. Venezuela: a trademark opposition action was filed against the RIVERSTONE trademark registration application by Bridgestone entities in 2015. These proceedings are still pending.

#### IV. SUMMARY OF THE RELEVANT FACTS

25. The factual background to this case is set out in sections V to X below, but to assist the Tribunal in understanding the key events, we provide the following summary:
- a. On 5 August 2003, LV International's application to register the RIVERSTONE mark in the United States was published in the Official Gazette.<sup>22</sup> On 3 December 2003, BFS Brands, LLC ("**BFS Brands**") and Bridgestone/Firestone North American Tire, LLC ("**BFNAT**") filed a notice of opposition against LV International's application.<sup>23</sup> (*See* paragraphs 26 to 30).
  - b. On 20 August 2004, LV International withdrew its application.<sup>24</sup> (*See* paragraph 31).
  - c. On 3 November 2004 – BFS Brands and BFNAT's lawyers, Foley and Lardner, wrote to LV International's lawyers in Florida, putting them on notice that Bridgestone would object to any use of the RIVERSTONE mark on tires by LV International in the United States and anywhere in the world (the "**Reservation of Rights Letter**").<sup>25</sup> (*See* paragraphs 32 to 33).
  - d. On 4 February 2005, Muresa's application to register the RIVERSTONE trademark in Panama was published in the Official Gazette.<sup>26</sup> On 5 April 2005, BSLS and BSJ, owners of the FIRESTONE and BRIDGESTONE trademarks in Panama, filed an opposition to the RIVERSTONE trademark.<sup>27</sup> (*See* paragraphs 34 to 39).

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<sup>22</sup> **Exhibit C-0149** – Official Gazette of the United States dated 5 August 2003, at 218.

<sup>23</sup> **Exhibit C-0010** – Notice of Riverstone Trademark Opposition.

<sup>24</sup> **Exhibit C-0011** – Notice of Voluntary Withdrawal of Application with Prejudice.

<sup>25</sup> **Exhibit C-0013** – Reservation of Rights Letter.

<sup>26</sup> **Exhibit C-0256** – Official Gazette of Panama dated 4 February 2005.

<sup>27</sup> **Exhibit C-0150** – Opposition to Trademark Register of Riverstone dated 5 April 2005.

- e. On 21 July 2006, the Panamanian court issued its judgment in favour of Muresa, finding that the marks were already coexisting in the market at the time of the application and there was no evidence of confusion, but noting that BSJ and BSLS had “*acted with evident good faith*” in bringing their opposition action.<sup>28</sup> (See paragraphs 40 to 42).
- f. On 3 August 2006, BSLS and BSJ filed an appeal to the above judgment,<sup>29</sup> which was withdrawn on 5 September 2006.<sup>30</sup> That should have been the end of the matter. (See paragraphs 43 to 45).
- g. On 12 September 2007, Muresa and TGFL filed a claim under Article 1644 of the Civil Code for USD 5 million against BSLS and BSJ for damages allegedly caused by their trademark opposition action.<sup>31</sup> (See paragraphs 46 to 52).
- h. Muresa submitted witness evidence from nine employees of Muresa, TGFL and LV International. All stated that they had stopped selling RIVERSTONE tires during the trademark opposition action because they were told by the manager of Muresa and president of TGFL, Mr. Fernan Luque, that there was risk of the tires being seized by Bridgestone. Instead, Muresa sold inferior Chinese brands which were low quality and had performance issues, resulting in lower sales.<sup>32</sup> Mr. Fernan Luque’s evidence was that unnamed “*customs agents and... some related persons*” suggested that RIVERSTONE tires might be seized, but there was no

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<sup>28</sup> **Exhibit C-0014** – Judgment No. 48, Eighth Civil Circuit Court.

<sup>29</sup> **Exhibit C-0151** – Bridgestone Notice of Appeal dated 3 August 2006.

<sup>30</sup> **Exhibit C-0152** – Bridgestone Withdrawal of Appeal dated 5 September 2006.

<sup>31</sup> **Exhibit C-0016** – Civil Complaint filed by Muresa Intertrade S.A.; **Exhibit C-0205** – Extracts from the Civil Code of the Republic of Panama, Article 1644.

<sup>32</sup> **Exhibit C-0153** – Testimony by Jose Orestes Medina Samaniego dated 21 April 2010; **Exhibit C-0154** – Testimony by Domingo Esteban Romero Ceballos dated 21 April 2010; **Exhibit C-0155** – Testimony by Gricelda Pineda Castillo dated 22 April 2010; **Exhibit C-0156** – Testimony by Aminta Julissa Vega De Barrera dated 23 April 2010; **Exhibit C-0157** – Testimony by Aixa Yadira Ramirez De Gonzalez dated 30 April 2010 (part 1); **Exhibit C-0158** – Testimony by Mirna Raquel Moreira Martinez dated 3 May 2010; **Exhibit C-0159** – Testimony by Laura Esther Murgas de Bracho dated 5 May 2010; **Exhibit C-0148** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 1); **Exhibit C-0148** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2).

evidence that BSLS, BSJ or any Bridgestone entity had threatened seizure of tires.<sup>33</sup> (See paragraphs 53 to 58).

- i. Expert reports as to quantum of loss were submitted by Muresa and TGFL, BSLS and BSJ, and the Court appointed expert. All of the experts agreed that Muresa had made sales amounting to over 34 million balboas (USD 34 million) in Panama during 2005 and 2006, including over 9 million balboas worth of sales of RIVERSTONE tires. After the trademark opposition action, in 2007 and 2008, Muresa made sales of over 37 million balboas, of which 8.5 million balboas were RIVERSTONE tires.<sup>34</sup> (See paragraphs 59 to 65).
- j. Although Muresa provided estimates of the sales it said it expected during 2005 to 2008, BSLS and BSJ's expert and the Court's expert could not find any supporting documentation for the estimates, and therefore could not reach any conclusion as to why the sales estimates had not been met, or what damages, if any, had been suffered by Muresa.<sup>35</sup> Muresa and TGFL's experts stated that the estimated sales had not been achieved because of the trademark opposition action and the Reservation of Rights Letter, which they attached to their report. The experts all made similar findings with regard to TGFL's sales and alleged loss.<sup>36</sup> (See paragraphs 60 to 65).
- k. In their closing arguments, Muresa and TGFL argued that BSLS and BSJ's trademark opposition action was part of "*an international persecution*"<sup>37</sup> and the Reservation of Rights Letter constituted "*malicious acts of intimidation and threats.*"<sup>38</sup> However, the Reservation of Rights Letter had

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<sup>33</sup> **Exhibit C-0160** – Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 1); **Exhibit C-0161** – Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2).

<sup>34</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, 4; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon (Muresa Experts) dated 24 May 2010, 2; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez (Court Expert) dated May 24 2010, 3.

<sup>35</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, 2-4, 7-8; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez (Court Expert) dated May 24 2010, 2-3, 5-7; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon (Muresa Experts) dated 24 May 2010, 4.

<sup>36</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, 9-12; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez (Court Expert) dated May 24 2010-13; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon (Muresa Experts) dated 24 May 2010, 5-8.

<sup>37</sup> **Exhibit C-0164** – Concluding Remarks Filed by Muresa in Civil Action dated 4 June 2010.

<sup>38</sup> *Id.* at 4.

not been properly admitted into evidence through the procedure which would have permitted BSLS and BSJ to examine and object to it. (*See* paragraphs 67 to 68).

- l. On 17 December 2010 the Panamanian court of first instance issued its judgment, finding in favour of BSLS and BSJ. In dismissing Muresa and TGFL's claims, it found that the documentary evidence showed that they had continued to sell RIVERSTONE tires during the period of the trademark opposition action, and also continued selling the inferior Chinese brands after the opposition action, even though Muresa's witnesses had claimed that sales of RIVERSTONE tires had ceased, and the Chinese brands were only sold because RIVERSTONE tires could not be. There was no basis for the fear of seizure of tires, and no evidence of the loss alleged by Muresa and TGFL. Muresa and TGFL were ordered to pay BSLS and BSJ's costs.<sup>39</sup> (*See* paragraphs 71 to 72).
- m. On 5 January 2011, Muresa and TGFL appealed,<sup>40</sup> and on 23 May 2013, the appellate court dismissed the appeal.<sup>41</sup> It held that under Article 1644 of the Civil Code, a plaintiff must present substantial evidence to establish (i) real damages; (ii) fault or negligence on the part of the defendant; and (iii) a causal link between the action and damage. Muresa had not established any fault or negligence by BSLS or BSJ, because all they had done was exercise the right they were entitled to by reason of their trademark rights. There was therefore no reason for the Court to consider whether the alleged loss had occurred, because the requisite fault was not established. (*See* paragraphs 73 to 78).
- n. On 1 July 2013, Muresa and TGFL applied for permission to appeal to the Supreme Court.<sup>42</sup> Permission was granted as to one of the grounds for

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<sup>39</sup> **Exhibit C-0021** – Judgment 70, 11th Circuit Civil Court.

<sup>40</sup> **Exhibit C-0022** – Muresa and TGFL Appeal to Judgment No. 70.

<sup>41</sup> **Exhibit C-0024** – Decision by the First Superior Court.

<sup>42</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013.

appeal,<sup>43</sup> and on 3 January 2014, Muresa and TGFL filed their grounds of appeal.<sup>44</sup> They argued that the lower courts had not “*appreciated*” certain evidence, in particular (i) the Reservation of Rights Letter; (ii) Muresa and TGFL’s expert report and testimony; (iii) Muresa and TGFL’s witness evidence; and (iv) the fact that BSLS and BSJ had withdrawn their appeal to the trademark opposition action. (*See* paragraphs 79 to 85).

- o. BSLS and BSJ argued that no evidence of bad faith or recklessness on their part had been provided, and the documentary evidence all showed large numbers of sales of RIVERSTONE tires during the relevant period. The witness evidence was not supported by, and indeed was contradicted by documentary evidence, and the Reservation of Rights Letter had not been properly admitted into evidence and in any event was irrelevant since it was addressed to parties not involved in the litigation. (*See* paragraph 86).
- p. On 28 May 2014, the Supreme Court issued its judgment, which found in favour of Muresa and TGFL.<sup>45</sup> It found that simply bringing a trademark opposition action, in circumstances where the trademark applicant was a competitor, was unlawful because there was a risk the competitor might thereby suffer loss. The Supreme Court did not specifically find that the Reservation of Rights Letter was unlawful, but found that it was evidence of BSLS and BSJ’s reckless and threatening behaviour. (*See* paragraphs 87 to 93).
- q. One of the three Supreme Court justices dissented from the judgment, and he said that there had been no reckless behaviour by BSLS and BSJ, who were merely exercising the legal rights granted to them by their registered trademarks. He also found that there had been no analysis of the value of the monetary award of USD 5 million.<sup>46</sup> (*See* paragraphs 94 to 101).

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<sup>43</sup> **Exhibit C-0167** – Supreme Court decision Accepting Muresa's application for appeal to Supreme Court dated 4 December 2013.

<sup>44</sup> **Exhibit C-0025** - Muresa and TGFL Appeal to the Panamanian Supreme Court.

<sup>45</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division.

<sup>46</sup> **Exhibit C-0166** – Dissenting Opinion by Justice Harley J. Mitchell.

- r. On 16 June 2014, BSLS and BSJ filed a motion for clarification and modification of the Supreme Court judgment,<sup>47</sup> which was refused on 28 November 2014.<sup>48</sup> On 10 December 2014, BSLS and BSJ filed a recourse for review of the Supreme Court judgment,<sup>49</sup> which was refused on 16 March 2016.<sup>50</sup> (See paragraphs 102 to 108).

**V. TRADEMARK OPPOSITION ACTION AGAINST RIVERSTONE IN THE UNITED STATES**

26. LV International's application for registration of the RIVERSTONE mark in the United States was published in the Official Gazette of 5 August 2003.<sup>51</sup>
27. On 2 September 2003, BFS Brands, the owner of the FIRESTONE trademarks in the United States, filed an application for extension of time to oppose the RIVERSTONE trademark,<sup>52</sup> and then filed a further application for an extension of time on 6 October 2003.<sup>53</sup> On 3 December 2003, BFS Brands, together with BFNAT (the predecessor of the entity now known as Bridgestone American Tire Operations, LLC "BATO", which held licenses to use the FIRESTONE trademarks in the United States)<sup>54</sup> filed a notice of opposition against the registration of the RIVERSTONE trademark for tires.<sup>55</sup>
28. The Notice of Opposition explained that the products bearing the RIVERSTONE name would be identical to those bearing the FIRESTONE and BRIDGESTONE names, and would be offered to the same class of purchaser through the same channels of trade. Purchasers and prospective purchasers who are familiar with FIRESTONE and BRIDGESTONE products were likely to be misled into believing

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<sup>47</sup> **Exhibit C-0168** – Bridgestone's Filing for Clarification and Modification of Sentence dated 16 June 2014.

<sup>48</sup> **Exhibit C-0030** – Supreme Court Decision on Motion for Clarification.

<sup>49</sup> **Exhibit C-0169** – Notice of Appeal dated 10 December 2014.

<sup>50</sup> **Exhibit C-0031** – Supreme Court Decision on Motion to Review.

<sup>51</sup> **Exhibit C-0149** – Official Gazette of the United States dated 5 August 2003, at 218.

<sup>52</sup> **Exhibit C-0252** – Application for Extension dated 2 September 2003.

<sup>53</sup> **Exhibit C-0253** – Application for Extension dated 6 October 2003.

<sup>54</sup> On 21 June 2005, Bridgestone/Firestone North American Tire, LLC changed its name to Bridgestone Firestone North American Tire, LLC. See **Exhibit C-0053** – Certificate of Amendment to Certificate of Formation dated 21 June 2005. On 18 December 2008, Bridgestone Firestone North American Tire, LLC changed its name to Bridgestone American Tire Operations, LLC. See **Exhibit C-0054** – Certificate of Name Change dated 18 December 2008.

<sup>55</sup> **Exhibit C-0010** – Notice of Riverstone Trademark Opposition.



that RIVERSTONE goods were connected to Bridgestone. This would cause damage to BFS Brands and BFNAT through loss and dilution of goodwill.

29. LV International filed their Answer to Notice of Opposition on 26 January 2004, denying all allegations in the Notice of Opposition, but without giving any reasons.<sup>56</sup> On the same date, LV International filed a Motion to Dismiss for Lack of Standing against BFNAT.<sup>57</sup> BFS Brands had filed requests for extension of time to oppose the trademark registration, but BFNAT had not been named on these requests, and LV International claimed that as there was no privity as between BFS Brands and BFNAT, BFNAT's opposition must be dismissed.
30. BFNAT and BFS Brands responded to LV International's Motion to Dismiss on 17 February 2004, explaining the relationship between the two entities, and that in the context of trademark, the concept of privity typically includes related companies, where one company owns and controls the trademark and the other uses the trademark.<sup>58</sup> The proceedings were suspended pending resolution of LV International's Motion to Dismiss.<sup>59</sup> However, on 13 April 2004, the USPTO denied LV International's Motion to Dismiss, and proceedings resumed.<sup>60</sup>
31. On 20 August 2004, without providing any explanation for its decision to do so, LV International filed a Notice of Voluntary Withdrawal of Application with Prejudice.<sup>61</sup> In their letter noting the withdrawal to BFS Brands and BFNAT, attorneys for LV International wrote, "[w]e will consider this matter closed."<sup>62</sup> Following this, the USPTO ordered judgment against LV International and registration of the RIVERSTONE trademark for tires was refused.<sup>63</sup> Under U.S. law, withdrawal of a

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<sup>56</sup> **Exhibit C-0170** – Answer to Notice of Opposition dated 26 January 2004.

<sup>57</sup> **Exhibit C-0171** – Motion to Dismiss for Lack of Standing dated 26 January 2004.

<sup>58</sup> **Exhibit C-0172** – Memorandum in Opposition to Applicant's Motion to Dismiss for Lack of Standing 17 February 2004.

<sup>59</sup> **Exhibit C-0173** – Order in Response to LV International's Motion to Dismiss dated 15 March 2004.

<sup>60</sup> **Exhibit C-0174** – Denial Order on LV International's Motion to Dismiss dated 13 April 2004.

<sup>61</sup> **Exhibit C-0011** – Notice of Voluntary Withdrawal of Application with Prejudice.

<sup>62</sup> *Id.*

<sup>63</sup> **Exhibit C-0175** – Judgment dated 13 October 2004.

trademark application with prejudice means that the applicant cannot register the same trademark again for the same goods.<sup>64</sup>

32. Finally, on 3 November 2004, Foley and Lardner, who had been acting for BFS Brands and BFNAT in the trademark opposition proceedings, wrote to LV International's attorneys in Florida (the "**Reservation of Rights Letter**").<sup>65</sup> This was a standard reservation of rights letter typically sent by Bridgestone following successful trademark oppositions, and it made clear that since the RIVERSTONE mark's registration had been refused, Bridgestone, as owner and user of the FIRESTONE and BRIDGESTONE marks in the United States for tires was entitled to prevent infringement of its marks by LV International. The letter noted that it would object to any use of the RIVERSTONE mark by LV International for tires anywhere else in the world. The reason that Bridgestone typically sends letters like this once it has succeeded in a trademark opposition action is because even though LV International would not have the right to use the RIVERSTONE trademark on tires in the United States, LV International could still produce and sell tires with the RIVERSTONE mark in the United States without repercussion unless Bridgestone was made aware that LV International was infringing their trademarks and then sought injunctive relief. In other words, Bridgestone's trademark rights in the United States simply give Bridgestone the right to prevent infringement, but Bridgestone must monitor the market and take action against infringers. The Reservation of Rights Letter therefore put LV International on notice of this and informed LV International that Bridgestone would take action against any infringement of Bridgestone's intellectual property. As Roberta Jacobs-Meadway explains, there was nothing unusual or improper about the Reservation of Rights Letter:

*"A reservation of rights letter is a standard part of trademark protection in common law jurisdictions such as the United States, and is not of itself abusive, threatening, intimidating, or otherwise inappropriate."*<sup>66</sup>

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<sup>64</sup> See e.g., **CLA-0061** – *Aromatique Inc. v. Lang*, 25 USPQ2d 1359, 1361 (TTAB 1992); **CLA-0062** – *Miller Brewing Co. v. Coy International Corp.*, 230 USPQ 675, 678 (TTAB 1986); **CLA-0063** – *United States Olympic Committee v. Bata Shoe Co.*, 225 USPQ 340, 342 (TTAB 1984), **CLA-0064** – *Bass Anglers Sportsman Society of America, Inc. v. Bass Pro Lures, Inc.*, and *In re Communications Technology Corp.*, 182 USPQ 695, 696 (TTAB 1974).

<sup>65</sup> **Exhibit C-0013** – Reservation of Rights Letter.

<sup>66</sup> Expert Report of Roberta Jacobs-Meadway dated 11 May 2018, ¶ 36

33. The Reservation of Rights Letter is of importance in this Arbitration because of the reliance placed upon it by the Supreme Court in its judgment, which found it evidence of reckless and intimidating behaviour by BSLS and BSJ. Accordingly, the text is reproduced here in full:

*Dear Mr. Sanchelima,*

*As you are well aware, the Trademark Trial and Appeal Board has rendered judgment against your client, sustained our opposition and refused registration in connection with your client's application to register RIVERSTONE as a trademark for tires.*

*Please take notice that Bridgestone/Firestone objects not only to any registration of the RIVERSTONE mark for tires by your client, but also to any use of the mark. Although it is not aware of any current use of the RIVERSTONE mark in the United States, Bridgestone/Firestone hereby makes formal demand upon your client to refrain from any use of the RIVERSTONE trademark in the United States now or at any time in the future.*

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

*Very truly yours,*

*Peter G. Mack*

**VI. TRADEMARK OPPOSITION ACTION AGAINST RIVERSTONE IN PANAMA**

34. As described at paragraph 20 above, on 6 May 2002, Muresa filed a trademark application for the RIVERSTONE mark, but the trademark application was not published in the Official Gazette until 4 February 2005.<sup>67</sup>
35. The publication of Muresa's trademark application came to the attention of Ladas & Parry LLP ("**Ladas & Parry**"), the New York law firm instructed by BSLS to

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<sup>67</sup> **Exhibit C-0256** – Official Gazette of Panama dated 4 February 2005.

monitor its trademarks, through its monitoring service known as “Watch Services”.<sup>68</sup> Ladas & Parry instructed Panamanian law firm Benedetti & Benedetti to commence trademark opposition proceedings against Muresa, consistent with Bridgestone’s policy to oppose trademarks with a –STONE suffix, and with its approach to the RIVERSTONE mark in the United States.

36. On 5 April 2005, BSLs and BSJ, as holders of the FIRESTONE and BRIDGESTONE trademarks in Panama respectively, filed an opposition to the RIVERSTONE trademark.<sup>69</sup> BSLs and BSJ argued that the RIVERSTONE mark was “*deceptively similar*” to the BRIDGESTONE and FIRESTONE trademarks, because it (i) had the same “-STONE” suffix; (ii) had the same I-E-O-E vowel sequence; (iii) incorporated a component, “river”, which is conceptually, phonetically and grammatically similar to “bridge” and “fire”; and (iv) was used to cover identical products.<sup>70</sup>
37. Muresa filed its response on 20 June 2005.<sup>71</sup> It argued, *inter alia*, that the RIVERSTONE trademark was not similar to the BRIDGESTONE or FIRESTONE marks, because the RIVERSTONE trademark (i) was original and distinctive; (ii) was different, graphically, phonetically and visually to the BRIDGESTONE and FIRESTONE trademarks; (iii) had 10 letters, whereas BRIDGESTONE had 11 and FIRESTONE had 9 letters; (iv) had a unique logo which was based on Tai Chi Chuan, (the Chinese martial art and system of coordinated body posture and movement); (v) differed phonetically, as RIVERSTONE is not pronounced in English in a similar way to FIRESTONE or BRIDGESTONE; (vi) differed conceptually in Spanish; (vii) used a different font; and (viii) was applied to products that were not purchased by the same consumers.<sup>72</sup>
38. Muresa also noted that the RIVERSTONE trademark was very well known to consumers, and alleged that Bridgestone and Firestone products had been publically discredited through various defects and product recalls in the preceding years. Muresa

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<sup>68</sup> See Witness Statement of Thomas R. Kingsbury (21 July 2017) at ¶¶ 12-13 (describing Watch Services and stating that “Ladas & Parry has directly helped BSLs in challenging competing “STONE” marks . . . includ[ing] the opposition to the RIVERSTONE trademark application filed in Panama which is at the center of the Panama civil damages litigation.”); **Exhibit C-0242** - Ladas & Parry, Watch Services.

<sup>69</sup> **Exhibit C-0150** – Opposition to Trademark Register of Riverstone dated 5 April 2005.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> **Exhibit C-0176** – Muresa Response dated 20 June 2005.

<sup>72</sup> *Id.* 4-8.

claimed that any confusion or similarity with BRIDGESTONE or FIRESTONE would actually harm the RIVERSTONE brand.<sup>73</sup>

39. On 25 and 26 August 2005, respectively, LV International and TGFL filed applications to join the proceedings. Both argued that they were closely related to Muresa, being in the same group of companies known as the Luque Group, and were licensed distributors and users of the RIVERSTONE mark.<sup>74</sup> The Court ordered TGFL and LV International be joined to the proceedings as interveners on 31 August 2005.<sup>75</sup> BSLS and BSJ appealed this decision on 8 September 2005,<sup>76</sup> and filed their arguments in support of their appeal on 14 October 2005.<sup>77</sup> Muresa, LV International and TGFL filed their response on 20 October 2005.<sup>78</sup> The Third Superior Court of Justice affirmed the Court's decision joining TGFL and LV International on 15 November 2005.<sup>79</sup>
40. The evidence in the trademark opposition action proceedings was heard by the Court on a number of days between March and May 2006. On 21 July 2006, the Eighth Civil Circuit Court issued its judgment.<sup>80</sup> The judge held that BSLS and BSJ held priority rights over certain trademarks in Panama, which had all been registered before Muresa applied to register the RIVERSTONE trademark.<sup>81</sup> Since BSLS and BSJ had superior rights to their trademarks, the Eighth Civil Circuit Court held that it should subject the RIVERSTONE mark to the "*known trademark comparison*"<sup>82</sup> which determines whether or not it could feasibly coexist with the known trademarks of BSLS and BSJ. The court also noted that the RIVERSTONE mark was already in

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<sup>73</sup> *Id.* 9-12.

<sup>74</sup> **Exhibit C-0177** – Third-party Intervention filed by Ballard & Ballard on behalf of LV International dated 25 August 2005; **Exhibit C-0178** – Third-party Intervention filed by Ballard & Ballard on behalf of TGFL dated 26 August 2005.

<sup>75</sup> **Exhibit C-0179** – Commercial Invoice dated 12 March 2003.

<sup>76</sup> **Exhibit C-0180** – Notice of Appeal filed by Benedetti & Benedetti to Order No. 911 dated 9 September 2005.

<sup>77</sup> **Exhibit C-0181** – Appeal to Order No. 911 by Benedetti & Benedetti dated 14 October 2005.

<sup>78</sup> **Exhibit C-0182** – Opposition to Appeal Filed by Ballard & Ballard dated 20 October 2005.

<sup>79</sup> **Exhibit C-0183** – Order joining TGFL and LV International on 15 November 2005.

<sup>80</sup> **Exhibit C-14** – Judgment No. 48, Eighth Civil Circuit Court.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

use in the market. Both parties submitted evidence of the use of their marks in Panama, including invoices of sales.<sup>83</sup>

41. The Eighth Circuit Court found that there were similarities between the RIVERSTONE and the BRIDGESTONE and FIRESTONE marks,<sup>84</sup> such as the spelling and phonetic similarities between them. However, that alone did not mean that there would be risk of confusion, and the court held that the similarities “*did not imply a confusing similarity*”.<sup>85</sup> The court further held that the way in which the trademarks were marketed, at specific points of sale that were distinct from each other, meant that consumers would not be confused.<sup>86</sup> Further, the RIVERSTONE trademark had a design element (the yin yang sign) that was distinctive from the BRIDGESTONE and FIRESTONE marks.<sup>87</sup> In practice, the trademarks were already coexisting in the market, and both sides had invested heavily in their trademarks. There was no evidence that the coexistence had caused any mistake or confusion to consumers. Therefore, Muresa’s application to register the RIVERSTONE mark was permitted.<sup>88</sup>

42. Importantly, the Eighth Circuit Court did not award costs to Muresa (as it had the power to do, and as subsequent courts did in the damages action brought by Muresa):

*“BRIDGESTONE CORPORATION and BRIDGESTONE LICENSING SERVICES, INC. shall be released from payment of Attorney’s fees, given that this administration of justice offices deems that it has acted with evident good faith; maintained and held its position in the process, submitted suitable evidence material to prove its standing in cause, all without abusing the right to litigate.”*<sup>89</sup>

43. On 3 August 2006, BSLs and BSJ filed an appeal to the judgment of the Eighth Civil Circuit Court.<sup>90</sup> The parties to a trademark opposition proceeding have an automatic right of appeal, but appeals must be filed within three business days of the date of

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 19.

<sup>85</sup> **Exhibit C-14** – Judgment No. 48, Eighth Civil Circuit Court, 20.

<sup>86</sup> *Id.* at 21.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 22.

<sup>89</sup> *Id.* at 22-23.

<sup>90</sup> **Exhibit C-0151** – Bridgestone Notice of Appeal dated 3 August 2006.

receipt of the judgment (which can be several days or weeks from the date of the judgment). In practice, this means that most unsuccessful parties file an appeal within the three-day period, even if they have not conducted a full review of the decision in order to determine the likely outcome of such appeal. During the days before their full appeal pleading was due, BSLS and BSJ decided not to pursue the appeal because they understood that they were very unlikely to succeed and therefore it would not be worth incurring the costs of continuing.

44. Therefore, on 5 September 2006, BSLS and BSJ withdrew their appeal.<sup>91</sup> The Third Superior Court of Justice of the First Judicial Circuit admitted BSLS and BSJ's withdrawal on 11 September 2006, and ordered BSLS and BSJ to pay costs of fifty balboas (USD 50).<sup>92</sup>
45. BSLS and BSJ believed that this was the end of the matter. They continued to oppose the RIVERSTONE trademark in other jurisdictions, and were generally successful, as described at paragraph 24 above.

## **VII. MURESA'S DAMAGES CLAIM AGAINST BSLS AND BSJ**

46. However, on 12 September 2007, Muresa and TGFL filed a claim against BSLS and BSJ in the Eleventh Civil Circuit Court of the First Judicial District of Panama (the "**Eleventh Circuit Court**").<sup>93</sup> Muresa and TGFL sought damages of USD 5 million, for "*damages and losses caused to the plaintiff companies due to its opposition to the Registry of the brand RIVERSTONE y DISEÑO.*"<sup>94</sup>
47. On 18 September 2007, the Eleventh Circuit Court ordered that Muresa and TGFL have 40 days in which to serve BSLS and BSJ, since they were out of the court's jurisdiction.<sup>95</sup> Within that period, Benedetti & Benedetti, BSLS and BSJ's Panamanian lawyers, accepted service on behalf of their clients.
48. Muresa and TGFL claimed loss of USD 500,000 plus attorney's fees and costs. Muresa and TGFL claimed that simply by filing trademark opposition proceedings

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<sup>91</sup> **Exhibit C-0152** – Bridgestone Withdrawal of Appeal dated 5 September 2006.

<sup>92</sup> **Exhibit C-0184** – Order Accepting Withdrawal of Appeal and Ordering Payment of 50 Balboas 8 September 2006.

<sup>93</sup> **Exhibit C-0016** – Civil Complaint filed by Muresa Intertrade S.A.

<sup>94</sup> *Id.* at 2.

<sup>95</sup> **Exhibit C-0021** – Judgment 70, 11th Circuit Civil Court, at 2.

against them, BSJ and BSLS had caused loss and damage, because it caused Muresa and TGFL to “*cease manufacturing the products distinguished with the aforementioned brand at the scale it was producing them prior to the claim, that is, in 2002, 2003 and 2004, and had to abandon all inventories it had in warehouses, consequently limiting the sale of these products, and consequently causing damages and losses... as they were unable to fulfill all orders, given the real risk of them being seized*” by BSJ and BSLS.<sup>96</sup>

49. Muresa and TGFL alleged (i) that they had abandoned their inventory of RIVERSTONE-branded tires and reduced sales of those tires following the trademark opposition filing; and (ii) that they sold other, inferior brands in the meantime to satisfy customer demand, but the inferior and sometimes defective products caused damage to the RIVERSTONE brand’s reputation. These allegations were said to be supported by both witness and expert evidence.
50. BSLS and BSJ filed their Answer to the Complaint of Muresa and TGFL on 19 August 2009.<sup>97</sup> BSLS and BSJ explained that the trademark opposition action was not a “*process initiated against Muresa*”,<sup>98</sup> but an “*exercise of the right granted thereto by Article 107 of Law 35 of 1996*”<sup>99</sup> and denied liability for any damages caused to Muresa or TGFL for the alleged halt in sales of RIVERSTONE tires.<sup>100</sup> BSLS and BSJ argued that (i) Muresa and TGFL had not explained what negligent or bad faith act or omission caused damages; (ii) a trademark opposition action cannot and did not have the effect of stopping a company from selling its products; (iii) the claim lacked the minimum requirements such as attribution of guilt or unlawfulness, causation and loss; (iv) trademark opposition proceedings do not suspend the use of a trademark, they simply suspend the process of registration of the trademark; (v) claims for damages resulting from legal proceedings should be made under Article 217 of the Judicial Code and a showing of require reckless or frivolous procedural conduct and damages caused by such conduct; (vi) BSLS and BSJ acted with good faith, legitimately defending its exclusive right of use to its registered trademarks, as

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<sup>96</sup> **Exhibit C-0016** – Civil Complaint filed by Muresa Intertrade S.A., at 5.

<sup>97</sup> **Exhibit C-0019** – BSJ and BSLS Answer to Complaint.

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.* See also **Exhibit C-0185** – Law 35 of 10 May 1996 of the Republic of Panama, Article 107.

<sup>100</sup> **Exhibit C-0019** – BSJ and BSLS Answer to Complaint, at 2.



explicitly acknowledged by the Eighth Civil Circuit judge; (vii) therefore the requirements of Article 217 of the Judicial Code are not met here; (viii) the complaint shows bad faith since it alleged damages that could not possibly have been incurred by the plaintiffs as a result of a trademark opposition action; and (ix) at the time of the trademark opposition action, Muresa did not yet have a right to use its trademark in Panama, and so did not have the right to enforce it against BSLS and BSJ.<sup>101</sup>

51. On the same date, BSLS and BSJ filed a Petition for Nullification due to Absence of Competence and Violation of Due Process.<sup>102</sup> BSLS and BSJ argued that the purpose of Muresa's complaint was to determine whether or not there was bad faith in the trademark opposition proceedings, and the appropriate legal basis for such complaint should have been Article 217 of the Judicial Code. However, Muresa's claims were made under Article 1644 of the Civil Code, which was inapplicable to these proceedings. Muresa's claim should have been brought before the Eighth Commercial Court, which had exclusive competence to hear issues relating to intellectual property disputes pursuant to Article 197 of Law 35 of 1996.<sup>103</sup>
52. Muresa replied to the Petition for Nullification on 14 September 2009.<sup>104</sup> Muresa argued that its claim went beyond the jurisdiction of the commercial division, because the claim was not for ownership of the trademark, but for damages allegedly suffered by Muresa due to the trademark opposition action. Therefore it was a civil action for non-contractual liability. As the conflict did not arise out of intellectual property issues, it could be submitted to the rules of ordinary proceedings, pursuant to Article 1228 of the Judicial Code.<sup>105</sup>
53. On 28 September 2009, Muresa and TGFL submitted the list of evidence that they wished to adduce,<sup>106</sup> supplemented by a further list on 1 October 2009.<sup>107</sup> The lists

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<sup>101</sup> *Id.* at 3-6.

<sup>102</sup> **Exhibit C-0186** – Nullification Application Filed by Bridgestone Arguing that Muresa Complaint in Violation of Due Process dated 19 August 2009.

<sup>103</sup> **Exhibit C-0185** – Law 35 of 10 May 1996 of the Republic of Panama, Article 197.

<sup>104</sup> **Exhibit C-0187** – Muresa's Response to Nullification Application dated 14 September 2009.

<sup>105</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 1228 – “*All adversarial issues which are not subject to special procedures in this code shall be tried and decided in an ordinary proceeding. Notwithstanding the fact that the Code permits special procedures, the plaintiff may choose the ordinary route.*”

<sup>106</sup> **Exhibit C-0189** – List of Evidence Submitted by Muresa dated 9 September 2009.

<sup>107</sup> **Exhibit C-0190** – List of Evidence Submitted by Muresa dated 1 October 2009.

included documentary evidence, a list of fact witnesses, and a request for expert evidence, including the questions to be put to the expert. The Reservation of Rights Letter was not among the documents listed.

54. On 6 October 2009, BSLS and BSJ submitted their list of counter-evidence that they wished to adduce.<sup>108</sup> This included sales projections and accounting documents from TGFL and witness evidence from the trademark opposition action.
55. On 9 October 2009, BSLS and BSJ set forth their objections to the lists of evidence submitted by Muresa and TGFL.<sup>109</sup>
56. On 26 January 2010, the Eleventh Circuit Court issued its order on the evidence, setting out the dates on which the witnesses would appear and ordering expert evidence to address a list of questions.<sup>110</sup>
57. The hearing of the evidence took place over several weeks. At each hearing, a witness would be examined first by Muresa's lawyers, and then cross-examined by BSLS and BSJ's lawyers. The resulting transcript formed the evidence that was considered by the court and referred to by both parties in their closing submissions.
58. The witness evidence of Muresa consisted of the following:
  - a) Jose Orestes Medina Samaniego, sales manager for Muresa, gave evidence on 21 April 2010. Mr. Medina stated that when he learned that BSJ and BSLS had opposed the registration of the RIVERSTONE mark in Panama, he had to "*create contingency plans within the company*",<sup>111</sup> and they brought in other brands to satisfy customer demand, resulting in "*very severe*" consequences, as some of the new brands, which were offered at a lower price, "*had quality issues, causing losses.*"<sup>112</sup> Mr. Medina also described losses across various markets in Latin America and the Caribbean. When asked why a contingency plan was put in place, Mr. Medina could not identify any order of the court

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<sup>108</sup> **Exhibit C-0191** – List of Counterevidence Presented by Bridgestone dated 6 October 2009.

<sup>109</sup> **Exhibit C-0192** – Bridgestone Objections to Evidence Submitted by Muresa dated 9 October 2009.

<sup>110</sup> **Exhibit C-0193** – Decision Accepting Evidence Presented by Muresa 26 January 2010; **Exhibit C-0194** – Decision Accepting Counterevidence Presented by Bridgestone 26 January 2017.

<sup>111</sup> **Exhibit C-0153** – Testimony by Jose Orestes Medina Samaniego dated 21 April 2010, 3.

<sup>112</sup> *Id.*

that had required this plan, but stated, “we were worried about an instruction that would allow the *BRIGSTONE* [sic: *BRIDGESTONE*] CORPORATION to carry out seizures or prevent the sale of the *RIVESTONE* [sic: *RIVERSTONE*] brand tires and the situation was very delicate as we had product in the warehouse, product in transit and product in the factory with the *RIVESTONE* [sic: *RIVERSTONE*] brand that we would not be able to sell in the case of any order was issued against us.”<sup>113</sup> Mr. Medina stated that as a manager, he was not involved in the decision to stop selling *RIVERSTONE* tires, and such decision would have been taken by the board of directors, and then communicated to managers.<sup>114</sup> Mr. Medina said, confusingly, that *RIVERSTONE* tires were already being sold before he joined Muresa in 2005,<sup>115</sup> but that the launch of *RIVERSTONE* tires was planned in Panama for the end of 2005 and beginning of 2006,<sup>116</sup> but that did not happen until 2009: “if the product development plans had not been halted while awaiting the outcome of this resolution, *MURESA INTERTRADE* would have been able to develop and invoice these new products three years earlier, and not have to wait until 2009 to launch these new products.”<sup>117</sup>

- b) Domingo Esteban Romero Ceballos, warehouse manager for Muresa, gave evidence on 21 April 2010.<sup>118</sup> Mr. Romero Ceballos stated that he was informed orally by Mr. Fernan Luque in April 2005 that they had to cease selling *RIVERSTONE* tires, “until some issues with the *BRIDGESTONE* and *FIRESTONE* brand were resolved.”<sup>119</sup>

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<sup>113</sup> *Id.* at 9.

<sup>114</sup> *Id.* at 10.

<sup>115</sup> *Id.* at 11.

<sup>116</sup> *Id.* at 12.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> **Exhibit C-0154** – Testimony by Domingo Esteban Romero Ceballos dated 21 April 2010.

<sup>119</sup> *Id.* at 2, 4.

- c) Gricelda Pineda Castillo, manager of the importation department at Muresa, gave evidence on 22 April 2010. Ms. Castillo clarified that the tires that Muresa decided to sell instead of RIVERSTONE tires were of poor quality – *“they were not well accepted by our customers, this lead to constant complaints, since the customers were saying that some products had faults and this forced the MURESA company to cover these costs from the customers in order to not lose the customers and in order for the customers to continue purchasing from the company.”*<sup>120</sup> Ms. Castillo explained that the order to stop sales and manufacture of RIVERSTONE tires came from *“my superior, Mr. Fernan Luque.”*<sup>121</sup> She was not aware of any documents from BSLS or BSJ requesting stoppage of manufacturing or sale of RIVERSTONE tires.<sup>122</sup>
- d) Aminta Julissa Vega de Barrera,<sup>123</sup> assistant in the sales support unit of Muresa, gave evidence on 23 April 2010. Ms. Vega de Barrera was told by Mr. Fernan Luque that *“there was opposition in relation to the brand,”*<sup>124</sup> and consequently other unknown, low quality brands of tires were sold instead of RIVERSTONE. Ms. Vega de Barrera did not see any documents ordering a halt to importation or production of tires.<sup>125</sup> It was her understanding that *“the opposition proceedings brought by BRIDGESTONE and FIRESTONE... prevented sales and distribution of the RIVERSTONE brand,”*<sup>126</sup> because the *“objection did not allow for the RIVERSTONE brand tire to be freely sold to various customers.”*<sup>127</sup>
- e) Fernan Jesus Luque Gonzalez, manager of Muresa and president of TGFL, gave evidence on 27 April 2010.<sup>128</sup> Mr. Fernan Luque stated that the RIVERSTONE brand had been challenged by Bridgestone in several other jurisdictions, which had resulted in expenses for Muresa in defending these

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<sup>120</sup> **Exhibit C-0155** – Testimony by Gricelda Pineda Castillo dated 22 April 2010, 6.

<sup>121</sup> *Id.* at 8.

<sup>122</sup> *Id.* at 9.

<sup>123</sup> **Exhibit C-0156** – Testimony by Aminta Julissa Vega De Barrera dated 23 April 2010.

<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 8.

<sup>127</sup> *Id.*

<sup>128</sup> **Exhibit C-0160** – Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 1), 2.

challenges.<sup>129</sup> He further stated that Muresa had been unable to continue trading RIVERSTONE tires during the period of the trademark opposition action, because of “*fears of a seizure*” of the products.<sup>130</sup> Such fears were based on “*the information we were given by customs agents and by some related persons*”, but no one from Bridgestone was mentioned, and there were no letters or communications received from BSLS or BSJ.<sup>131</sup> Mr. Fernan Luque also said that “*the factories in China and all of our customers were aware of the dispute and therefore the latter refused to buy and the former to produce.*”<sup>132</sup> Instead of RIVERSTONE tires, he explained that Muresa had to start selling various other brands of tires which did not have recognition in the Panamanian market, and so had to be sold at a discount.<sup>133</sup> Mr. Fernan Luque mentioned that at a trade fair in Las Vegas, a Bridgestone representative “*came over to our stand to tell us that we could not sell nor exhibit this product at this fair, as well as the RIVERSTONE product that we had in our warehouses in Miami, they informed us that we could not sell the brand in the United States and in that instance we had to get rid of the RIVERSTONE brand that we had in the warehouse.*”<sup>134</sup>

- f) Aixa Yadira Ramirez de Gonzalez,<sup>135</sup> sales manager at Multii Respuesto S.A. (“**Multii**”), a company which sells replacement parts, accessories and tires, gave evidence on 30 April 2010. The main brand of tires sold by Multii was RIVERSTONE.<sup>136</sup> Ms. Ramirez de Gonzalez stated that around mid-2005, “*the rumor was going around that they were going to collect all of the tires of that brand [RIVERSTONE],*”<sup>137</sup> and so Multii tried to sell all of its stock. Since Muresa was no longer supplying them with RIVERSTONE tires, they obtained tires from other brands, which were not well-received in the market

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<sup>129</sup> *Id.* at 3-4. The other jurisdictions mentioned by Mr. Luque Gonzalez were the United States, Argentina, Chile, the Dominican Republic, Colombia, Venezuela, South Africa, South Korea and China.

<sup>130</sup> **Exhibit C-0161** – Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2), 3.

<sup>131</sup> *Id.* at 3, 7.

<sup>132</sup> *Id.* at 7.

<sup>133</sup> *Id.* at 4.

<sup>134</sup> *Id.* at 6.

<sup>135</sup> **Exhibit C-0157** – Testimony by Aixa Yadira Ramirez De Gonzalez dated 30 April 2010 (part 1).

<sup>136</sup> *Id.* at 2.

<sup>137</sup> *Id.* at 3.

as they were unknown brands.<sup>138</sup> Ms. Ramirez de Gonzalez did not know the origin or cause of the rumors about RIVERSTONE.<sup>139</sup>

- g) Mirna Raquel Moreira Martinez,<sup>140</sup> authorised public accountant, providing services to Muresa and TGFL, gave evidence on 3 May 2010. Ms. Moreira Martinez said that Mr. Fernan Luque told her that tires could not be sold because of a “*rumor in the customs office*”.<sup>141</sup> It was her belief that Mr. Fernan Luque had “*received calls from persons in the customs office and customers*” who had found out about a seizure that “*had already occurred in the United States.*”<sup>142</sup>
- h) Laura Esther Murgas de Bracho, administrative manager of Muresa, gave evidence on 5 May 2010.<sup>143</sup> Ms. Murgas de Bracho stated that “*because of the objection*”, Muresa had to sell other tires in Panama which were lower quality than RIVERSTONE tires and not brands that were known by Panamanian consumers.<sup>144</sup> Ms. Murgas de Bracho said that she was told about “*possible seizure*” by Mr. Fernan Luque in 2005 or 2006,<sup>145</sup> and that sales of RIVERSTONE tires restarted in 2006.<sup>146</sup>
- i) Jorge Alberto Luque Gonzalez, manager of LV International, gave evidence on 14 May 2010.<sup>147</sup> Mr. Jorge Luque stated that he was told by Mr. Fernan Luque that “*there was a threat of a seizure should the tires have entered Panama,*”<sup>148</sup> and that threat had come from “*customs agents.*”<sup>149</sup> Mr. Jorge

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<sup>138</sup> *Id.* at 3-4.

<sup>139</sup> *Id.* at 6.

<sup>140</sup> **Exhibit C-0158** – Testimony by Mirna Raquel Moreira Martinez dated 3 May 2010.

<sup>141</sup> *Id.* at 8-9.

<sup>142</sup> *Id.* at 9.

<sup>143</sup> **Exhibit C-0159** – Testimony by Laura Esther Murgas de Bracho dated 5 May 2010.

<sup>144</sup> *Id.* at 4.

<sup>145</sup> *Id.* at 5-7.

<sup>146</sup> *Id.* at 8.

<sup>147</sup> **Exhibit C-0148** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 1).

<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Id.* at 6.

Luque also said that he had informed personnel at Muresa and TGFL of the Reservation of Rights Letter.<sup>150</sup>

59. The parties' accounting experts filed their reports on 24 May 2010. BSLs and BSJ's accounting expert was Manuel Ochoa Sanchez,<sup>151</sup> and Muresa's accounting experts were Jose A. Aguilar and Psiquies de Leon.<sup>152</sup> The court's accounting expert, Vera Luisa Lindo de Gutierrez, filed her report on the same day.<sup>153</sup>
60. In their reports, the experts considered the following points with respect to Muresa:
- a. The sales Muresa expected during 2005 and 2006. All experts agreed that these were 22 million balboas in 2005 and 23 million balboas in 2006. These were for total sales, not specifically RIVERSTONE sales.<sup>154</sup> No basis for the sales projections were provided, and BSLs and BSJ's expert found them to be arbitrary and unrealistic, given that total sales for 2004 had been around 14 million balboas, and no explanation was provided for the projected 54% increase.<sup>155</sup> The Court's expert also noted the lack of supporting documentation for the projections.<sup>156</sup> Actual sales of RIVERSTONE tires in 2003 and 2004 had been 3,412,908.13 balboas and 4,391,166.79, balboas respectively.<sup>157</sup>
  - b. The actual sales Muresa made during 2005 and 2006. Muresa sales were 16,831,729 balboas in 2005 and 17,185,850 balboas in 2006.<sup>158</sup> This

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<sup>150</sup> **Exhibit C-0147** – Testimony by Jorge Alberto Luque Gonzalez dated 14 May 2010 (part 2).

<sup>151</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report.

<sup>152</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010.

<sup>153</sup> **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010.

<sup>154</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 3; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 1; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 2.

<sup>155</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 2-4.

<sup>156</sup> **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, 2; *see also* minutes of the Board of Muresa, being the sole basis for the sales projections provided to the experts: **Exhibit C-0248** - Minutes from Muresa Board Meeting – 2008; **Exhibit C-0249** - Minutes from Muresa Board Meeting - 2007; **Exhibit C-0250** - Minutes from Muresa Board Meeting – 2006; **Exhibit C-0251** - Minutes from Muresa Board Meeting – 2005.

<sup>157</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 3.

<sup>158</sup> *Id.* at 4; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 2; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 3.

included 5,364,132 balboas in 2005 and 3,971,533 balboas in 2006 for RIVERSTONE tires.

- c. The reason why Muresa did not meet its anticipated sales objective during 2005 and 2006. BSLS and BSJ's expert and the Court's expert considered that adequate supporting documentation for the projections had not been provided and so no conclusion could be drawn.<sup>159</sup> BSLS and BSJ's expert noted that it was likely that the projections were unrealistic as they did not appear to be based on actual sales of previous years or market research.<sup>160</sup> Muresa's experts stated that the sales did not occur because of the trademark opposition action filed by BSLS and BSJ, and referred to the Reservation of Rights Letter. They further noted that sales of RIVERSTONE tires represented a lower percentage of Muresa's sales from 2005 onwards.<sup>161</sup>
- d. The reason for limiting or restricting the import of RIVERSTONE tires to the Colon Free Zone. BSLS and BSJ's expert and the Court's expert could not reach any conclusion on this issue.<sup>162</sup> It was not possible to make a determination on this issue from the sales data provided, which did not distinguish sales destinations.<sup>163</sup> Without referring to any supporting documentation, Muresa's experts stated that imports were limited or restricted due to the trademark opposition action filed by BSLS and BSJ.<sup>164</sup>
- e. The reason Muresa was unable to make direct sales from the Colon Free Zone to certain counties in Central and South America. BSLS and BSJ's expert and the Court's expert both stated that it was not possible to

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<sup>159</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 4; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 3.

<sup>160</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 4.

<sup>161</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 2-3.

<sup>162</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 4-5; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 4.

<sup>163</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 4-5.

<sup>164</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 3.



determine sales destinations from the data provided.<sup>165</sup> Muresa's experts noted that sales had been made abroad, including to Central and South American countries.<sup>166</sup>

- f. The concerns of Muresa's customers with regards to the purchase of RIVERSTONE tires. BSLS and BSJ's expert stated that Muresa had sold RIVERSTONE tires.<sup>167</sup> The Court's expert and Muresa's experts stated that they had not been shown documents that would evidence concern of customers.<sup>168</sup>
- g. The damages caused to Muresa as a result of not being able to sell its RIVERSTONE tires. BSLS and BSJ's expert stated that Muresa's sales projections were not based on sales history or any other data such as feasibility analyses or market research. Therefore, since tires were sold at similar levels in 2005 and 2006 to the preceding years, no loss was suffered.<sup>169</sup> The Court's expert made a similar finding – that projections were not based on any supporting data so it was not possible to ascertain any damages or determine the cause of reduced sales.<sup>170</sup> Muresa's experts noted that sales of RIVERSTONE tires increased in 2005 from 2004, despite the fact that 2005 was the year when the trademark opposition action was filed, and decreased thereafter.<sup>171</sup>
- h. The sales expected by Muresa during 2007 and 2008. The estimated sales were said to be 23 million balboas for each year, although no basis was provided for these sales projections.<sup>172</sup>

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<sup>165</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 5-6.

<sup>166</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, 3.

<sup>167</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 6.

<sup>168</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 3; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 5.

<sup>169</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 7.

<sup>170</sup> **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 5.

<sup>171</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 3-4.

<sup>172</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, 7-8; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, 4; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 6.

- i. The actual sales by Muresa during 2007 and 2008. Muresa sold 4,717,299 balboas of RIVERSTONE tires and had total sales of 17,186,091 balboas for 2007, and sold 3,777,637 balboas of RIVERSTONE tires and had total sales of 20,197,735 balboas in 2008.<sup>173</sup>
- j. The reason Muresa did not meet its sales objectives during 2007 and 2008. BSLS and BSJ's expert and the Court's expert both stated that, as with previous years, no scientific basis for the sales projections was provided, and RIVERSTONE tires continued to be sold throughout 2005 and 2006.<sup>174</sup> Therefore, in BSLS and BSJ's expert's view, "*the responsibility regarding the reason why the company did not meet its expected sales objectives lies completely with the development and management of the company.*"<sup>175</sup> Muresa's experts stated that Muresa did not meet its sales objectives because of the trademark opposition action by BSLS and BSJ, and although sales of RIVERSTONE tires increased in 2007 and 2008, they were unable to recover the levels of increase that they had before the opposition action.<sup>176</sup>

61. With respect to TGFL, the experts considered the following points:

- a. The sales TGFL expected during 2005 and 2006. Although the records provided were not fully reliable from an accounting point of view,<sup>177</sup> the projections provided showed sales of 8 million balboas for each of 2005 and 2006.<sup>178</sup>

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<sup>173</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 8; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 4; **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 7.

<sup>174</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 8; **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 7.

<sup>175</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 8.

<sup>176</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 5.

<sup>177</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 9.

<sup>178</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 10; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 5; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 8.

- b. The actual sales of TGFL during 2005 and 2006. The actual sales were 5,437,600 balboas for 2005 and 5,369,729 balboas for 2006.<sup>179</sup>
- c. The reason why TGFL did not meet its anticipated sales objective during 2005 and 2006. BSLS and BSJ's expert and the Court's expert stated that no reliable records or documents were provided to support the projections, so no conclusion could be reached.<sup>180</sup> Muresa's expert stated that this was because of the trademark opposition action filed by BSLS and BSJ, and referred to the Reservation of Rights Letter.<sup>181</sup>
- d. The reason for limiting or restricting the import of RIVERSTONE tires to the Colon Free Zone. BSLS and BSJ's expert and the Court's expert could not reach any conclusion on this issue because no documents were provided to explain why imports had to be limited or restricted.<sup>182</sup> Muresa's expert stated that imports were limited or restricted because of the trademark opposition action filed by BSLS and BSJ.<sup>183</sup>
- e. The reason direct sales could not be made from the Colon Free Zone to certain countries in Central and South America. BSLS and BSJ's expert and the Court's expert could not find any reasons based on the information provided.<sup>184</sup> Muresa's expert noted that sales had been made by TGFL to Central and South American countries.<sup>185</sup>
- f. The concerns of TGFL customers with regards to RIVERSTONE tires. None of the experts was able to express a view because no accounting or

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<sup>179</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 10; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 5; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 9.

<sup>180</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 10; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 9-10.

<sup>181</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 5-6.

<sup>182</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, 10; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 10.

<sup>183</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 6.

<sup>184</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, 10; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 10.

<sup>185</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 6.

administrative documents in Panama were provided, and so there were no documents with notes from customers expressing any concerns.<sup>186</sup>

- g. The damages caused to TGFL as a result of not being able to sell its RIVERSTONE tires. BSLs and BSJ's expert stated that no evidence was provided to support any conclusion being drawn. In particular, there was no evidence provided to support the sales projections.<sup>187</sup> The Court's expert made a similar finding and noted that TGFL had not stopped selling RIVERSTONE tires.<sup>188</sup> Muresa's experts noted that sales had decreased in the years after 2005.<sup>189</sup>
- h. The sales TGFL expected during 2007 and 2008. According to the sales projections, for which no substantiating data was provided, projected sales were 8 million balboas for each of 2007 and 2008.<sup>190</sup> BSLs and BSJ's expert noted that these figures did not comport with the historical data of the years 2003 to 2006.<sup>191</sup>
- i. The actual sales of TGFL during 2007 and 2008. Actual sales for 2007 were 7,875,951 balboas for 2007 and 8,361,568 balboas for 2008.<sup>192</sup>
- j. The reason that TGFL did not meet its sales objectives during 2007 and 2008. BSLs and BSJ's expert and the Court's expert stated that no reliable records were provided of the sales projections so it was not possible to draw a conclusion.<sup>193</sup> Muresa's expert stated that the sales projections

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<sup>186</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, 11; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, 6; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 11.

<sup>187</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 11.

<sup>188</sup> **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 11.

<sup>189</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 7.

<sup>190</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 11; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 7; **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 11.

<sup>191</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 11.

<sup>192</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, at 12; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 7; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 12.

<sup>193</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, 12; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 13.

were not achieved because of the trademark opposition action filed by BSLs and BSJ.<sup>194</sup>

62. Cross examination of the experts started the day after the reports were submitted, on 25 May 2010, and continued until 27 May 2010. BSLs and BSJ's expert was examined first,<sup>195</sup> followed by the Court's expert<sup>196</sup> and then Muresa's experts.<sup>197</sup>
63. During cross examination of BSLs and BSJ's expert, Muresa's lawyer attempted to ask whether the expert was aware of the trademark opposition action, or had seen the Reservation of Rights Letter.<sup>198</sup> BSLs and BSJ's lawyer objected to these questions on the grounds that the trademark opposition action was irrelevant to the report, and that the Reservation of Rights Letter was not a document that had been admitted into evidence, and the judge upheld these objections.<sup>199</sup>
64. During her cross examination, the Court's expert explained that she asked why the total amount of sales was less in 2006 than in 2005. Ms. Moreira and Mr. Orestes Medina "*verbally informed us that they had not achieved the projected sales because they were afraid of having problems if they continued to sell the RIVERSTONE tires*" and the Court's expert therefore "*asked them to provide us with some documentation from that time which stated that they could not sell those tires or that they were afraid of selling them, I also asked him for a document or letter that referred to the reduction of production or something similar and the only thing that we were provided with was the letter that I included in my report [the Reservation of Rights Letter] and which I already explained and 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.*"<sup>200</sup> However, when Muresa's lawyer tried to ask the Court's expert about the Reservation

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<sup>194</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 8.

<sup>195</sup> **Exhibit C-0195** – Interrogatory of Manuel Ochoa Sanchez dated 25 May 2010.

<sup>196</sup> **Exhibit C-0196** – Interrogatory of Vera Luisa Lindo de Gutierrez dated 25 May 2010; and **Exhibit C-0197** – Interrogatory of Vera Luisa Lindo de Gutierrez dated 26 May 2010.

<sup>197</sup> **Exhibit C-0198** – Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 26 May 2010; and **Exhibit C-0199** – Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 27 May 2010.

<sup>198</sup> **Exhibit C-0195** – Interrogatory of Manuel Ochoa Sanchez dated 25 May 2010, at 8-11.

<sup>199</sup> *Id.* at 8-12.

<sup>200</sup> **Exhibit C-0199** – Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 27 May 2010, at 21-22.

of Rights Letter, BSLS and BSJ's lawyer objected on the grounds that the Reservation of Rights Letter had not been properly admitted into evidence, and the judge upheld that objection.<sup>201</sup>

65. Muresa's experts accepted in their oral examination that "*the company continued to sell the RIVERSTONE tires*" but stated that from 2005 onwards it had not been able to achieve the sales levels it had in 2005.<sup>202</sup>
66. On 11 May 2010, LV International applied to the Eleventh Circuit Court for permission to intervene as a third party on behalf of Muresa and TGFL on the basis that there was a substantial relationship between LV International and Muresa, as it was authorised by Muresa to apply for trademark registrations in certain jurisdictions, and to distribute RIVERSTONE tires. It claimed to have suffered loss as a result of the trademark opposition action brought by BSLS and BSJ in the same way as Muresa.<sup>203</sup>
67. On 4 June 2010, Muresa and TGFL filed their Concluding Arguments.<sup>204</sup> They argued:
  - a. BSLS and BSJ "*began an international persecution of our clients at the global level, and even tried to intimidate them, successfully, by announcing to our clients or buyers throughout the world that they would be subject to legal actions filed by them.*"<sup>205</sup>
  - b. The Reservation of Rights Letter "*confirms the malicious acts of intimidation and threats*"<sup>206</sup> against Muresa, TGFL and LV International.
  - c. Muresa had to cease manufacturing RIVERSTONE products and abandon their inventory in warehouses, causing loss and damage,<sup>207</sup> because of "*the fears that there would be seizures or reprisals against them.*"<sup>208</sup>

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<sup>201</sup> *Id.* at 23-24.

<sup>202</sup> **Exhibit C-0198** – Interrogatory of Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 26 May 2010, at 39.

<sup>203</sup> **Exhibit C-0018** – L.V. International Third-Party Submission.

<sup>204</sup> **Exhibit C-0164** – Concluding Remarks Filed by Muresa in Civil Action dated 4 June 2010.

<sup>205</sup> *Id.* at 3.

<sup>206</sup> *Id.* at 4.

- d. The RIVERSTONE mark was already in use in the tire market before Muresa applied for registration of the trademark, and this was known to BSLs and BSJ when they opposed the registration.
- e. Bridgestone had challenged the RIVERSTONE mark in other countries (allegedly without success)<sup>209</sup> and had allegedly seized RIVERSTONE tires in the Dominican Republic.<sup>210</sup>

68. It was notable that the Reservation of Rights Letter was referred to, although it had not been admitted into evidence in the formal procedure set out at paragraph 53 above. Muresa's case was based on loss caused to it by simply filing a trademark opposition action, although under Panamanian as well as international intellectual property law, that is within the rights of a trademark holder and cannot itself be abusive.<sup>211</sup> Muresa argued that it had to stop selling RIVERSTONE tires because of fear of seizure by Bridgestone, although no evidence was adduced to show the basis of any fears other than testimony of Muresa, TGFL and LV International employees who referred to oral warnings on unspecified occasions by unidentified customs officials. There was reference to seizure of tires in the Dominican Republic, but no evidence was offered for this, and no such seizure ever took place either in the Dominican Republic or elsewhere.<sup>212</sup> Muresa also claimed that it stopped selling RIVERSTONE tires, although the evidence did not support that – RIVERSTONE tires continued to be sold both during the trademark opposition action and afterwards, as all of the experts agreed.<sup>213</sup>

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<sup>207</sup> *Id.* at 5.

<sup>208</sup> *Id.* at 16.

<sup>209</sup> *Id.* at 8.

<sup>210</sup> *Id.* at 19.

<sup>211</sup> See Expert Report of Roberta Jacobs-Meadway dated 11 May 2018, ¶ 23: “Any person who believes that it is or may be damaged by registration of a mark has the right to lodge an opposition during the allowed time period, whether or not the goods/services are being advertised or sold under the challenged mark”; and Expert Report of Adan Arjona, ¶ 76.

<sup>212</sup> **Exhibit C-0200** – Concluding Statement Filed by Bridgestone in Civil Action dated 11 June 2010, 7; and see Third Witness Statement of Thomas Kingbury dated 11 May 2018, ¶ 14.

<sup>213</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report; **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, 2; **Exhibit C-0163** – Expert Report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 3.

69. On 11 June 2010, BSLS and BSJ filed their Concluding Arguments.<sup>214</sup> They argued:
- a. Muresa had not alleged any negligent conduct by BSLS and BSJ which caused it to suffer loss.<sup>215</sup>
  - b. Muresa's claim, if it had one, should have been brought under Article 217 of the Judicial Code because the claim arose out of a procedural action, but it brought it under Article 1644 of the Civil Code instead.<sup>216</sup>
  - c. Muresa stated that the trademark opposition proceedings were reckless, but the judgment in those proceedings specifically found that BSLS and BSJ had "*acted with clear good faith*".<sup>217</sup>
  - d. Muresa's claim that it had stopped selling RIVERSTONE tires was proven to be false by all of the experts, who found that there was no cease in sales of RIVERSTONE tires by Muresa or TGFL.<sup>218</sup>
  - e. TGFL had no standing to sue, because it only participated in the trademark opposition proceedings as a third party intervener, and cannot now claim that BSLS and BSJ's actions in those proceedings affected it.
  - f. Muresa's witnesses stated that they had been ordered to stop selling tires by Mr. Fernan Luque, but the basis for his alleged fear of seizures was simply rumour and statements allegedly made by customs officials,<sup>219</sup> and no witness referred to any communications, seizure orders or actions by BSLS or BSJ.<sup>220</sup>
  - g. That the allegation that seizures of tires had occurred in the Dominican Republic was not supported by evidence, and similarly no evidence was

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<sup>214</sup> **Exhibit C-0200** – Concluding Statement Filed by Bridgestone in Civil Action dated 11 June 2010, at 7.

<sup>215</sup> *Id.* at 2.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 3.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 5.

<sup>220</sup> *Id.* at 6.



provided for any oppositions of RIVERSTONE in any country other than the United States (which was a claim not filed by BSLS or BSJ).<sup>221</sup>

- h. The statements made by Muresa and TGFL and their witnesses were false and reckless.<sup>222</sup>
- i. Muresa's experts did not address the questions which were put to them, and added documents to their appendix which were irrelevant and created new points of dispute, which violated BSLS and BSJ's rights to defend themselves.<sup>223</sup> They were asked whether sales had ceased, but since they could not find evidence that they had, the experts instead introduced a new point not claimed by Muresa and TGFL, that sales had decreased.<sup>224</sup>
- j. Muresa's experts referred to the Reservation of Rights Letter, a document not admitted into evidence, and not containing any accounting data relevant for accounting experts.<sup>225</sup>

70. The Eleventh Circuit Court issued its decision on the Petition for Nullification on 6 December 2010.<sup>226</sup> The Court held that Muresa's claim was properly brought in the Eleventh Circuit Court, and dismissed the Petition for Nullification.

71. On 17 December 2010, the Eleventh Circuit Court issued its judgment.<sup>227</sup> In dealing with the merits of the case, the Eleventh Circuit Court made the following findings:

- a. BSLS and BSJ's application for a res judicata declaration was refused (the clear statement of good faith made by the judge in the Eight Circuit Court bars the possibility of claiming damages arising out of that procedural act),

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<sup>221</sup> *Id.* at 7.

<sup>222</sup> *Id.* at 7-8.

<sup>223</sup> *Id.* at 8-9

<sup>224</sup> *Id.* at 9-10.

<sup>225</sup> *Id.* at 12-13.

<sup>226</sup> **Exhibit C-0201** – Decision Denying Bridgestone's Nullification Application dated 6 December 2010.

<sup>227</sup> **Exhibit C-0021** – Judgment 70, 11th Circuit Civil Court.

because the parties were not identical and the causes of action were not identical.<sup>228</sup>

- b. BSLS and BSJ's application for the exception of absence of liability with respect to TGFL succeeded, as pursuant to the representation and distribution agreement between TGFL and Muresa, if TGFL suffered any damages as a result of the trademark opposition action, it would need to recover that loss from Muresa.<sup>229</sup>
  
- c. Muresa's claimed that that BSLS and BSJ's trademark opposition action caused it to incur loss of USD 5 million, as it stopped selling RIVERSTONE tires during that period, replacing its inventory with inferior products.<sup>230</sup> Muresa's witness, Jose Orestes Medina Samaniego stated, "*When we learned about the opposition against the registration of the trademark, we had to make contingency plans within the company to attempt to manage the same sales volume or other sales volume of the company; because of this, we had to choose entering with other trademarks to meet the needs of our customers.*"<sup>231</sup> Another witness, Gricelda Pineda, stated that the company's sales projections were not met because customers did not like the products being offered to replace RIVERSTONE.<sup>232</sup> However, Muresa's invoices dating back to December 2003 show tires sold with the RIVERSTONE mark and also various others, such as REIDA, TRIANGLE, JINYU, and DURUN. These "*showed profit margins similar to the ones that the RIVERSTONE trademark reported... therefore, the plaintiff corporation cannot argue that to replace the RIVERSTONE trademark it began marketing other trademarks for tires of low quality, since there is evidence in the file that shows that the commercialization of these trademark was simultaneous to the commercialization of the RIVERSTONE tires.*"<sup>233</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 9.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 10.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

- d. The invoices on the record show that even after the trademark opposition action, Muresa continued selling the same brands it had been selling before, which had allegedly replaced RIVERSTONE, and therefore it could not have been true that Muresa had only sold the other brands because of the fear of seizure during the trademark opposition action.<sup>234</sup>
- e. Muresa's witnesses testified that it was fear of seizure action that prompted Muresa to cease the manufacture and sale of RIVERSTONE tires, but "*this decision was not made to comply with any court order; moreover, such action was not viable or feasible within a trademark opposition proceedings.*"<sup>235</sup>
- f. Muresa's income tax returns did not show the losses alleged and its capital increased year on year.<sup>236</sup>
- g. BSLS and BSJ's expert found that Muresa did manufacture and sell tires during the opposition action, and there was no quantitative basis for the sales projections provided by Muresa.<sup>237</sup>
- h. The Eleventh Circuit Court's expert also stated "*We do not have documents that show that they had to cease the sales and the projections were not based in any research, and additionally the question indicates what were the damages for not being able to sell its products, and the company did not stop selling the RIVERSTONE tires, consequently, it is not possible to say if there were damages caused to the company MURESA INTERTRADE, S.A., if they did exist, nor the possible causes of these damages since there is no information in the file that allows to show the existence of such damages.*"<sup>238</sup>

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<sup>234</sup> *Id.* at 11.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 12.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

72. Accordingly, the Eleventh Circuit Court held that Muresa had failed to prove that the filing of the opposition action had caused it to suffer damages.<sup>239</sup> Muresa was ordered to pay BSLS and BSJ's costs of USD 371,700.

### **VIII. APPEAL TO THE SUPERIOR COURT**

73. Under Panamanian law, there is an automatic right of appeal for judgments of first instance.<sup>240</sup> Muresa and TGFL exercised this right, and appealed the decision of the Eleventh Circuit Court on 5 January 2011.<sup>241</sup>

74. Muresa and TGFL provided a summary of the background to the proceedings,<sup>242</sup> and argued *inter alia*:

- a. TGFL did have standing to bring the claim because it was joined to the Eighth Civil Circuit proceedings, and because TGFL has the right to market and distribute RIVERSTONE tires, it also suffered loss alongside Muresa.<sup>243</sup> It was also subject to the “*intimidating action*” in the Reservation of Rights Letter.<sup>244</sup>
- b. The Eleventh Civil Circuit Court determined that there were no damages because it was Muresa's decision to suspend manufacture and sale of RIVERSTONE tires, since trademark opposition proceedings do not permit seizure, but this is wrong since judges are able to take “*precautionary measures*” during opposition actions.<sup>245</sup>
- c. The Court based its views on quantum on the Court-appointed expert, without paying proper attention to the party-appointed experts.<sup>246</sup>
- d. Experts are empowered to seek any information that might be relevant of his or her own accord.<sup>247</sup>

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<sup>239</sup> *Id.* at 13.

<sup>240</sup> **Exhibit C-0188** – Extracts from the Judicial Code of Panama, Article 1132.

<sup>241</sup> **Exhibit C-0022** – Muresa and TGFL Appeal to Judgment No. 70.

<sup>242</sup> *Id.* at 2-4.

<sup>243</sup> *Id.* at 6-9.

<sup>244</sup> *Id.* at 17.

<sup>245</sup> *Id.* at 10.

<sup>246</sup> *Id.* at 10-11.

- e. Muresa’s expert and the Court expert all noticed that there was a reduction in sales from 2005 onwards, and while sales were increasing between 2003 and 2005, they dropped thereafter. The difference between the projected growth and the actual sales represents the loss suffered by Muresa and TGFL.<sup>248</sup>
  - f. There is a causal link between the trademark opposition action filed by BSLS and BSJ and the fact that Muresa and TGFL had to suspend orders and sales for RIVERSTONE tires. The Reservation of Rights Letter is further evidence of the causal link.<sup>249</sup>
  - g. The Eleventh Circuit Court ignored the fact that BSLS and BSJ were involved in a “*campaign of prosecution across all countries where it was attempted to register the brand*”<sup>250</sup> and that their “*true purpose... was to remove RIVERSTONE tires from the market, which results in unfair competition, and which constitutes an unlawful and negligent act*” by BSLS and BSJ.<sup>251</sup>
  - h. The Court noted that Muresa experienced an increase in capital, but this had no bearing on the question of damages caused by the trademark opposition action. In fact, Muresa experienced a reduction in sales.<sup>252</sup>
  - i. The Eleventh Circuit Court ignored Muresa’s expert report.<sup>253</sup>
75. BSLS and BSJ filed their response on 11 January 2011.<sup>254</sup> They argued, *inter alia*:
- a. BSLS and BSJ acted in good faith in their trademark opposition action.<sup>255</sup>

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<sup>247</sup> *Id.* at 11.

<sup>248</sup> *Id.* at 12-13.

<sup>249</sup> **Exhibit C-0022** – Muresa and TGFL Appeal to Judgment No. 70, at 16.

<sup>250</sup> *Id.* at 20.

<sup>251</sup> *Id.* at 21.

<sup>252</sup> *Id.* at 27.

<sup>253</sup> *Id.* at 29-47.

<sup>254</sup> **Exhibit C-0023** – BSJ and BSLS Opposition to Muresa Appeal.

<sup>255</sup> *Id.* at 3.

- b. BSLS and BSJ did not prevent the sale, marketing or manufacture of RIVERSTONE tires in any way, because a trademark opposition action does not and cannot have that effect.<sup>256</sup>
- c. In order to claim damages, Muresa would need to prove that there was a reckless or bad faith procedural action connected with the RIVERSTONE trademark opposition action, and it could not.<sup>257</sup>
- d. Muresa did not stop selling RIVERSTONE tires during the period of the trademark opposition action, and they did not replace their RIVERSTONE sales with Chinese brands, because they had already been selling those brands before the opposition action.<sup>258</sup>
- e. The witness evidence of Muresa's employees was demonstrably false because the witnesses said that Muresa had stopped selling RIVERSTONE tires during the relevant period, but the sales records showed that Muresa had continued to sell RIVERSTONE tires.<sup>259</sup>
- f. Muresa's experts did not comply with their duty of impartiality, as they did not even refer in their report to Muresa's claim that sales of RIVERSTONE tires had ceased. They referred instead to a decrease in sales, which was a claim not alleged by Muresa, and based the alleged damages on a "fear" which they said arose out of the Reservation of Rights Letter. This document was referred to and incorporated into their expert report, but had not been submitted as evidence in the proceedings, which was a breach of due process. It was not provided during the discovery stage of proceedings, where it could have been subject to cross-examination, it does not refer to a matter concerning the parties to the Panamanian proceedings, and it is not an accounting document.<sup>260</sup>

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<sup>256</sup> *Id.* at 3-4.

<sup>257</sup> *Id.* at 4-5.

<sup>258</sup> *Id.* at 6-10.

<sup>259</sup> *Id.* at 6-12, 22.

<sup>260</sup> *Id.* at 12-18.

- g. There was no evidence that BSLS and BSJ threatened or intimidated Muresa or TGFL, or requested them to stop marketing or selling RIVERSTONE-branded tires.<sup>261</sup>
- h. TGFL had no standing to bring a claim because it is not a company trading in Panama, it is not the owner of the RIVERSTONE brand, it was never sued by BSLS or BSJ, so it cannot claim for loss arising out of a procedural action that it was never party to, and simply voluntarily participated in as an intervening party.<sup>262</sup>
- i. Muresa did not establish any causal link between the alleged conduct of BSLS and BSJ and the alleged loss it suffered. To establish a causal link, it must be determined whether the *“action or omission of the allegedly responsible party had the aim of normally or regularly producing a result; and this probability judgment must be made on the basis of what a man of normal intelligence, judged in the abstract, would have been able to predict as a result of his action.”*<sup>263</sup> Merely filing an opposition action could not be the cause of damages, because in that case brand owners could never file opposition proceedings due to risk of damages and would thereby lose the right to exclude others, which is the key benefit of owning a trademark.<sup>264</sup> No one could have predicted that Muresa would suffer loss resulting from the trademark opposition proceedings when there were no actions taken by BSLS or BSJ to try to stop the sale of RIVERSTONE tires.<sup>265</sup>
- j. Muresa did not provide any documentary evidence for its allegations that BSLS and BSJ were engaged in an international campaign of persecution, including by filing opposition actions in other jurisdictions and seizing tires in the Dominican Republic. The only evidence provided was witness testimony, but these sorts of allegations are required to be supported by

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<sup>261</sup> **Exhibit C-0023** – BSJ and BSLS Opposition to Muresa Appeal, at 22.

<sup>262</sup> *Id.* at 23-25.

<sup>263</sup> **Exhibit C-0023** – BSJ and BSLS Opposition to Muresa Appeal, 33; quoting jurist Jorge Bustamante Alsina, *Teoria General de la Responsabilidad Civil [General Theory of Civil Liability]*, Ninth Edition, Buenos Aires, Argentina, Abeledo-Perrot Editorial, at 270.

<sup>264</sup> *Id.* at 34-35.

<sup>265</sup> *Id.* at 35.

documentary evidence under Article 844 of the Judicial Code.<sup>266</sup> Documentary evidence should be readily available for these allegations, if they were true.<sup>267</sup>

76. The First Superior Court issued its judgment on 23 May 2013. It held that under Article 1644 of the Civil Code, the plaintiff must present substantial evidence to establish (i) the existence of real damages caused; (ii) the existence of fault or negligence by the defendant; and (iii) a causal link between the action and the damage caused.<sup>268</sup> The First Superior Court added, *“In every case of extra-contractual civil liability, what one tries to obtain is compensation, which necessarily assumes that damages exist. Damage is the element that gives interest to the creditor to exercise the action of liability, since in civil matters, unlike what happens in cases of criminal liability, the illegality of the action (objective non-compliance) not even when together with fault (subjective non-compliance) would be enough to create a reaction of the legal system.”*<sup>269</sup>
77. Accordingly, the First Superior Court decided that before examining whether Muresa had established the existence of any damage, it needed to determine whether Muresa had the right to bring its claim.<sup>270</sup> In order to bring a claim for damages arising out of bad faith or recklessness of the defendant in bringing court proceedings, Muresa first needed to prove that the defendant brought the proceedings in bad faith or recklessly. *“In order to acknowledge recklessness as a source for compensation, whoever adduces it, must provide “full proof capable of demonstrating it”*”<sup>271</sup> In this case, Muresa did not demonstrate any recklessness, fraud or negligence in BSLs or BSJ’s behaviour *“because it did not evidence that they committed excesses beyond the exercise of a right that the law itself allows in this type of cases.”*<sup>272</sup>
78. The First Superior Court held that since Muresa had not been able to show recklessness or fraud by BSLs or BSJ, it could not examine whether the alleged

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<sup>266</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 844.

<sup>267</sup> **Exhibit C-0023** – BSJ and BSLs Opposition to Muresa Appeal, at 36-37.

<sup>268</sup> **Exhibit C-0024** – Decision by the First Superior Court, 11.

<sup>269</sup> *Id.* at 11-12.

<sup>270</sup> *Id.* at 13.

<sup>271</sup> *Id.* at 15.

<sup>272</sup> *Id.* at 16.



financial damage had occurred. It therefore upheld the judgment of the Eleventh Circuit Court (except that it determined that TGFL did have standing to bring the claim), and ordered Muresa to pay costs of 300 Balboas (USD 300).<sup>273</sup>

## **IX. APPEAL TO THE SUPREME COURT**

79. Unhappy with the result of their appeal, on 1 July 2013, Muresa and TGFL filed an application for permission to appeal to the Supreme Court, known as a Cassation on the Merits, on two grounds.<sup>274</sup> First, they alleged a breach of the law by error of fact as to the existence of certain evidence. Muresa and TGFL argued:

- a. The First Superior Court ignored the Reservation of Rights Letter and thus made an error of fact because this evidence “*demonstrates the intent and recklessness of the defendants.*”<sup>275</sup>
- b. The First Superior Court ignored the evidence of Ms. Moreira, the Certified Public Accountant who provided evidence for Muresa and TGFL which stated that between 2005 and 2008, Muresa and TGFL lost sales of USD 5,168,270.56, and thus made an error of fact because this evidences the “*serious economic damages*” caused by BSLS and BSJ.<sup>276</sup>
- c. The First Superior Court ignored the fact that BSLS and BSJ withdrew their appeal of the trademark opposition action, which shows BSLS and BSJ’s bad faith.<sup>277</sup>
- d. The First Superior Court ignored the testimony of witnesses Jose Orestes Medina Samaniego, Domingo Esteban Romero Ceballos, Gricelda Pineda Castillo, Aminta Julisa Vega de Barrera, Aixe Yadira Ramirez Gonzalez, Mirna Raquel Moreira Martinez and Laura Esther Murgas de Bracho, who attested that sales of RIVERSTONE-branded tires had to stop because of BSLS and BSJ’s trademark opposition action and “*the threats of the*

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<sup>273</sup> *Id.*

<sup>274</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013.

<sup>275</sup> *Id.* at 2.

<sup>276</sup> *Id.* at 2-3.

<sup>277</sup> *Id.*

*Transnational BRIDGESTONE.*” This was an error of fact, because this evidenced the damages suffered by Muresa and TGFL.<sup>278</sup>

- e. The First Superior Court ignored the testimony of Fernan Jesus Luque Gonzalez and Jorge Alberto Luque Gonzalez, who stated that they were aware of a “*threat*” through the Reservation of Rights Letter and seizure of tires in the Dominican Republic and China, leading to Muresa and TGFL’s fears for their tires. This was an error of fact because it would have proven “*the fraud and bad faith*” of BSLS and BSJ.<sup>279</sup>
- f. The First Superior Court ignored the expert report of Psiquies de Leon and Jose Antonio Aguilar, which showed Muresa and TGFL’s decrease in sales between 2005 and 2008, and thus made an error of fact because this evidence would have proved the fraud, bad faith and damages.<sup>280</sup>

80. As part of this ground, Muresa and TGFL also alleged that the First Superior Court had infringed legal provisions, in particular:

- a. Article 780 of the Judicial Code.<sup>281</sup> The First Superior Court had breached Article 780 of the Judicial Code by ignoring the evidence set out above.<sup>282</sup>
- b. Article 1 of Law No. 57 of 1 September 1978.<sup>283</sup> This Article relates to the attesting power of a Certified Public Accountant. Muresa and TGFL

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<sup>278</sup> *Id.*

<sup>279</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013, at 4.

<sup>280</sup> *Id.*

<sup>281</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 780 provide: “*There are used as evidence the documents, the confession, the oath, the declaration of the party, the declaration of the witness, the judicial inspection, the expert reports, the reports, the evidence, the scientific means, and any other rational means that serve to form the conviction of the judge, provided that they are not expressly prohibited by law, nor violate human rights, nor are they contrary to morality or public order. Copies, reproductions, and photographs of objects, documents and places may also be used. It is allowed, in order to establish whether or not a fact may be carried out in a certain way, to proceed to the reconstruction thereof. If the judge considers it necessary, it can be registered in a photographic or electromagnetic form. If this is the case, it may also be possible to obtain radiographies, radioscopies, haematological and bacteriological analyses, as well as the practice of any other scientific verification procedure.*”

<sup>282</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013, 5.

<sup>283</sup> **Exhibit C-0202** – Law No. 57 of 1 September 1978 of the Republic of Panama, Article 1 provides: “*All those services that attest to the veracity of the information related to the technical function of producing, in a systematic and structural manner, quantitative information, in monetary terms, of the economic transaction carried out by individuals and legal entities, be they public or private, and of the economic events that affect*

alleged that the First Superior Court had ignored certain documents despite their having been signed by the Certified Public Accountant appointed by them.<sup>284</sup>

- c. Article 217 of the Judicial Code<sup>285</sup> This Article makes a party who has acted in bad faith or recklessly liable for damages. The First Superior Court erred because “[a]lthough the malicious behaviour in bad faith of the defendants has been proven,” they failed to recognise this and therefore did not require BSLs and BSJs to pay damages.<sup>286</sup>

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*them, and to communicate said information, with the purpose of facilitating to the various interested parties, the decision making of a financial nature in relation to the development of their respective activities are acts of the exercise of the profession of the Certified Public Accountant. The following are also acts proper to the profession of Certified Public Accountant:*

1. *The systematic recording of economic and financial transactions;*
2. *The preparation, analysis, and interpretation of financial statements, their annexes, and other financial information; as well as the opinion on the reasonableness thereof;*
3. *The planning, design, installation, or reforms of accounting systems;*
4. *The intervention, verification, auditing, and inspection of the accounting records, as well as the certification or opinion on accuracy or veracity;*
5. *The fiscal, judicial, administrative reports, or the reports of any other kind related to the transactions or businesses that contain records of a financial and accounting nature;*
6. *Consultancy on financial matters, when these involve accounting reports;*
7. *The direction and supervision of any of the aforementioned works;*
8. *The endorsement of the income tax returns of individuals and legal entities, in any of the following cases:*
  - i. *In the case of individuals and legal entities engaged in activities of any kind whose net capital is greater than fifty thousand balboas (B/50,000.00) and,*
  - ii. *In the case of individuals and legal entities who have an annual turnover or gross income greater than fifty thousand balboas (B/50,000.00).*
9. *All those acts in which the certification or endorsement of reports, exhibitions, and constancy of accounting and financial nature by a Certified Public Accountant according to special laws is required.*
10. *All those other acts that are considered as proper to the accounting profession, by the Technical Accounting Board.”*

<sup>284</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013, at 7.

<sup>285</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 217 provide: “The parties shall be liable for the damages caused to the other party or third parties with their reckless or bad faith procedural actions. When there is proof of such conduct in the proceedings, the Judge will impose the corresponding sentence in the judgment or in the order that decides it, and if it is not possible to establish the amount at that moment, it will be settled in the manner provided for in article 996; if the proceeding has concluded, this procedure will be carried out independently of the former.”

<sup>286</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013, 8.

- d. Article 1644 of the Civil Code<sup>287</sup> This Article requires parties to repay damage caused by action or omission through fault or negligence, when tort liability is proven. The First Superior Court erred because they ignored the evidence which would have proven BSLs and BSJ's liability.<sup>288</sup>
81. Second, Muresa and TGFL alleged violation of the substantive rules of law by direct infringement of substantive law, which substantially influenced the operative provisions of the First Superior Court's decision.<sup>289</sup> Muresa and TGFL argued that the First Superior Court did not apply Article 217 of the Judicial Code or Article 1644 of the Civil Code.<sup>290</sup>
82. The First Superior Court granted permission to appeal, and ordered that the record be sent to the Supreme Court on 24 July 2013.<sup>291</sup>
83. On 19 September 2013, Muresa and TGFL filed their permission to appeal (Request for Cassation) with the Supreme Court.<sup>292</sup> The request for cassation set out eight grounds:
- a. First, the First Superior Court's judgement had not applied certain substantive provisions of the Judicial Code and the Civil Code.
  - b. Second, the amount in question exceeded 25,000 Balboas (USD 25,000).
  - c. Third, this was a second instance judgment.
  - d. Fourth, there were factual grounds and omissions that required review.
  - e. Fifth, Muresa and TGFL were denied the right to receive damages for the harm they suffered caused by the Reservation of Rights Letter.

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<sup>287</sup> **Exhibit C-0205** – Extracts from the Civil Code of the Republic of Panama, Article 1644 provides: *“The one that by action or omission causes harm to another, due to fault or negligence, is obligated to repair the damage caused. If the action or omission is attributable to two or more persons, each one of them will be liable for the damages caused.”*

<sup>288</sup> **Exhibit C-0165** – Formal Application by Muresa to Appeal to the Panama Supreme Court in Cassation dated 1 July 2013, at 9.

<sup>289</sup> *Id.* at 10.

<sup>290</sup> *Id.* at 10-12.

<sup>291</sup> **Exhibit C-0203** – Order Accepting appeal to Supreme Court dated 26 July 2013.

<sup>292</sup> **Exhibit C-0204** – Further briefing by Muresa on admissibility of appeal before the Supreme Court 19 September 2013.

- f. Sixth, the actions of BSLS and BSJ were direct, forceful, reckless and in bad faith.
  - g. Seventh, BSLS and BSJ have engaged in similar actions around the world and particularly in the Americas, and these actions can force small companies out of production.
  - h. Eighth, the Supreme Court should review the merits of the case because Muresa and TGFL were in fact affected by the illegitimate actions of BSLS and BSJ.
84. On 4 December 2013, the Supreme Court gave permission to appeal on the first part of the Cause of Cassation, namely the error in fact in relation to the existence of evidence, but dismissed the Cause of Cassation on the grounds of direct violation of substantive rules of law.<sup>293</sup>
85. On 3 January 2014, Muresa and TGFL filed their grounds of appeal.<sup>294</sup> They argued, *inter alia*:
- a. The court violated the rule of law “*due to a factual error regarding the existence of evidence, which has substantially influenced the dispositive aspects of the appealed decision.*”<sup>295</sup>
  - b. The First Superior Court ignored evidence that “*clearly proves*” BSLS and BSJ’s lack of good faith, including the Reservation of Rights Letter, documents provided by Muresa’s accountant, Muresa’s expert report and testimony, and witness testimony, as well as the fact that BSLS and BSJ withdrew their appeal to the trademark opposition action.<sup>296</sup>
  - c. The threat made in the Reservation of Rights Letter and the alleged seizure of tires in the Dominican Republic led Muresa and TGFL to fear actions

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<sup>293</sup> **Exhibit C-0167** – Supreme Court decision Accepting Muresa’s application for appeal to Supreme Court dated 4 December 2013.

<sup>294</sup> **Exhibit C-0025** – Muresa and TGFL Appeal to the Panamanian Supreme Court.

<sup>295</sup> *Id.* at 1-2.

<sup>296</sup> *Id.* at 2-4.

against them and this fear prevented the sale of RIVERSTONE tires, causing loss to Muresa and TGFL.<sup>297</sup>

- d. If the above evidence had been properly assessed, a different conclusion would have been reached by the First Superior Court and damages would have been awarded to Muresa and TGFL.<sup>298</sup>

86. On 14 January 2014, BSLS and BSJ filed their response to the appeal.<sup>299</sup> They argued, *inter alia*:

- a. That Muresa and TGFL had not provided any evidence of “*bad faith and recklessness*” by BSLS and BSJ, and such bad faith would need to be proven to be “*willful and evident*”.<sup>300</sup> Instead, the trademark opposition proceedings that Muresa and TGFL complain of were expressly stated to be in good faith by the Eighth Civil Circuit Court.<sup>301</sup>
- b. The evidence on the record, referred to by all of the experts, showed “*the massive sales of RIVERSTONE tires made by the plaintiffs, both during the process of the patent suit against the RIVERSTONE Y DISEÑO trademark, and in the subsequent years*”.<sup>302</sup>
- c. Muresa and TGFL argued that the First Superior Court did not take into consideration the Reservation of Rights Letter, but that letter was not properly admitted into evidence, and was not a document relevant to assessment of quantum, and so should not have been referred to by Muresa’s experts, nor introduced into the record without going through the proper procedures. Thus, the First Superior Court did not “*ignore*” the Reservation of Rights Letter; it merely correctly did not give it any probative value.<sup>303</sup>

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<sup>297</sup> *Id.* at 4.

<sup>298</sup> *Id.* at 5.

<sup>299</sup> **Exhibit C-0206** – Bridgestone’s written arguments before the Supreme Court dated 15 January 2014.

<sup>300</sup> *Id.* at 2-3.

<sup>301</sup> *Id.* at 2.

<sup>302</sup> *Id.* at 5.

<sup>303</sup> *Id.* at 5-7.

- d. The Reservation of Rights Letter was not admitted into evidence because:
- i. It was not submitted as evidence during the period for presentation of documentary evidence, pursuant to Article 1265 of the Judicial Code.<sup>304</sup>
  - ii. Neither the original of the letter nor a certified copy was submitted, and the signature and content were not recognised by the signatory, pursuant to Articles 856, 857 and 861 of the Judicial Code.<sup>305</sup>
  - iii. Its content was not ratified by the author or signatory of the document, pursuant to Article 871 of the Judicial Code.<sup>306</sup>
  - iv. The original is in English, and the Spanish translation provided is not accurate and has not been ratified by translators, pursuant to Articles 877 and 878 of the Judicial Code.<sup>307</sup>
  - v. As it was not submitted by Muresa and TGFL during the period for submission of evidence, BSLS and BSJ did not have the opportunity to challenge it.
  - vi. It was addressed to an American lawyer and written by another American lawyer, relating to events in the United States which are not part of these proceedings, and so it is irrelevant and outside of the jurisdiction of the Panamanian courts.
  - vii. It refers to American lawyers who have no relationship with BSLS and BSJ, and is therefore irrelevant.
- e. Muresa and TGFL argued that the First Superior Court ignored various certifications provided by Muresa's accountant, which stated the loss of sales of RIVERSTONE tires internationally. But again, the First Superior Court did not ignore these documents; rather, they were unsubstantiated

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<sup>304</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 1265.

<sup>305</sup> *Id.* at Articles 856, 857 and 861.

<sup>306</sup> *Id.* at Article 871.

<sup>307</sup> *Id.* at Articles 877 and 878.

and contradicted the mass of evidence agreed on by all of the experts that RIVERSTONE tires were sold, in their millions, during the whole of the relevant period.<sup>308</sup>

- f. Muresa and TGFL argued that the First Superior Court ignored BSLS and BSJ's "*willful misconduct and bad faith*" in withdrawing their appeal to the trademark opposition action. But withdrawal of an appeal does not constitute proof of damage, or an abuse of process. Generally an abuse of process would arise when a party maintains proceedings, rather than ended them. The Supreme Court has established that "*Judicial Resolutions are not evidence of recklessness if they do not result in any action that exceeds the limits of the litigation*".<sup>309</sup>
- g. Muresa and TGFL argued that the First Superior Court failed to acknowledge the testimony of their witnesses of fact. But all of the witnesses failed to tell the truth because they all said sales of RIVERSTONE tires stopped, when the accounts of the company showed that they did not.<sup>310</sup> Further, none of the witness statements shed any light on the main reason for the dispute – they do not show any action by BSLS or BSJ that caused loss to Muresa and TGFL.<sup>311</sup>
- h. Similarly, Muresa and TGFL argued that the First Superior Court ignored the evidence of their expert, but such evidence did not go to the main issue in dispute, i.e., the reckless or negligent act of BSLS and BSJ that caused loss to Muresa and TGFL, and would only have been relevant to determining the quantum of loss.<sup>312</sup>

87. There was no hearing, and on 28 May 2014, the Supreme Court issued its judgment (the "**Supreme Court Judgment**").<sup>313</sup> The Supreme Court Judgment was drafted by

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<sup>308</sup> **Exhibit C-0206** – Bridgestone's written arguments before the Supreme Court dated 15 January 2014, 7-8.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 10.

<sup>311</sup> *Id.* at 11-12.

<sup>312</sup> *Id.* at 12.

<sup>313</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division.



Justice Oyden Ortega Duran, and Justice Harley Mitchell issued a dissent (the “**Dissent**”).

88. The Supreme Court Judgment noted that the appeal was based on an error of fact regarding the existence of evidence. The error was that certain evidence (as described at paragraph 79 above) had not been “*appreciated*” by the First Superior Court.<sup>314</sup> The Supreme Court agreed that the First Superior Court had not thoroughly analysed all of the evidence or identified each element of the evidence specifically.<sup>315</sup>

89. The Supreme Court Judgment set out the categories of evidence that Muresa alleged were not “*appreciated*” by the First Superior Court, namely the Reservation of Rights Letter, witness testimony from various Muresa employees and BSLS and BSJ’s withdrawal of the appeal to the trademark opposition action. Without any analysis whatsoever, the Supreme Court simply stated:

*“Regarding the fact the legal initiative exercised by the Defendants BRIDGESTONE LICENSING SERVICES, INC., and BRIDGESTONE CORPORATION caused damage to the plaintiffs MURESA INTERTRADE, S.A. and TIRE GROUP OF FACTORIES LTD, INC., it is for this Court a fully proven element from the mass of evidence submitted within the Action and upon which the invoked evidentiary ground of error of fact in connection with the existence of evidence is based.”*<sup>316</sup>

90. The Supreme Court accepted the legal analysis of the First Superior Court concerning “*when and how extra-contractual civil liability occurs*,”<sup>317</sup> but found that the First Superior Court had not properly considered the Reservation of Rights Letter, which the Supreme Court thought evidenced the “*intimidating manner*” of BSLS and BSJ. There was no discussion of the arguments raised by BSLS and BSJ that the Reservation of Rights Letter had not been properly admitted into evidence, and so should not be accorded any probative value.

91. Despite the specific finding of the Eighth Civil Circuit Judge that BSLS and BSJ’s trademark opposition action was brought in good faith, the Supreme Court found that

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<sup>314</sup> *Id.* at 8.

<sup>315</sup> *Id.* at 8-9

<sup>316</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 18.

<sup>317</sup> *Id.* at 19.

BSLS and BSJ had acted recklessly in bringing the trademark opposition action, appealing it and then withdrawing their appeal. Although the Supreme Court accepted that generally “*the fact of exercising a judicial initiative for claiming any right*” is not in itself reckless,<sup>318</sup> they found that in this case, “*in which there were strong evidences that showed that the appellants plaintiffs had with legal basis the right to market a product that also constituted an item of great importance for their own profits in connection with the commercial activity they are engaged in*”,<sup>319</sup> BSLS and BSJ had engaged in “*obviously intimidating and reckless behavior*”<sup>320</sup> which “*caused irreversible damages.*”<sup>321</sup>

92. The Supreme Court Judgment held that when the evidence cited by Muresa was “*appreciated*”, the “*facts upon which the claim of this Ordinary Action is based are proven.*”<sup>322</sup>
93. In short, the Supreme Court held that, once certain items of evidence were given proper consideration, Muresa’s claim succeeded. But that evidence consisted of:
  - a. The Reservation of Rights Letter – a letter sent by a party not involved in the Muresa-Bridgestone action in Panama, to a party not involved in the Muresa-Bridgestone action in Panama, in respect of a jurisdiction not involved in the Muresa-Bridgestone action in Panama, and following a circumstance not analogous to that in the Muresa-Bridgestone action in Panama: where the RIVERSTONE mark had been voluntarily withdrawn from registration.
  - b. Evidence of Muresa’s expert accountant, which was contradicted not only by BSLS and BSJ’s expert, but also by the court-appointed expert, who found that Muresa had continued selling RIVERSTONE tires throughout the relevant period.

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<sup>318</sup> *Id.* at 21.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 20.

<sup>321</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 22.

<sup>322</sup> *Id.* at 22.

- c. Evidence from Muresa's employees of unspecified fears arising from statements allegedly made by unspecified third parties that they would be forced to stop selling RIVERSTONE-branded tires.
94. The result was shocking: according to the Supreme Court Judgment, simply exercising legal rights in bringing trademark opposition proceedings was reckless behaviour because the trademark applicant was a competitor: *"there were strong evidences that showed that the appellants plaintiffs had with legal basis the right to market a product that also constituted an item of great importance for their own profits in connection with the commercial activity they are engaged in and conveniently an element of commercial competitiveness for the opposing parties"*.<sup>323</sup>
95. It was not surprising that all three Supreme Court judges were unable to agree to this judgment. Justice Harley Mitchell's Dissent sets out in clear terms why the Supreme Court Judgment was wrong.
96. First, the Reservation of Rights Letter and the withdrawal of the appeal were not *"reckless acts per se"*.<sup>324</sup> The Reservation of Rights Letter was not a threat, *"as it was up to the company the letter was addressed to whether or not to use the mark, which, according to that company, it was entitled to."*<sup>325</sup> The Dissent also noted that the Supreme Court Judgment had not considered the question of how the Reservation of Rights Letter had entered the record, and did not acknowledge that it had not been properly admitted as evidence in the case.<sup>326</sup>
97. Justice Mitchell identified the key problem with the Supreme Court Judgment, stating: *"The ruling, as it is focused, creates a bad precedent for damages claims matters, given that the defendants' conduct was the filing of a trademark opposition action under the belief that they had a better right against the parties. The filing of legal actions obviously creates discomforts between the parties; however, that is not a*

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<sup>323</sup> *Id.* at 21.

<sup>324</sup> *Id.* at 24.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 24-25.

*synonym of damages. Reckless behavior must be proven and the documents do not comply with the burden of proof that the plaintiffs must have had met.”*<sup>327</sup>

98. As to the so-called reckless behaviour of BSLS and BSJ, Justice Mitchell noted that such allegations of reckless behaviour must be proven. Punishing BSLS and BSJ from withdrawing from an appeal when they realised they could not continue with it is not an abuse of process or bad faith; on the contrary, if they had continued with litigation without good reason, that would have been abusive behaviour.<sup>328</sup>
99. Justice Mitchell found that the idea that it is “*reckless*” for a trademark owner to bring trademark opposition proceedings was absurd. The Supreme Court Judgment found that this was a special case because there was strong evidence that Muresa and TGFL could and had been commercializing the mark. But this is not only illogical (because a trademark owner would not know this until it had been to court and obtained evidence of this), but also contradicts the very nature of the right of a trademark holder to exclude others. If a trademark holder cannot exclude competitors, then there is little value in the trademark.<sup>329</sup>
100. Justice Mitchell further noted that the witness testimony did not comport with the documentary evidence submitted by Muresa and TGFL, which showed that brands of lower quality that were allegedly sold to compensate for the lack of sales of RIVERSTONE tires were in fact sold both before and after the trademark opposition action. The decline in sales of RIVERSTONE tires “*was the result of contingency plans made due to fears of a seizure that never occurred and not because of the filing of an opposition action.*”<sup>330</sup>
101. Finally, Justice Mitchell noted that there was “*no analysis*” and “*little legal basis*” of the value of the monetary award. Muresa’s experts’ report found that Muresa had incurred damages of USD 3,351,731.15, and the Court’s expert found that there was

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<sup>327</sup> *Id.* at 25.

<sup>328</sup> *Id.* at 30.

<sup>329</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 29.

<sup>330</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 27-28.

no supporting evidence for the projected sales, yet the Court ordered damages of USD 5 million.<sup>331</sup>

## **X. MOTIONS TO OVERTURN THE SUPREME COURT JUDGMENT**

102. On 16 June 2014, BSLS and BSJ filed a motion for clarification and modification of the Supreme Court Judgment (the “**Motion for Clarification**”).<sup>332</sup> The grounds for modification of a Supreme Court Judgment are limited, and so this motion was based solely on the question of how the damages had been calculated. BSLS and BSJ argued that the sum awarded was incorrectly calculated, by reference to the figures recorded by the experts, and complained that the Supreme Court Judgment did not explain how it had arrived at the number.<sup>333</sup>
103. Muresa and TGFL filed their response to the Motion for Clarification on 20 June 2014.<sup>334</sup> They argued that there was a solid basis for the amount of damages awarded by the Supreme Court,<sup>335</sup> and also that the request for clarification and modification was improper because such request could only be made when the “*operative part [of the judgment] is contradictory or ambiguous*”, pursuant to Article 1123 of the Judicial Code.<sup>336</sup> The operative part of the Supreme Court Judgment was neither contradictory nor ambiguous, and so the application should fail.<sup>337</sup>
104. The Supreme Court issued its decision on the Motion for Clarification on 28 November 2014.<sup>338</sup> It held that BSLS and BSJ were asking the Supreme Court to reconsider aspects of valuation and assessment of the substance of the claim, but under Article 999 of the Judicial Code, it is only appropriate to clarify or modify a judgment when there are “*obscure or double meaning phrases*” or “*pure and evidence*

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<sup>331</sup> *Id.* at 30-31.

<sup>332</sup> **Exhibit C-0168** – Bridgestone's Filing for Clarification and Modification of Sentence dated 16 June 2014.

<sup>333</sup> *Id.* at 1.

<sup>334</sup> **Exhibit C-0207** – Muresa's Opposition to Bridgestone's Application for Clarification and Modification of Decision dated 20 June 2014.

<sup>335</sup> *Id.* at 1-4.

<sup>336</sup> *Id.* at 4; **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 1123.

<sup>337</sup> **Exhibit C-0207** – Muresa's Opposition to Bridgestone's Application for Clarification and Modification of Decision dated 20 June 2014, at 5.

<sup>338</sup> **Exhibit C-0030** – Supreme Court Decision on Motion for Clarification.

*arithmetical error; or an error in the writing or quotation*". Article 999 of the Judicial Code does not permit a judgment to be otherwise amended.<sup>339</sup>

105. Following their unsuccessful challenge, BSLs and BSJ appointed a new Panamanian law firm, Morgan and Morgan, which had specific expertise in Supreme Court matters. On 10 December 2014, BSLs and BSJ filed a further application for permission to challenge the Supreme Court Judgment, known as a Recourse for Review, pursuant to Article 1204 of the Judicial Code (the "**Recourse for Review**").<sup>340</sup> The particulars of the Recourse for Review were filed on 16 December 2014, and contained the following grounds:<sup>341</sup>

- a. The Resolution of 7 November 2014 of the First Civil Chamber of the Supreme Court rejected BSLs and BSJ's request for review on the basis that Article 1204 of the Judicial Code is only applicable to resolutions of the Circuit Courts or Superior Court. However, if Article 1204 of the Judicial Code<sup>342</sup> was to be limited in that way, then it would serve little purpose.
- b. Numerous Supreme Court rulings have found that Supreme Court decisions can be so reviewed.
- c. Article 215 of the National Constitution<sup>343</sup> and Article 469 of the Judicial Code<sup>344</sup> require the judge to take into account "*the object of the process and the substantial right of the parties*".<sup>345</sup>

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<sup>339</sup> *Id.* at 2-3.

<sup>340</sup> **Exhibit C-0169** – Notice of Appeal dated 10 December 2014 and **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 1204.

<sup>341</sup> **Exhibit C-0208** – Recourse for Review dated 16 December 2014.

<sup>342</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 1204.

<sup>343</sup> **Exhibit C-0209** – Extracts from the Constitution of the Republic of Panama, Article 215 provide: "*The procedural laws that are approved shall be inspired, among other things, on the following principles:*

1. *The simplification of formalities, procedural economy, and the absence of formalisms.*
2. *The object of the process is the recognition of the rights consigned in substantial law.*"

<sup>344</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 469 provide: "*The judge, when issuing his rulings, must keep in mind that the object of the process is the recognition of the rights consigned in substantial law, and the resolutions of this Code must be interpreted with that criterion. The doubts that may arise in the interpretation of the Regulations of this Code must be cleared up by means of the application of constitutional and general principles of Procedural Law, in the manner that due process, the procedural equality of the parties, and procedural loyalty and economy be observed.*"

<sup>345</sup> **Exhibit C-0208** – Recourse for Review dated 16 December 2014, 3.

d. The Supreme Court's refusal to permit review of the Supreme Court Judgment constituted "*a hasty denial, unfounded and lacking in legal justification by being contrary to the spirit of the regulations and imposing restrictions with respect to the laws of the Republic, by means of the adoption of formalisms that, certainly, restrict its protection, a reason for which the Honorable Civil Chamber of the Supreme Court of Justice, in the use of its powers and guaranteeing due process, must also procure effective protection and not the illusoriness of the recourse.*"<sup>346</sup>

106. The Supreme Court issued its decision on the Recourse for Review on 16 March 2016.<sup>347</sup> It denied the motion on the basis that a recourse for review pursuant to Article 1204 of the Judicial Code can only apply to decisions of circuit courts or superior courts (the first level court of appeal). Article 1204 of the Judicial Code does not apply to judgments of the Supreme Court.<sup>348</sup>

107. On 29 March 2016, BSLS and BSJ filed a Motion for Clarification of the Resolution dated 16 March 2016.<sup>349</sup> They asked the Supreme Court to resolve the confusion arising out of the fact that on the one hand the Supreme Court had found that Article 1204 could only be used to review judgments of lower courts, but on the other, the Supreme Court had noted that all levels of the judicial system were required to protect substantive rights.

108. However, the Supreme Court dismissed this final motion for clarification on 28 May 2016,<sup>350</sup> leaving BSLS and BSJ with no further avenues to pursue in Panama.

## **XI. BRIDGESTONE'S DIPLOMATIC EFFORTS**

109. Bridgestone's representatives, both in the United States and Japan, were shocked at the outcome of the proceedings in Panama. In all of the hundreds of trademark opposition proceedings in which they had been involved, they had never before encountered a situation in which a court determined that simply filing opposition

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<sup>346</sup> *Id.* at 4.

<sup>347</sup> **Exhibit C-0031** – Supreme Court Decision on Motion to Review.

<sup>348</sup> *Id.* at 1.

<sup>349</sup> **Exhibit C-0210** – Request for Clarification Filed after the Supreme Court Decision on the Motion for Review 29 March 2016.

<sup>350</sup> **Exhibit C-0211** – Final Decision on Motion to Review 10 March 2016.

proceedings was unlawful and “reckless”, and ordered damages to be paid.<sup>351</sup> We are not aware that any such decision has ever previously been made by any court in any jurisdiction worldwide. Therefore, while BSLS and BSJ were attempting to reverse the Supreme Court Judgment by means of the Motion for Clarification and the Recourse for Review described above, Bridgestone sought to open dialogue with Panama through diplomatic and governmental means to see if there might be other, non-judicial ways to resolve not just the dispute with Muresa, but also ensure that the dangerous precedent set by the Supreme Court is not followed.

110. To that end, Bridgestone representatives in the United States attended various meetings with U.S. government agencies between around July and November 2014. Following these meetings, Bridgestone considered that it could be helpful to try to meet with the Panamanian Ambassador to the United States, and Akin Gump contacted the Panamanian Embassy in December 2014 in order to try to set up a meeting.<sup>352</sup>
111. Akin Gump did not receive a response to that email, and so in January 2015, asked Jeffrey Lightfoot, of Jones Group International, which had a strategic alliance with Akin Gump at the time, to see whether he could establish contact with the Panamanian Embassy. Mr. Lightfoot emailed Juan Heilbron of the Panamanian Embassy on 12 January 2015,<sup>353</sup> but did not receive a response for nearly two months.<sup>354</sup>
112. Meanwhile, Mr. Kingsbury, Associate Chief Counsel for Intellectual Property of BSAM, wrote to the Office of the United States Trade Representative (“USTR”) on 6 February 2015, requesting an opportunity to testify before the USTR’s Special 301 Subcommittee of the Trade Policy Staff Committee.<sup>355</sup>
113. On 24 February 2015, Mr. Kingsbury attended the Special 301 Public Hearing, and explained Bridgestone’s concerns with regards to its intellectual property rights in

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<sup>351</sup> See Third Witness Statement of Thomas Kingsbury dated 11 May 2018, ¶ 15.

<sup>352</sup> **Exhibit C-0212** – Email from Akin Gump to Panamanian Embassy dated 23 December 2014; Witness Statement of Jeffrey Lightfoot dated 9 May 2018, ¶ 5

<sup>353</sup> **Exhibit C-0213** – Email from J. Lightfoot to J. Heilbron dated 12 January 2015.

<sup>354</sup> **Exhibit C-0214** – Email from J. Heilbron to J. Lightfoot dated 3 March 2015; Witness Statement of Jeffrey Lightfoot dated 9 May 2018, ¶ 7.

<sup>355</sup> **Exhibit C-32** – Special 301 Public Hearing Oral and Written Statement.



Panama.<sup>356</sup> Mr. Kingsbury explained: “*the Supreme Court’s decision severely penalized Bridgestone simply for utilizing an ordinary opposition mechanism to protect its intellectual property as provided for under Panamanian law.*”<sup>357</sup>

114. A few days later, on 3 March 2015, the Panamanian embassy responded to Mr. Lightfoot’s email, and a meeting with the Ambassador was set for 13 March 2015.<sup>358</sup> The attendees were Mr. Steven Akey, Vice President for Government Affairs of BSAM, two Akin Gump partners, Mr. Charles Johnson and Mr. Stephen Kho, and Mr. Lightfoot. The Panamanian Ambassador, Mr. Gonzalez-Revilla, was accompanied by Mr. Heilbron and Ms. Gonzalez.<sup>359</sup> It was clear to the Bridgestone attendees that Mr. Gonzalez-Revilla was familiar with Bridgestone’s case.<sup>360</sup> Within a few minutes of sitting down, while the Bridgestone team were explaining the circumstances of the case, the Ambassador interrupted and said, “*You know what this is, right? It’s corruption.*”<sup>361</sup> Although Bridgestone’s representatives were surprised that the Panamanian Ambassador so readily admitted that the Supreme Court Judgment was procured through corruption, the fact that it had been was not surprising, given the corruption endemic to the Panamanian judiciary.
115. Mr. Gonzalez-Revilla was appointed to serve as the Ambassador of Panama to the United States by President Juan Carlos Varela Rodriguez in August 2014. He presented his credentials to the President of the United States on 18 September 2014.<sup>362</sup> Under international law, an ambassador is “*the person charged by the sending State with the duty of acting in that capacity*”<sup>363</sup> and is a diplomat of the highest rank, with full representative powers.”<sup>364</sup> Ambassador Gonzalez-Revilla is

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<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 4.

<sup>358</sup> **Exhibit C-0214** – Email from J. Heilbron to J. Lightfoot dated 3 March 2015.

<sup>359</sup> Witness Statement of Steven Akey dated 30 April 2018, ¶ 6-7; Witness Statement of Jeffrey Lightfoot dated 9 May 2018, ¶ 10.

<sup>360</sup> Witness Statement of Steven Akey dated 30 April 2018, ¶ 8; Witness Statement of Jeffrey Lightfoot dated 9 May 2018, ¶ 11.

<sup>361</sup> Witness Statement of Steven Akey dated 30 April 2018, ¶ 8; Witness Statement of Jeffrey Lightfoot dated 9 May 2018, ¶ 11.

<sup>362</sup> See **Exhibit C-0214** – Profile of Ambassador Emanuel Gonzalez-Revilla.

<sup>363</sup> **CLA-0065** – Vienna Convention on Diplomatic Relations, 1961, Article 1

<sup>364</sup> **CLA-0066** – Règlement du 19 mars 1815 sur le rang entre les agents diplomatiques (Annexe n. 17 à l’acte final du Congrès de Vienne du 9 juin 1815 (Regulation on the Precedence of Diplomatic Agents of 19 March 1815, part of the Final Act of the Congress of Vienna of 9 June 1815), Art 1 “*Les employés*

therefore the formal representative of Panama, and his admission of corruption (which occurred during a formal meeting held in his capacity as Ambassador) is Panama's admission.

## **XII. CORRUPTION WITHIN THE PANAMANIAN SUPREME COURT**

116. It is widely accepted that Panama has high rates of corruption. Transparency International, an international NGO whose purpose is to combat corruption and prevent criminal activities arising from corruption, ranked Panama at 96 out of 180 countries, with a corruption perception score of 37 out of 100 (any score below 50 is considered to be very poor) in their most recent rankings in 2017.<sup>365</sup>
117. Additionally, Transparency International's Global Corruption Monitor gave Panama's judiciary a score of 4.5 on a scale of 1-5 (where 5 is the most corrupt) in 2005.<sup>366</sup> A Panamanian coalition of NGOs, academics, trade unions and journalists known as Alianza Ciudadana pro Justicia (Citizens' Alliance for Justice) hired lawyers in 2005 to analyse the record of the Supreme Court with respect to certain drug crime cases. They concluded, "*the rulings were questionable as they demonstrate not only selectivity but grave indications that the actions of the judges in question suggest favouritism at the heart of the high court, motivated by reasons that should be investigated*".<sup>367</sup> The Council on Hemispheric Affairs ("COHA"), an independent research organisation focused on inter-American affairs described the problem thus: "*an anachronistic and obscure judiciary whose structure makes it highly prone to entrenched political manipulations and allows for bribes and pay-offs*".<sup>368</sup> For example, COHA noted that "*[j]udges can freely associate with legal representatives of a litigant outside of the courtroom, which increases the likelihood that they will fall into an unprofessional relationship and may develop a tainted perception of the facts of a given case.*"<sup>369</sup>

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*diplomatiques sont partagés en trois classes: Celle des Ambassadeurs, Légats or Nonces;... Art 2. Les Ambassadeurs, Légats ou Nonces, ont seuls le caractère représentatif.*

<sup>365</sup> **Exhibit C-0216** – Transparency Corruption Perceptions Index 2017.

<sup>366</sup> **Exhibit C-0217** – Corruption Perceptions Index 2005.

<sup>367</sup> **Exhibit C-0218** – "Alianza Requests Citizen's Audit," Prensa, dated 11 July 2005.

<sup>368</sup> **Exhibit C-0243** – "Hungry for Justice: Corrupt Courts in Panama Deny Impoverished Children \$50 Million in Inheritance," Council on Hemispheric Affairs.

<sup>369</sup> *Id.*

118. Transparency International's Global Corruption Report of 2007 identified two major reasons why the Panamanian judiciary is so corrupt: "*One reason why the judiciary is so vulnerable to corruption is the lack of robust accountability mechanisms. A second is political interference in the selection of judges*".<sup>370</sup> Transparency International's most recent publication on corruption perceptions, "People and Corruption: Latin America and the Caribbean", published in October 2017, found that between 11 and 20 percent of people surveyed who had used the courts in the last 12 months had paid a bribe.<sup>371</sup>
119. As Transparency International's report notes, one of the main corruption issues in the Panamanian courts is that the judiciary is nominated by the President and there are frequently strong ties between judges and political parties.<sup>372</sup> A more recent report by Transparency International and the U4 Anti-Corruption Resource Centre in 2014 concluded:
- "The legal system in Panama faces serious challenges to its integrity. There is political interference in appointing judges, particularly to the Supreme Court. There is no independent body to investigate corrupt acts of public officials. It is problematic that by law only Supreme Court judges can investigate corrupt acts of National Assembly members and vice versa. Anti-Corruption Prosecution Offices are underfunded and understaffed. Some state institutions do not cooperate with prosecutors in corruption cases involving illicit enrichment of public officials."*<sup>373</sup>
120. The National Assembly of Panama (the legislative branch of the Panamanian government, currently consisting of 71 elected representatives)<sup>374</sup> is the government body empowered to investigate Supreme Court Justices, if allegations of corruption are made. Any claims against Supreme Court Justices must be filed with the Secretary General of the National Assembly,<sup>375</sup> containing a detailed account of the

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<sup>370</sup> **CLA-0067** – Global Corruption Report 2007, 252.

<sup>371</sup> **CLA-0068** – Transparency International, People and Corruption: Latin America and the Caribbean 2017, 19.

<sup>372</sup> **CLA-0067** – Global Corruption Report 2007, 254.

<sup>373</sup> **Exhibit C-0220** – Transparency International and the U4 Anti-Corruption Resource Centre, *Panama: Overview of Corruption Risks in the Judiciary and Prosecution Service* (2014), 1.

<sup>374</sup> **Exhibit C-0244** - History of National Assembly of Panama.

<sup>375</sup> **Exhibit C-0245** - Extracts from the Criminal Procedure Code of the Republic of Panama, Articles 479 and 468.

commission of the offense together with prima facie evidence.<sup>376</sup> The National Assembly may then appoint a special commission to conduct an investigation into a Supreme Court Justice, but in practice, when allegations of corruption are made, they are not properly investigated (if they are investigated at all). For example, Transparency International notes,

*“Another scandal erupted in November 2005 when the US government revoked Judge Winston Spadafora’s visa on grounds of corruption. A spokesperson for the US embassy said it was willing to provide evidence of the corrupt act if the government requested it. A number of civil society organisations, including the Panama chapter of TI [Transparency International], asked the authorities to apply for the proof that led to such a ban and use it to evaluate what action should be taken against Spadafora. To date neither congress nor the judiciary have taken steps to secure the evidence.”*<sup>377</sup>

121. The Due Process of Law Foundation reports on rule of law issues in Latin America. In their report on judicial corruption in Central America and Panama, published in 2012, they listed the following types of judicial corruption in Panama for which they had found evidence -

*“monetary payments in exchange for information; altering the contents of a report; sale of draft rulings; protection for individuals connected to drug trafficking; granting of alternative measures in exchange for money; lawyers drafting judgments; failure to transmit detention orders by junior personnel; and jail privileges, among others.”*<sup>378</sup>

122. As noted above, the National Assembly is the only body empowered to investigate Supreme Court justices, and the Supreme Court is the only body empowered to investigate members of the National Assembly. Consequently, there is something of a “non-aggression pact” between the two, whereby neither ever investigates the other, despite numerous complaints of corruption and criminal behaviour<sup>379</sup> The Organization of American States noted, in its most recent Report on the Implementation of the Provisions of the Inter-American Convention Against

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<sup>376</sup> *Id.* at article 488.

<sup>377</sup> **CLA-0067** – Global Corruption Report 2007, 253.

<sup>378</sup> **Exhibit C-0226** – Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat it: Executive Summary & Regional Comparative Study (2007), 39.

<sup>379</sup> **Exhibit C-0228** – Country Guide - Panama (last updated 14 November 2016)

Corruption, that “*at present there is no functioning system of internal ethics and discipline in the judiciary. In other words, if a member of the public wished to file a complaint against a judge, there would be no way of investigating or prosecuting the judge because the standards were repealed and the new rules cannot be enforced because the bodies that the new law created are not in place.*”<sup>380</sup>

123. In April 2017, a complaint was filed against one of the judges who issued the Supreme Court Judgment, Justice Oyden Ortega, in which it was alleged that Mr. Ortega and his son conspired to accept money in exchange for procuring a judgment favourable to the appellant in a case.<sup>381</sup> According to press reports, the claims relate to a case which commenced in 2013, Ganadera Cerro Jesus (“**Ganadera**”) vs. Forrest for Friends and Green Development (“**Forrest for Friends**”) from 2013. Mr. Cesar Guillermo Alvarado Taylor was the administrator for Ganadera. Ganadera lost at first instance, in the Third Civil Court of Panama. On appeal to the Superior Court of Justice, Ganadera won. Forrest for Friends filed a cassation for appeal to the Civil Chamber of the Supreme Court, which was admitted by Justices Oyden Ortega and Hernan De Leon, the two justices who issued the majority opinion of the Supreme Court Judgment.
124. According to the press report, by the time the dispute was in the Supreme Court, Ganadera was on the brink of bankruptcy and could not afford to continue defending itself against the appeal. At that point, Mr. Alvarado Taylor alleged that Justice Oyden Ortega’s son intervened and told Ganadera that he could “*resolve*” their predicament and help them avoid bankruptcy by guaranteeing that his father would issue a judgment in their favour. Justice Oyden Ortega’s son is also alleged to have threatened Ganadera that they would lose the case if they did not pay him, and Mr. Alvarado Taylor stated that he received calls, emails, and personal visits from Justice Oyden Ortega’s son. Ultimately, Mr. Alvarado Taylor acceded to the solicitations by Justice Oyden Ortega’s son and “*made payments in exchange for a judgment that would be supposedly issued in his favour.*” The evidence included by Mr. Alvarado Taylor in his complaint included details of meetings and a payment of 15,000 balboas (USD

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<sup>380</sup> **Exhibit C-0229** – MESICIC, *Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption - Republic of Panama Final Report*, dated 17 March 2017, 16-17.

<sup>381</sup> **Exhibit C-0230** – “Otra denuncia contra un magistrado de la Corte llega a la Asamblea” [Another complaint against a magistrate of the Court arrives at the Assembly], article from *La Estrella*, dated 19 April 2017.

15,000) in the name of Ortega. He also recounts a meeting in a Ford vehicle in which Justice Ortega's assistant (a woman by the name of Claudia) was present.

125. In June 2017, it was reported that the National Assembly had “*archived*” the complaint against Justice Ortega, along with twelve other complaints against other Supreme Court justices concerning allegations of abuse of authority.<sup>382</sup>
126. That was not the first complaint made against Justice Ortega. There have been at least three more, none of which appear to have been taken further by the National Assembly.
127. On 6 June 2014, the Panamanian press reported a complaint filed against Justice Ortega with the Secretary General of the National Assembly which included allegations and evidence of bribery. We have not been able to locate any publicly available resources describing the outcome of this complaint.<sup>383</sup>
128. On 15 July 2015, former Panamanian President Ricardo Martinelli (himself the subject of numerous criminal charges<sup>384</sup>) filed complaints against six Supreme Court Justices, including Justice Ortega and Justice Mitchell (author of the dissent in the Supreme Court Judgment), claiming \$10 million in compensation.<sup>385</sup>
129. On 30 September 2015, the National Assembly's Credentials Committee archived three complaints filed against Supreme Court Justices Oyden Ortega, Harley Mitchell, and José Ayú Prado. The complaint against Justices Ortega and Mitchell was filed by Miguel Antonio Bernal, in relation to a judgment issued with respect to the inheritance of a U.S. businessman, Wilson Lucom. Even though Mr. Lucom's will stated that his inheritance would go to a trust he had set up for the benefit of poor children in Panama, the Supreme Court reversed that decision and instead gave the

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<sup>382</sup> **Exhibit C-0231** – “Diputados archivan doce denuncias contra magistrados de la Corte” [Deputies file twelve complaints against magistrates of the Court], article from *Telemetro* dated 26 June 2017

<sup>383</sup> **Exhibit C-0232** – “Presentan denuncia contra el magistrado Oydén Ortega” [They're filing a complaint against the magistrate Oydén Ortega] article from *La Estrella* dated 6 June 2014.

<sup>384</sup> **Exhibit C-0233** – “U.S. Takes Ex-Leader of Panama Into Custody for Possible Extradition”, article from the New York Times dated 13 June 2017.

<sup>385</sup> **Exhibit C-0234** – Complaint Filed by Ricardo Martinelli Against the Justices of the Supreme Court of the Republic of Panama.

money to the businessman's widow. Mr. Bernal, who represented the trust, filed for an appeal of this decision, which was rejected by the Supreme Court.<sup>386</sup>

130. In relation to the same case, on 23 September 2011, a claim was filed in the United States District Court Southern District of Florida by Richard S. Lehman, as the executor of the estate of Mr. Lucom, which included assets in Florida. The defendants included Supreme Court Justices Oydén Ortega and Harley Mitchell.<sup>387</sup> The plaintiff alleged a widespread criminal conspiracy, through acts of corruption, extortion, theft, money laundering and bribery. The complaint alleged that the widow's lawyer "offered and negotiated a \$1.5 million bribe to each Justice of the [Supreme Court] Panel", and that as a consequence, once the bribes became public knowledge, the U.S. State Department revoked the visas of the three judges.<sup>388</sup> The claim was dismissed on limitation grounds, and so the merits of the case were never debated.<sup>389</sup>

### **XIII. JURISDICTION**

131. The TPA grants a tribunal jurisdiction over measures adopted or maintained by a Party relating to investors of the other Party and covered investments.<sup>390</sup>
132. The TPA defines "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."<sup>391</sup>
133. The TPA defines "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of

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<sup>386</sup> **Exhibit C-0235** – "Complaints against judges Harley Mitchell, Oydén Ortega and José Ayú Prado dismissed" article from *La Prensa* dated 30 September 2015

<sup>387</sup> **Exhibit C-0246** – Lucom Complaint dated 23 September 2011.

<sup>388</sup> *Id.* ¶ 6 and 140: "On or about June 2008, Infante acting as agent and conduit for the Arias Group, made their boldest move to date. Infante went to lunch at Café Marisco in Panama with Justice Mitchell, and two attorneys, and offered each of the three presiding Supreme Court Justices \$1.5 Million to issue an Order that named Hilda as the sole Executor and "universal heir" of Lucom's Estate. The Justices complied."

<sup>389</sup> **Exhibit C-0254** - Lucom Appeal dated 28 August 2013.

<sup>390</sup> **Exhibit C-0117** – US-Panama TPA, Chapters 10 and 18, Article 10.1.

<sup>391</sup> *Id.* at Article 10.29.

*gain or profit, or the assumption of risk.*” Forms that the investment may take include “(f) intellectual property rights”.<sup>392</sup>

134. Article 25 of the ICSID Convention provides: “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”. As the Tribunal noted in its Decision on Expedited Objections, “It follows that the jurisdiction of the Tribunal requires first that each Claimant should have an “investment” and secondly that any dispute raised by a Claimant should “arise directly” out of that investment.”<sup>393</sup>
135. BSLS satisfies each of these requirements because (i) its Panamanian intellectual property rights (the FIRESTONE trademarks registered in Panama) constitute “investments” as defined by the TPA; (ii) BSLS is an investor of another Party, the United States; and (iii) BSLS’s dispute arises directly out of its investment.
136. BSAM satisfies each of these requirements because (i) its Panamanian intellectual property rights (its licenses to use the BRIDGESTONE and FIRESTONE trademarks in Panama) constitute investments as defined by the TPA; (ii) BSAM is an investor of another Party, the United States; and (iii) BSAM’s dispute arises directly out of its investment.

BSLS’s FIRESTONE Trademark constitutes an investment under the TPA

137. The Tribunal has already considered the question of when a registered trademark constitutes a qualifying investment, notwithstanding the fact that Panama has not contended that BSLS does not have a covered investment in Panama. The Tribunal summarised its findings on this issue thus: “a registered trademark will constitute a qualifying investment provided that it is exploited by its owner by activities that, together with the trademark itself, have the normal characteristics of an investment.”<sup>394</sup>

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<sup>392</sup> *Id.*

<sup>393</sup> Decision on Expedited Objections, ¶ 154.

<sup>394</sup> *Id.* at ¶ 177.



138. The Tribunal noted that “*the mere registration of a trademark in a country manifestly does not amount to, or have the characteristics of, an investment in that country.*”<sup>395</sup> In Panama, as in most jurisdictions, the law does “*not permit a trademark to remain on the register indefinitely if it is not being used.*”<sup>396</sup> However, the position is entirely different “*if the trademark is exploited.*”<sup>397</sup> The Tribunal notes that a trademark is exploited “*by the manufacture, promotion and sale of goods that bear the mark. The exploitation accords to the trademark, by the activities to which the trademark is central, the characteristics of an investment*”.<sup>398</sup>
139. BSLS owns the FIRESTONE trademark in Panama. As the Tribunal noted, BSLS’s role “*was not itself to exploit those trademarks but to protect them and to delegate the exploitation of the marks by license to BSAM.*”<sup>399</sup> It delegated the exploitation of the FIRESTONE trademark in Panama to BSAM by licensing the rights to manufacture, use and sell the trademark.<sup>400</sup> Through those license rights, tires with the FIRESTONE trademark are manufactured, and then promoted and sold in Panama. BSLS retains some control over the exploitation of the rights – for example, BSAM must obtain consent from BSLS if it wishes to assign or sell the trademark license – and earns money from royalties paid under the FIRESTONE Trademark License Agreement.<sup>401</sup>
140. Accordingly, since the Tribunal has determined (i) that a registered trademark “*will constitute a qualifying investment provided that it is exploited by its owner*”<sup>402</sup>; and (ii) that BSLS has “*protect[ed]*” the trademarks and “*delegate[d] the exploitation of the marks by license to BSAM*”<sup>403</sup>, it is clear that BSLS has a qualifying investment under the TPA.

#### BSLS qualifies as an investor under the TPA

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<sup>395</sup> *Id.* at ¶ 171.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at ¶ 172.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at ¶ 207.

<sup>400</sup> **Exhibit C-0048** –Agreement to License Trademarks Between BSLS and BSAH.

<sup>401</sup> *Id.* at Article 2, Article 27.

<sup>402</sup> Decision on Expedited Objections, ¶ 177.

<sup>403</sup> *Id.* at ¶ 207.

141. BSLS is an enterprise duly constituted under the laws of Delaware, USA,<sup>404</sup> and it has made investments in Panama as explained above.
142. In its Expedited Preliminary Objections, Panama attempted to deny the benefits of the TPA to BSLS pursuant to Article 10.12.2 of the TPA,<sup>405</sup> on the basis that BSLS (i) is an enterprise of the other TPA Party; (ii) is wholly owned by BSJ, a Japanese corporation; and (iii) does not have “*substantial business activities*” in the United States.<sup>406</sup> The Tribunal dismissed this objection, finding that it was satisfied that “*BSLS has and had substantial business activities within the United States.*”<sup>407</sup>
143. Accordingly, BSLS, as an enterprise of the United States which has made an investment in Panama, qualifies as an investor under the TPA.

BSLS’s dispute arises directly out of its investment

144. The Tribunal has already determined that BSLS’s dispute arises out of its investment:
- “Panama does not challenge BSLS’s contention that it has a dispute with Panama that arises directly out of its investment in Panama. Its investment is the FIRESTONE trademark registered in Panama. The dispute in BSLS’s case is as to whether the judgment of the Panama Supreme Court has wrongfully inflicted a penalty on BSLS for taking lawful and reasonable steps to protect that investment. The penalty is the damages and costs awarded by the Supreme Court against BSLS and BSJ in the total sum of US\$5,431,000. BSLS seeks to recover that sum. The nexus between the action that is alleged to have caused the harm to the investment and the alleged harm could hardly be closer.”*<sup>408</sup>

BSAM’s trademark licenses constitute an investment under the TPA

145. This issue was the subject of one of Panama’s Expedited Preliminary Objections, and the Tribunal has made a final determination that BSAM has covered investments

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<sup>404</sup> **Exhibit C-0004** – BSLS and BSAM Certificates of Incorporation; **Exhibit C-0219** – U.S. Panama TPA - Chapter 2, Article 2.1 provides, “*enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association.*”

<sup>405</sup> Expedited Preliminary Objections, ¶¶ 28-29.

<sup>406</sup> *Id.* at ¶¶ 28, 30, 31, 37.

<sup>407</sup> *Id.* at ¶ 302.

<sup>408</sup> *Id.* at ¶ 239.

under the TPA, holding that “[t]he FIRESTONE Trademark License was thus an investment in Panama owned by BSAM”<sup>409</sup> and “the BRIDGESTONE Trademark License was an investment in Panama owned or controlled by BSAM.”<sup>410</sup>

BSAM qualifies as an investor under the TPA

146. BSAM is an enterprise duly constituted under the laws of Nevada, USA, so it is an enterprise of a Party to the TPA,<sup>411</sup> and it has made an investment in Panama, as described above.

BSAM’s dispute arises directly out of its investment

147. This issue was the subject of one of Panama’s Expedited Preliminary Objections, and the Tribunal has made a final determination that BSAM’s dispute does arise directly out of its investment insofar as its claim relates to damage suffered within Panama. Describing BSAM’s dispute as “*an aberrant decision of the Supreme Court to award damages against BSJ and BSLS, for taking action designed to protect their investments and those of BSAM, has caused damage to the value of those investments,*” the Tribunal held, “*that dispute arises directly out of the investments of BSLS and BSAM.*”<sup>412</sup>
148. BSAM also claims loss suffered outside Panama. The Tribunal allowed Panama’s objection that BSAM’s dispute did not arise out of its investment with respect to loss suffered outside Panama,<sup>413</sup> but based on the claims for damages described in paragraphs 55 to 58 of the Request for Arbitration and on the basis that disputes “*as to whether States other than Panama are likely to copy Panama’s alleged abuse of the Claimants’ intellectual property rights to the detriment of the Claimants*”<sup>414</sup> BSAM’s claim for damages outside of Panama, as described more fully at paragraphs 226 to 237 below, is currently made on a different basis.

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<sup>409</sup> *Id.* at ¶ 210.

<sup>410</sup> *Id.* at ¶ 216.

<sup>411</sup> **Exhibit C-0004** – BSLS and BSAM Certificates of Incorporation.

<sup>412</sup> Decision on Expedited Objections, ¶ 246.

<sup>413</sup> *Id.* at ¶ 248.

<sup>414</sup> *Id.* at ¶¶ 245, 247, 346 to 355.

149. As the Tribunal has accepted, BSLS and BSAM both benefit from the exploitation of the trademarks: “*BSLS’s interest in the trademark was restricted to the royalties that it was to receive from BSAM for the use of the trademark. BSAM’s interest was in the fruits of the exploitation of the trademark.*”<sup>415</sup> The Supreme Court Judgment has caused damage to the value of BSAM and BSLS’s investments, and the Tribunal has held that such dispute arises directly out of BSAM and BSLS’s investments.<sup>416</sup>
150. BSAM claims that the Supreme Court Judgment has had a detrimental effect on the value of its trademark rights. As Mr Daniel explains,
- “the result of the Supreme Court decision is that BSLS is exposed to the risk (a) of liability to pay damages if it opposes an application for a “-STONE” trademark, and (b) that it will be unlawful for BSLS (or BSJ) to oppose a trademark application by an existing competitor altogether in the future. The exposure to those risks has the effect of impairing the exclusivity (or legal protection) of Claimants’ Subject Trademark rights, which increases the likelihood of products bearing confusingly similar marks competing against those bearing the Subject Trademarks in Panama and in the BSCR region. Therefore, the Supreme Court decision effectively places Claimants in an economic and competitive position in which they face the risk of no longer benefiting from exclusive rights in the Subject Trademarks. For example, in either case the Claimants would (1) face increased competition from other products bearing confusingly similar marks and (2) have lost the exclusive ability to control the brand messaging associated with BRIDGESTONE and FIRESTONE branded products.”*<sup>417</sup>
151. Such impairment has an economic impact on BSAM. For example, if BSAM sought to sell its trademark rights to a third party, the buyer would take the Supreme Court Judgment into consideration when determining the value of the trademark rights, and the effect would be to lower the value of the asset. If the buyer were just acquiring the Panamanian trademark rights, the impact on value would be high, but even if the buyer were acquiring trademark rights for the whole Central American region (the region covered by the Costa Rican entity with responsibility for Panama, Bridgestone

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<sup>415</sup> *Id.* at ¶ 241.

<sup>416</sup> *Id.* at ¶ 246.

<sup>417</sup> Expert Report of Brian Daniel dated 11 May 2018 ¶ 95, and Expert Report of Roberta Jacobs-Meadway ¶ 52.

Costa Rica, S.A. (BSCR”) (or worldwide), there would be some impact on value, as described further below. Additionally, the BRIDGESTONE and FIRESTONE marks have “well-known” status in certain jurisdictions,<sup>418</sup> which makes the trademarks more valuable assets, but such status is obtained based on both local and extra-territorial use of the trademarks. Accordingly, jurisdictions outside of Panama may look to the status of the trademarks in Panama and the rest of the world in order to determine whether or not they should attain the more valuable “well-known” status, and the Supreme Court Judgment’s chilling effect on BSLS, BSJ and BSAM’s ability to enforce their trademark rights has a direct impact on the value of the trademarks, both in and outside of Panama. BSAM’s claim for loss outside suffered outside Panama is based on the diminution of value to BSAM’s trademark rights (wherever that loss occurs)<sup>419</sup> caused directly by the Panamanian Supreme Court Judgment. That dispute therefore arises directly out of BSAM’s investment.

#### **XIV. PANAMA’S COMMITMENT TO PROTECT FOREIGN INVESTMENT UNDER THE TPA**

152. The Preamble to the TPA provides that both parties are resolved to “*ensure a predictable commercial framework for business planning and investment*” and “*foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights.*”
153. The investment protections in the TPA include obligations for Panama to accord to investments covered by the TPA fair and equitable treatment, in accordance with customary international law, and, explicitly, require Panama not to deny justice to investors.
154. As part of Panama’s commitment to protect foreign investments, Panama is required to ensure its judicial system allows for the effective exercise of the substantive rights granted to foreign investors.
155. The investment protections in the TPA extend to investments in intellectual property rights.<sup>420</sup> The USTR’s annual Special 301 Report reviews the global state of

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<sup>418</sup> Third Witness Statement of Thomas Kingsbury dated 11 May 2008 ¶ 5.

<sup>419</sup> CLA-0031 – S.D. Myers v. Canada ¶ 118.

<sup>420</sup> See Article 10.29 of the TPA.

intellectual property rights protection and enforcement, and highlights any areas of concern. In 2015, the Special 301 Report found:

*“Of additional concern is a report that significant punitive damages were imposed on the owner of a trademark registered in Panama in connection with that owner’s efforts to oppose the registration and use of a second mark which has been found to be confusing similar in other markets. While the decision in this dispute is not necessarily representative of a systemic concern in Panama, the damage award may discourage other legitimate trademark owners from entering the market out of concern that defending their marks will result in punitive action.”*<sup>421</sup>

156. The Special 301 Report for 2016 further noted, “Many other countries, including Argentina, Brazil, India, Malaysia, Mexico, Panama, the Philippines, and Russia reportedly either have no administrative opposition proceeding, an extremely limited opposition proceeding, or extremely delayed opposition proceedings.”<sup>422</sup> The USTR’s National Trade Estimates Report (an annual report documenting foreign trade and investment barriers facing American exports around the world) for 2016 provided, “Confidence in the competence and independence of the judicial system remains low, based on decisions that call into question its susceptibility to influence. Examples range from the previously-cited disputes on property titling, to reports of significant punitive damages being imposed on the owner of a trademark registered in Panama after attempting to enforce the trademark. The United States continues to stress the need to increase transparency and accountability in both government procurement and judicial processes.”<sup>423</sup>

**XV. PANAMA IS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE 10.5 OF THE TPA**

157. By issuing the Supreme Court Judgment, following a deeply problematic Supreme Court process, Panama failed to comport with “*the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*” in breach of Article 10.5 of the TPA.

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<sup>421</sup> **Exhibit C-0032** – USTR Special 301 Report 2015.

<sup>422</sup> **Exhibit C-0260** – Office of the United States Trade Representative, Special 301 Report (April 2016), 18.

<sup>423</sup> **Exhibit C-0261** – National Trade Estimate Report (2016), 342.

158. Panama’s duty not to deny justice also arises from customary international law.<sup>424</sup>
159. Denial of justice is characterized by a court’s “*clear and malicious misapplication of the law*”<sup>425</sup> or “[*m*]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.”<sup>426</sup> It “*may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety.*”<sup>427</sup>
160. Although not the exclusive test for denial of justice, one occurs when the tribunal “*can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable.*”<sup>428</sup> That tribunal added, “*This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.*”<sup>429</sup>
161. As stated by the tribunal in *Waste Management v. Mexico*, “*Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in*

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<sup>424</sup> For instance, **CLA-0013** – *Amto v. Ukraine* ¶ 75: “[Denial of justice] is a manifestation of a breach of the obligation of a State to provide fair and equitable treatment and the minimum standard of treatment required by international law. Denial of justice relates to the administration of justice, and some understandings of the concept include both judicial failure and also legislative failures relating to the administration of justice (for example, denying access to the courts)”; **CLA -0069** – *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of June 26, 2003, ¶ 137 (holding that “*the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.*”); **CLA -0070** – *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of July 29, 2008, ¶ 651: “[T]he duty not to deny justice arises from customary international law and can also be considered to fall within the scope of treaty provisions provided for ‘fair and equitable treatment.’”

<sup>425</sup> **CLA-0071**– *Robert Azinian et al v the United Mexican States*, ICSID case no. ARB(AF)/97/2, Award of 1 November 1999, ¶ 103.

<sup>426</sup> **CLA -0069** – *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award of June 26, 2003 ¶ 132.

<sup>427</sup> **CLA – 0072** – *Jan de Nul N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award of November 6, 2008 ¶ 193.

<sup>428</sup> **CLA-0073** – *Mondev International Ltd v. United States of America*, ICSID case ARB(AF)/99/2, Award 11 October 2002 ¶ 127.

<sup>429</sup> *Id.*

*judicial proceedings or a complete lack of transparency and candour in an administrative process.”*<sup>430</sup>

162. Put more simply, a denial of justice may be found when it is clear that the court has as “*administer[ed] justice in a seriously inadequate way.*”<sup>431</sup>

#### Exhaustion of domestic remedies

163. The exhaustion of domestic remedies is a precondition to the existence of a denial of justice, unless the remaining remedies provide no reasonable possibility of effective redress, because it is inherent in the concept of denial of justice that the domestic legal system be considered as a whole. Thus, before an international tribunal may find a denial of justice to have occurred, the domestic legal system as a whole must have been put to the test and, as a system, have failed to meet the standard required by international law – “*It is the whole system of legal protection, as provided by municipal law, which must have been put to the test.*”<sup>432</sup>
164. As Mr. Arjona explained, and pursuant to Article 1195 of the Judicial Code,<sup>433</sup> the Panamanian Supreme Court is the court of last instance in Panama – there is no appeal available.<sup>434</sup> It is possible for parties to seek to modify or correct a judgment,

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<sup>430</sup> **CLA-0074** – *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, ¶ 98.

<sup>431</sup> **CLA-0071** – *Robert Azinian et al v the United Mexican States* ¶ 102. See also **CLA-0075** – *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9; Decision on Jurisdiction and Liability, 24 August 2015, ¶ 146.

<sup>432</sup> **CLA-0076** – *Ambatielos Claim* (Greece v. United Kingdom), Vol XII UNRIIA 83 (1956), 20.

<sup>433</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama Article 1195 provide: “*The Court shall not take into consideration any grounds for Appeal for Reversal that have not been invoked in the pleading formalizing the appeal.*

*Should the Court find any of the pleaded grounds to be founded, it shall not consider the rest; it shall revoke the appealed judgment and issue the corresponding decision instead.*

*In this case, where the judgment of the court of first instance is concerned the Court found itself in the same situation as the Superior Court. **The judgment permits no appeal whatsoever.***

*Having been converted into a Court of instance, it may order the submission of evidence.*

*The judgment must contain in its operational part all of the solutions required for the claim when the latter does not include a joinder of the causes of action, or when the latter are connected. If the causes of action have been joindered and there is no connection between the joindered actions such that the burden of the judgment on the one affects the other, it shall be adjudicated only in respect of the action upon which the decision that gave rise to the appeal fell.” (Emphasis added)*

<sup>434</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 37.



and motions attempting this were filed by BSLS and BSJ, but were unsuccessful.<sup>435</sup> BSLS and BSJ have therefore exhausted all domestic remedies available to them.

165. In his seminal work on denial of justice, Jan Paulsson lists a number of categories of denial of justice by the decision-maker.<sup>436</sup> Of these, at least four categories are relevant here. First, there were fundamental breaches of due process. Second, the decision was arbitrary. Third, there was corruption in the process. Fourth, the decision was incompetent.

#### Fundamental breaches of due process

166. As the tribunal found in *Rumeli v. Kazakhstan*, “a court procedure which does not comply with due process is in breach of the duty [to provide fair and equitable treatment].”<sup>437</sup>
167. Due process is a fundamental guarantee enshrined in the Constitution of the Republic of Panama – Article 32 provides: “No one may be tried except by a competent authority and in accordance with legal procedure, nor may they be tried more than once for the same criminal, administrative, police or disciplinary case.”<sup>438</sup> Similarly, Article 8 of the American Convention on Human Rights (incorporated by Panama into its laws) guarantees due process.<sup>439</sup>

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<sup>435</sup> See paragraphs 100 to 106 above.

<sup>436</sup> **CLA-0077** – Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005), Chapter 7.

<sup>437</sup> **CLA – 0070** – *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* ¶ 653.

<sup>438</sup> **Exhibits C-209** – Extracts from the Constitution of the Republic of Panama Article 32.

<sup>439</sup> **CLA-0078** – American Convention on Human Rights (Pact of San José, November 1969), Article 8:

“1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b) prior notification in detail to the accused of the charges against him;
- c) adequate time and means for the preparation of his defense;
- d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

168. Mr. Arjona explains that the right to due process encompasses a number of elements, including:

- “1. The right that causes of action or defenses be examined in accordance with legal procedures.*
- 2. The right to submit or adduce evidence and rebuttals.*
- 3. The right to exercise the means of defense and appeal recognized in Law.*
- 4. The right to the holding of a public procedure, except where otherwise provided in Law for reasons of morality, honor, decorum, safety or public order.*
- 5. The right not to be tried more than once for the same criminal, administrative, police or disciplinary case.”<sup>440</sup>*

169. There were numerous breaches of due process in the Supreme Court Judgment, including:

- a. The Supreme Court found against BSLS and BSJ for a reason other than that contained in the claim, in violation of Article 991 of the Judicial Code.
- b. The Supreme Court based its decision on a document issued by a third party in a foreign language and from outside Panama that did not meet any of the requirements for admission into evidence, in violation of Articles 792, 856, 857, 871, 877 and 878 of the Judicial Code and the principle of listening to the other side.

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*e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;*

*f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;*

*g) the right not to be compelled to be a witness against himself or to plead guilty; and*

*h) the right to appeal the judgment to a higher court.*

*3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.*

*4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.*

*5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.”*

<sup>440</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 62

- c. The Supreme Court based its decision on a document that was not relevant to the proceedings, in violation of Article 783 of the Judicial Code.
  - d. The Supreme Court based its decision on grounds not raised by Muresa in its complaint, which BSLS and BSJ consequently could not respond to, in violation of the fundamental due process principle of consistency.
170. As the court of last instance in the Panamanian judicial system, the Supreme Court is “required to ensure “exact observance of the law” (art. 1162 of the Judicial Code).”<sup>441</sup>

(a) Violation of Article 991 of the Judicial Code

171. Article 991 of the Judicial Code provides:

*“The judgment must be consistent with the causes of action adduced in the claim or subsequently in those cases explicitly contained therein and with the defenses that have been proved and would have been pleaded if so required in law.*

*The respondent cannot be found liable for any additional amount or for a reason other than that stated in the claim.*

*If the amount claimed by the claimant exceeds what has been demonstrated, only the latter shall be recognized.*

*If several petitions have been formulated, the corresponding declaration shall be made with respect to each one of these.”*<sup>442</sup>

172. The Supreme Court Judgment violates Article 991 of the Judicial Code in two respects.

173. First, Muresa’s claim was brought under Article 1644 of the Civil Code.<sup>443</sup> As described above, Article 1644 of the Civil Code is the general tort provision – “Whoever by act or omission causes damage to another by fault or negligence is

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<sup>441</sup> *Id.* at ¶ 37

<sup>442</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 991.

<sup>443</sup> **Exhibit C-0016** – Civil Complaint filed by Muresa Intertrade S.A, 4: “we are filing an Award plus Costs in Ordinary Proceedings Complaint for tort liability on the basis of Article 1644 and 1644 A of the Civil Code.”

*bound to repair the damage. If the act or omission is attributable to two or more persons, each shall be jointly and severally liable for the damages caused.”* Muresa did not claim under Article 217 of the Judicial Code – in fact, this argument was raised by BSLS and BSJ and the Eleventh Circuit Court determined that Muresa could claim under Article 1644 of the Civil Code and did not need to claim under Article 217 of the Judicial Code.<sup>444</sup> Muresa also did not claim under Article 780 of the Judicial Code.

174. However, the Supreme Court based its decision on Articles 217 and 780 of the Judicial Code: *“the damages caused to the plaintiffs are shown, committing not only the infringement of Article 780 of the Judicial Code, but also violating the provisions of Article 1644 of the Civil Code, in accordance with Article 217 of the Judicial Code.”*<sup>445</sup>
175. Although the Supreme Court referred to Article 1644 of the Civil Code as well, it is clear from the judgment that they based their decision on Article 217 because having cited Article 1644 of the Civil Code and Article 217 of the Judicial Code, they determine that BSLS and BSJ acted in bad faith or recklessly, which is the language contained in Article 217 of the Judicial Code, but which does not appear in Article 1644 of the Civil Code.
176. Second, the Supreme Court Judgment based its decision on a finding that BSLS and BSJ adopted an *“attitude that was plainly threatening and reckless”*, but this was not a ground on which Muresa’s claim was based. There was no allegation of reckless behaviour in Muresa’s complaint.
177. Mr. Arjona notes that although there is *“some flexibility in assessing the errors or defects committed by the parties in identifying the cause of action, it is obvious that the Court has the unavoidable obligation, in adjudicating the case, to respect the **facts invoked and the evidence examined**, since it is on that point that the decision must be based.”*<sup>446</sup>

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<sup>444</sup> See ¶¶ 50-51 and 70.

<sup>445</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 17.

<sup>446</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018 ¶ 35.

(b) Violation of Articles 792, 856, 857, 871, 877 and 878 of the Judicial Code and the principle of listening to the other side

178. Article 792 of the Judicial Code provides:

*“In order for the evidence to be assessed in the proceeding, it must be requested, examined and incorporated in the proceeding within the terms and periods stipulated for that purpose in this Code.*

*However, evidence incorporated in the case file that have been examined with the intervention of the parties after the evidentiary term has expired shall be included in the decision so long as they have been subject to a binding order.*

*Evidence examined with the intervention of the parties may be considered in a decision in those cases in which the nullity of the proceedings has been declared without the defect that caused the nullity having occurred in the examination of the evidence. Similarly, evidence examined with the intervention of the parties may be utilized in the proceeding in the case of an annulled proceeding in which the examination did not affect the declaration of nullity.”<sup>447</sup>*

179. Article 856 of the Judicial Code provides:

*“A private document is one that does not meet the requirements for being a public document. A private document is authentic in the following cases:*

- 1. If it has been recognized before a Judge or notary, or if it is held to be recognized on judicial grounds;*
- 2. If it was entered in the public registry by the signatory;*
- 3. If having been submitted to the proceeding it has not been deleted or challenged pursuant to the provisions set forth in article 861;*
- 4. If it has been declared authentic in a court decision issued in an earlier proceeding, with a hearing given to the counterpart opposing the new proceeding; and,*

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<sup>447</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 792.

5. *If it has been forwarded or transferred via a state or municipal office the regulations of which require prior identification of the forwarding or transferring party.*

*Also authentic with respect to those intervening are Government bonds, lottery tickets, raffle tickets, insurance policies, certificates of investment in mutual funds and receipts from loan or pawnbrokers, bonds issued by the State or independent institutions, tickets from airlines or any other mode of transport, certificates and documents from general deposit stores, coupons or booklets from grocery store clubs and other private documents to which the law grants the presumption of authenticity.”<sup>448</sup>*

180. Article 857 of the Judicial Code provides:

*“Private documents must be submitted in the original in order for them to have the value accorded them in this chapter, but copies of such documents shall have the same value in the following cases:*

- 1. When the party against whom a copy is submitted explicitly or tacitly acknowledges it to be genuine;*
- 2. When the copy has been authenticated and certified by the Notary who registered the document at the request of the signatory or by any other public official in his or her office;*
- 3. When a photocopy or copy reproduced by another technical medium is submitted so long as it is authenticated by the official responsible for the custody of the original;*
- 4. When the original is not in the possession of the interested party. In order for it to have evidentiary value, it shall in this case be necessary for its authenticity to have been certified by the corresponding public official, or to have been explicitly or tacitly recognized by the opposing party or when this is demonstrated by comparison; and,*

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<sup>448</sup> *Id.* at Article 856.

5. *In the case of copies from private archives utilizing the microfilm system, when duly authenticated by a Notary Public.*<sup>449</sup>

181. Article 871 of the Judicial Code provides:

*“Except where otherwise provided, documents issued by third parties shall only be assessed by the Judge:*

*1. When they are of a dispositive nature, if they have been explicitly acknowledged by their authors or ordered to be held as having been acknowledged; and*

*2. When they are testimonial in nature, assuming their content has been ratified in the proceeding via the formal procedures established for witness evidence.”*<sup>450</sup>

182. Article 877 of the Judicial Code provides:

*“Except where provided in international agreements, documents issued in a foreign country shall be deemed to be evidence, as applicable, if they are submitted with the authentication of the Panamanian diplomatic or consular official exercising his or her functions in the location of origin of the document, and failing that by the diplomatic or consular representative of a friendly nation. In the latter case, it shall be accompanied by a certificate of the Ministry of Foreign Affairs stating that there is no Panamanian consular or diplomatic official in the place of origin of the document.*

*It is assumed by the fact of them being so authenticated that the documents are issued in accordance with the law of the location where they originate, without prejudice to the interested party verifying otherwise.*

*If the documents originating abroad are written in a language other than Spanish, they shall be submitted in translation, or translation thereof shall be requested by certified translator and, failing that, by an ad hoc translator appointed by the Court.”*<sup>451</sup>

183. Article 878 of the Judicial Code provides:

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<sup>449</sup> *Id.* at Article 857.

<sup>450</sup> *Id.* at Article 871.

<sup>451</sup> *Id.* at Article 877.

*“Notwithstanding the foregoing, should the Judge note the existence of a document in a language other than Spanish in the proceeding, he or she shall order its translation pursuant to the provisions set forth in the preceding article and at the expense of the party submitting the evidence.*

*All translations may be challenged for critical errors by means of a motion; the parties and the Judge shall appoint translators in the same way they appoint experts.*

*The translators appointed pursuant to the preceding articles and those required to intervene in a proceeding by Court appointment may be recused on the same grounds as witnesses and experts.”<sup>452</sup>*

184. The Supreme Court accorded decisive weight to the Reservation of Rights Letter, reproducing it in their judgment,<sup>453</sup> and found that BSLS and BSJ’s “negligence” was proven “*when observing the note that appears on pages 2622 to 2628 and on pages 2955 to 2958 [the Reservation of Rights Letter], in which the legal counsel of the plaintiffs, in an intimidating manner indicated to have brought in several countries Opposition Actions against the registration of the RIVERSTONE trademark for tires and adding without legal basis, at least within Panamanian law, that the plaintiffs should refrain from commercially selling that product, it represents an obviously intimidating and reckless behavior.*”<sup>454</sup>
185. However, the Reservation of Rights Letter was not sent by or on behalf of BSLS or BSJ, it was not sent to Muresa or TGFL, and it related to entirely separate proceedings within the United States, and it was written in English and not Spanish. Muresa did not request admission of the Reservation of Rights Letter during the period for admission of evidence (or, indeed, at any other time), which is a clear violation of the rule in Article 792 of the Judicial Code that the evidence must be “*requested, examined and incorporated in the proceedings within the terms and periods stipulated for that purpose*”.

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<sup>452</sup> *Id.* at Article 878.

<sup>453</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, 10.

<sup>454</sup> *Id.* at 19-20.



186. In violation of Article 856 of the Judicial Code, the Reservation of Rights Letter was not authenticated either by being recognised before a judge or notary, or through any of the other means provided in Article 856.
187. In violation of Article 857 of the Judicial Code, a copy of the Reservation of Rights Letter (not the original) was included with Muresa and TGFL's expert report, and the original was never provided and the copy was not authenticated.
188. In violation of Article 871 of the Judicial Code, the Reservation of Rights Letter was not verified by the author. Mr. Arjona explains that the author would have needed to make an appearance in the proceedings in order to verify the document.<sup>455</sup> Further, the Panamanian Supreme Court has been strict in its adherence to this provision in other cases, finding that evidentiary weight should not have been given to a document which was not ratified by the author.<sup>456</sup>
189. In violation of Article 877 of the Judicial Code, the Reservation of Rights Letter was not authenticated by any Panamanian diplomatic or consular official in the United States, where the document originated, or any authentication of any representative of any other nation.
190. In violation of Article 878 of the Judicial Code, the Reservation of Rights Letter was not accompanied by a translation ordered by the Court, and the translation that did accompany the Reservation of Rights Letter was not verified and was not accurate.
191. The above violations of the Judicial Code constitute serious breaches of due process because the failure to admit the document properly into evidence meant that BSLs and BSJ did not have the opportunity to challenge it, as required under the Panamanian principle of listening to the other side – *“The requirement that the parties have equal opportunity to formulate their petition or petitions on the one hand, and their defense on the other.... No evidence can be assessed that has not been incorporated in accordance with the legal regulations, and within the terms specified*

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<sup>455</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 47.

<sup>456</sup> *Id.* at ¶ 49; **Exhibit C-0222** - Appeal for Reversal, Supreme Court of Panama dated 7 July 199.

*in the latter, with the parties having the opportunity to challenge or participate in the examination thereof*”.<sup>457</sup>

(c) Violation of Article 783 of the Judicial Code

192. Article 783 of the Judicial Code provides:

*“Evidence must relate to the subject of the proceeding and those that do not refer to the facts being discussed are inadmissible, as well as legally ineffective.*

*The Judge must reject outright those items of evidence that are prohibited in law, manifestly prolix or submitted for the purpose of obstructing the progress of the proceeding; the examination of evidence that is obviously irrelevant or ineffective may also be rejected.”*<sup>458</sup>

193. The Reservation of Rights Letter was sent by and addressed to parties not involved in the Panamanian proceedings, and relating to a proceeding in the United States which is not relevant to the proceedings in Panama. The Supreme Court should not have given any evidentiary weight to the Reservation of Rights Letter in those circumstances, as Mr. Arjona explained: *“The Judgment relied on the aforementioned document in a completely unacceptable manner”*.<sup>459</sup>

(d) Violation of the Principle of Consistency

194. The Principle of Consistency is explained by Mr Arjona at paragraphs 65 to 77 of his Expert Report. Briefly, it is the principle under requiring that judgments must be in accordance with the purpose of the proceeding – i.e. that they must relate to the claims which are made. A judgment which is based on arguments not made by the appellants, so that the other side did not have the opportunity to respond to them, is a grave violation of this principle.

195. The Supreme Court Judgment relied on allegations of proceedings that BSLS and BSJ were said to have brought in other countries, based on the words of the Reservation of

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<sup>457</sup> **Exhibit C-0188** - Extracts from the Judicial Code of the Republic of Panama, article 783; **CLA-0091** - Fábrega Ponce, Jorge. Diccionario de Derecho Procesal Civil [Dictionary of Civil Procedure] and Diccionario de Derecho Procesal Penal [Dictionary of Criminal Procedure]. Plaza & Janés Editores Colombia S.A., 2003; Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 42.

<sup>458</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 783.

<sup>459</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 44.

Rights Letter: *“the legal counsel of the plaintiffs, in an intimidating manner indicated to have brought in several countries Opposition Actions against the registration of the RIVERSTONE trademark for tires and adding without legal basis, at least in Panamanian law, that the plaintiffs should refrain from commercially selling that product, it represents an obviously intimidating and reckless behavior.”*<sup>460</sup>

196. BSLS and BSJ never had the opportunity properly to respond to this allegation, because it was not made in Muresa’s complaint before the Eleventh Circuit Court, and the evidence on which it was based, the Reservation of Rights Letter, was never admitted into evidence.

197. Second, the Supreme Court Judgment found BSLS and BSJ liable simply for having exercised their right to claim protection from the courts in relation to the application for registration of a potentially confusing similar trademark. As Mr Arjona notes:

*“The opposition to the registration of a trademark is in no way “proof of the intention to cause harm.” The Panamanian system rules, that in matters of civil liability, it is mandatory to prove fault or negligence, which means that it has to be established, concretely, a reliable demonstration that he or she who opposed the registration of the trademark, in this particular case, did so with the intention of causing harm to the other party. This intention needs to be proven and can in no way be presumed.”*<sup>461</sup>

#### Arbitrariness

198. As the tribunal in *Rumeli v. Kazakhstan* found, while the duty not to denial justice is of a procedural nature, *“the substance of a decision may be relevant in the sense that a breach of the standard can also be found when the decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith.”*<sup>462</sup>

199. Article 781 of the Judicial Code provides:

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<sup>460</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, 19-20.

<sup>461</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 76

<sup>462</sup> **CLA-0070** – *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ¶ 653.

*“The evidence shall be assessed by the Judge based on the rules of logic and reason, without this excluding the formal review of the documentation provided in law for the existence or validity of certain acts or contracts.*

*The Judge shall provide a reasoned assessment of the evidentiary material subject to examination and the merit to be accorded it.”*<sup>463</sup>

200. Accordingly, the Supreme Court was required to examine the evidence in a logical way – the rule in Article 781 of the Judicial Code is designed to “*prevent the examination of the evidentiary material resulting in arbitrary judgments or those contrary to logic and experience.*”<sup>464</sup>

201. The Supreme Court’s decision was arbitrary in a number of ways:

- a. It did not conduct a reasoned examination of the evidence when it ignored the documentary evidence in the case file that showed huge quantities of sales of RIVERSTONE tires during the relevant period;
- b. It did not conduct a reasoned examination of the evidence when it ignored the expert reports of the Court-appointed expert and BSLS and BSJ’s expert;
- c. It did not conduct a reasoned examination of the evidence when it only considered the opinion of Muresa’s experts and the witness evidence of Muresa, TGFL and LV International employees, even though such evidence was contradicted by the Court-appointed expert, BSLS and BSJ’s expert, and all of the documentary evidence on file.
- d. It did not conduct any examination of the evidence or provide any analysis of loss when it awarded damages of US\$ 5 million.

(a) The Supreme Court ignored the documentary evidence in the case file

202. The documentary evidence showed clearly that throughout the relevant period, sales of RIVERSTONE tires had been made. All of the experts, including Muresa’s, agreed

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<sup>463</sup> **Exhibit C-0188** – Extracts from the Judicial Code of the Republic of Panama, Article 781.

<sup>464</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018, ¶ 52.

on this,<sup>465</sup> yet the Supreme Court held, “*despite the commercial impact that was caused due to taking out from the market the sales of the RIVERSTONE tires, which created damages in terms of the annual sales of the plaintiffs corporations, situation that this Chamber considers perfectly demonstrated...*” (emphasis added).<sup>466</sup>

(b) The Supreme Court ignored the expert evidence other than Muresa’s experts

203. The Supreme Court only referred to the expert report of Muresa’s experts, despite the fact that both the Court-appointed expert and BSLS and BSJ’s expert disagreed with Muresa’s experts’ conclusions, and the fact that Muresa’s experts’ conclusions were not based on accounting principles. For example, in response to the question on why Muresa’s projected sales for 2005 and 2006 did not occur, Muresa’s experts answered: “*The sales scheduled by the company MURESA INTERTRADE, S.A. did not occur because the Factory Brand RIVERSTONE, primary product sold by the company MURESA INTERTRADE, S.A. was subject to a complaint opposing the registry application 120823-01 of the Brand RIVERSTONE Y DISEÑO filed by BRIGESTONE CORP. AND BRIGESTONE LICENSING SERVICES, INC. [sic], filed April 5, 2005. Also, prior to the complaint, on November 3, 2004, Foley & Lardner LLP Attorneys sent a letter that is attached with the documents submitted with the expert’s report, which specifies that the position of Bridgestone/Firestone was to formally request that L.V. International Inc. abstain from using the brand RIVERSTONE, not just in the United States but also in all parts of the world.*”<sup>467</sup>.

(c) The Supreme Court relied on witness evidence that was contradicted by documentary evidence

204. Muresa’s witnesses (who were employees of Muresa, TGFL, LV International and a distributor for RIVERSTONE tires) stated that they had stopped selling tires during the trademark opposition action.<sup>468</sup> All of them stated that they had done so solely because they were told to by Fernan Jesus Luque Gonzalez, manager of Muresa and

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<sup>465</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 4 – sales of RIVERSTONE tires in 2005 were 5,364,132 balboas and 3,971,353 balboas in 2006, and the same was noted by Muresa’s expert – **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, at 2.

<sup>466</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 19.

<sup>467</sup> **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, 2.

<sup>468</sup> See ¶ 58.

president of TGFL.<sup>469</sup> Mr. Fernan Luque said that he had ordered a halt to production and import because of “*information we were given by customs agents and by some related persons that in the case of a brand registration challenge we could face seizures.*”<sup>470</sup> There was no documentary evidence in support of that assertion, nor any witness evidence from the “*customs agents*” or “*related persons*”. Instead, all of the documentary evidence contradicted those statements, since there were sales of tires throughout the period amounting to over 9 million balboas over the two years in question, as noted by experts for both parties.<sup>471</sup> As Mr. Arjona explained, “*arbitrary conduct was clearly exhibited in the analysis and weighing of the facts and the evidence in the proceeding.*”<sup>472</sup>

(d) The Supreme Court did not analyse the amount of damages at all

205. The amount of damages was not assessed at all. Article 990 of the Judicial Code provides:

“*Sentences shall be issued in accordance with the following rules:*

1. *Succinctly express the claim and the factual points of the controversy;*
2. *In separate paragraphs, there shall be an accounting of the verified facts, which were alleged in a timely manner and relate to the matters that are to be resolved. Reference will be made to the evidence that is in the file and that have served as a basis for the Judge to consider them as proven facts.*
3. *Next, the reasons and legal bases that are deemed pertinent shall be presented and the legal decisions or doctrines that are applicable to the case shall be cited; and,*
4. *It shall be indicated that the decision administers justice in the name of the Republic and with authority under the Law.”<sup>473</sup>*

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<sup>469</sup> **Exhibit C-0161** - Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2).

<sup>470</sup> **Exhibit C-0161** – Testimony by Fernan Jesus Luque Gonzalez dated 27 April 2010 (part 2), 3.

<sup>471</sup> **Exhibit C-0020** – BSJ and BSLs Expert Report, 4 – sales of RIVERSTONE tires in 2005 were 5,364,132 balboas and 3,971,353 balboas in 2006, and the same was noted by Muresa’s expert - **Exhibit C-0162** – Expert Report by Jose Antonio Aguilar De Sedas and Psiquies De Leon dated 24 May 2010, 2.

<sup>472</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018 ¶ 59.

<sup>473</sup> **Exhibit C-0188** - Extracts from the Judicial Code of the Republic of Panama, Article 990.

206. The Supreme Court was required to set out the reasons and legal bases for its finding of USD 5 million in damages, but there was no attempt at all by the Supreme Court to analyse the damages, a fact noted by Justice Mitchell in his dissent: “*Finally, I do not agree with the way the monetary award was motivated in this case. There was no analysis as to how a judgment for five million dollars was feasible; that amount in damages was awarded with little legal basis.*”<sup>474</sup>
207. There was also no attempt to apportion loss suffered by Muresa and loss suffered by TGFL. The evidence submitted by both Muresa and TGFL of their loss was minimal, a fact noted by the expert accountants for BSLS and BSJ and the Court. In particular, because all of TGFL’s records were kept in Shanghai and were not provided to the experts.<sup>475</sup> BSLS and BSJ’s expert and the Court’s expert, having reviewed the financial documentation provided to them, could not find evidence of any loss. That was because the calculations for loss were based on projections for sales, but there was no basis provided for the projections. Therefore, as the Court’s expert explained, “*AS ACCOUNTING EXPERTS, WE HAVE TO WORK WITH THE DOCUMENTATION HELD IN THE FILE, WHAT THE COMPANY PROVIDES TO US AND ANY OTHER INFORMATION THAT CAN BE GATHERED. MURESA INTERTRADE, S.A. PROVIDED US WITH DOCUMENTATION THAT VERBALLY EXPLAINED TO US WHAT THE REASON WAS WHY THE PLANNED SALES DID NOT OCCUR, HOWEVER, AS I EXPLAINED IN THE PREVIOUS QUESTIONS, THERE IS NO SUPPORTING ACCOUNTING OR MARKETING DOCUMENTATION THAT WE COULD USE TO MAKE A STATEMENT REGARDING THE REASONS OR MOTIVES THAT LIMITED THE SALES OBJECTIVES OF MURESA.*”<sup>476</sup> Meanwhile, the basis for Muresa’s projections were simply statements made in Muresa’s Board minutes, without any support.<sup>477</sup>

### Corruption

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<sup>474</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 30.

<sup>475</sup> **Exhibit C-0020** – BSJ and BSLS Expert Report, at 10-12; **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 9.

<sup>476</sup> **Exhibit C-0163** – Expert report by Vera Luisa Lindo de Gutierrez dated 24 May 2010, at 3.

<sup>477</sup> **Exhibit C-0248** - Minutes from Muresa Board Meeting – 2008; **Exhibit C-0249** - Minutes from Muresa Board Meeting - 2007 ; **Exhibit C-0250** - Minutes from Muresa Board Meeting – 2006; **Exhibit C-0251** - Minutes from Muresa Board Meeting – 2005.

208. We are not aware of any investment treaty cases in which an investor was able to prove specific allegations of corruption by the courts – for obvious reasons, an investor is unlikely to have access to evidence proving corruption and a host state is unlikely to divulge any such evidence (or may itself find it difficult to access such evidence). The allegation that a host state, through its judiciary, has denied justice to an investor is a serious one, and it is a generally accepted proposition “*that international tribunals ought to be deferential to domestic courts.*”<sup>478</sup> However, such deference “*requires the clear perception that domestic courts are independent, competent and above all clear of suspicion of corruption.*”<sup>479</sup> With respect to Panama, there can be no such perception. The decisions of the highest English and United States courts which have considered this issue are instructive here. In *AK Investment v. Kyrgyz Mobil and others* the UK Privy Council held, “*depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption.*”<sup>480</sup> In the United States, courts have also made findings that the court systems of other countries are inadequate and would not render a just outcome.<sup>481</sup>
209. As explained by Professor Freeman, serious errors in the substance of court judgments, such as clear misapplication of the law or untenable factual findings, are evidence of a local court’s malice:

“*Although there is unquestionably no responsibility for simple or ordinary ‘reversible’ errors (i.e., errors which might allow a domestic court of appeals to reverse the judgment below) clear proof of serious error plus additional factors in the nature of malice towards the alien – which may be evidenced by the court ‘in consciously misapplying the law or in declaring the existence of a fact which it had previously recognized as non existent, or the non existence of a fact which obviously exists’ – or, stated negatively, the absence of good faith, will involve the State where the alien’s rights are materially prejudiced thereby. Where it is not possible to establish the*

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<sup>478</sup> **CLA-0079** – *Tatneft v. Ukraine*, Award on Merits, 29 July 2014 ¶ 475.

<sup>479</sup> *Id.* ¶ 476.

<sup>480</sup> **CLA-0080** – *AK Investment CJSC v. Kyrgyz Mobil Tel Limited and Others* [2011] UKPC 7 ¶ 95.

<sup>481</sup> See e.g., **CLA-0081** – *Rasoulzadeh v. Associated Press*, 574 F Supp 854 (SDNY 1983), **CLA-0082** – *affd* 767 F 2d 908 (2d Cir 1985); and **CLA-0083** – *Osorio v. Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009).



*influence of corruption, bias or malice upon the outcome of the proceedings – and here it is worth remembering that the psychological motives of the judge are absolutely immaterial if the judgment is based upon law – the State’s responsibility may still be engaged where the decision is so erroneous that no court which was composed of competent jurists could honestly have arrived at such a decision; or, as De Visscher has put it, ‘where the judge’s defaillance attains such a degree that one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason’.*<sup>482</sup>

210. The derisory state of the Panamanian courts, as well as the endemic corruption of the justice system, is described at paragraphs 116 to 129 above. The most recent complaint made against Justice Oyden Ortega, the author of the Supreme Court Judgment, relate to the same period as in these proceedings. When Bridgestone and its representatives met with the Panamanian Ambassador, he admitted on behalf of Panama that the Supreme Court Judgment was the result of “*corruption*”.<sup>483</sup> Naturally, specific acts of corruption in a case like this would be very hard to prove. In the most recent proceedings against Justice Ortega, the allegation is that Justice Ortega’s son procured a favourable result for one of the parties.<sup>484</sup> If something similar happened here, it is unlikely to be traceable. In light of Panama’s admission of corruption in this case, the Tribunal is invited to conclude, along with the Panamanian Ambassador, that the Supreme Court Judgment is so clearly and manifestly wrong, that it could only have been procured through corruption.

### Incompetence

211. It is clear that the categories described above involve many overlaps. As Jan Paulsson noted, “*where a denial of justice has occurred it is likely that gross incompetence coexists with other deep flaws.*”<sup>485</sup> The purpose of the “incompetency” ground is to capture judicial bad faith, not mere error. The serious violations of due process and the arbitrary findings outlined above which resulted in manifest injustice themselves

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<sup>482</sup> **CLA-0084** – Alwyn Freeman, *The International Responsibility of States for Denial of Justice* (1970), at 330-331.

<sup>483</sup> Witness Statement of Steven Akey dated 30 April 2018, ¶ 8.

<sup>484</sup> **Exhibit C-0230** – “Otra denuncia contra un magistrado de la Corte llega a la Asamblea” [Another complaint against a magistrate of the Court arrives at the Assembly], article from *La Estrella*, dated 19 April 2017.

<sup>485</sup> **CLA-0077** – Paulsson, *Denial of Justice*, 200.

give rise to the conclusion that no judge, attempting to apply the law in good faith, could have made the findings in the Supreme Court Judgment. That lack of good faith may have been the result of corruption, malice or gross incompetence, but the Tribunal is not required to make a specific finding as to which might have been present.<sup>486</sup>

212. In the case of the “*Orient*” (*US v. Mexico*),<sup>487</sup> the only evidence against the alleged offender was the testimony of one witness, relying on one document. Four other witnesses gave testimony that directly contradicted the evidence of the single witness. The commissioners, deciding the case under the US-Mexico Treaty of 11 April 1839, stated:

*“An examination of the proceedings in this case, and of the evidence upon which the sentence of confiscation was rendered, which is embraced in the expediente, has satisfied the board that the sentence was unwarranted by the evidence, and therefore unjust, and consequently presents no bar to the present claim for indemnity....*

*The decision of the court confiscating the vessel and cargo was thus founded on a single fact, ascertained to exist only on the testimony of a single witness, while it was expressly denied by four others, having an equal opportunity of knowing the truth and equally entitled to credit. A decision thus given in direct opposition to so strong a preponderance of the testimony cannot be entitled to respect. It indicates strongly a predetermination on the part of the judge to confiscate the property without reference to the testimony.”*<sup>488</sup>

213. The Panamanian Supreme Court justices who authored the majority opinion did the same thing as the judge in Stetson’s Case. Where there was a preponderance of documentary evidence proving one point – that Muresa had not ceased sales of tires during the trademark opposition action – the judges ignored that evidence in favour of unsupported witness evidence from employees of the claimant. Here, there was more than one witness who said that Muresa had ceased sales of tires, but there was no

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<sup>486</sup> **CLA-0070** – *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ¶ 653.

<sup>487</sup> **CLA-0085** – “Case of the Orient (U.S. v. Mexico)”, Award, in III John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (1898).

<sup>488</sup> *Id.* at 3230-3231.

documentary evidence that Muresa had done so, and ample documentary evidence that they had not. If the Supreme Court justices were not corrupt or malicious, then it is hard to see how their actions were anything other than grossly incompetent.

214. Second, the Supreme Court’s understanding and application of Panamanian law was wrong. In addition to the points discussed above (reliance on Article 217 of the Judicial Code which was not a ground asserted by Muresa; weight given to evidence that had not been properly admitted into the record; determination of loss based on no evidence whatsoever), the Supreme Court found that BSLS and BSJ acted negligently in bringing the trademark opposition action against Muresa when Muresa was already commercially exploiting the RIVERSTONE trademark – *“as to the specific situation in this case, in which there were strong evidences that showed that the appellants plaintiffs had with legal basis the right to market a product that also constituted an item of great importance for their own profits in connection with the commercial activity they are engaged in and conveniently an element of commercial competitiveness for the opposing parties, it may represent a key situation for one who intends to commercially decrease that condition of market possession, without strong legal support and with the intent to cause damages because of the commercial competitiveness that this represents.”*<sup>489</sup>
215. This shows clear ignorance on the part of the Court. As Zachary Douglas states, an intellectual property right is *“a right to exclude others”*<sup>490</sup> and as the Tribunal noted in the Decision on Expedited Objections, a trademark *“prevents competitors from using that trademark on their products”*.<sup>491</sup> Ms Jacobs-Meadway also notes, *“the very nature of a trademark right is the ability to exclude others from using confusingly similar marks for similar and competing products.”*<sup>492</sup> In other words, the whole purpose of BSLS and BSJ’s trademarks in Panama was to enable them to stop others from using the same or confusingly similar trademarks on tires. The way in which BSLS and BSJ are able to prevent others from doing this is by opposing registrations of similar trademarks. If such opposition actions succeed, BSLS and BSJ would then be able to obtain injunctions against users of these unregistered trademarks if they

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<sup>489</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, 21.

<sup>490</sup> **RLA-001**– Douglas, ¶ 396.

<sup>491</sup> Decision on Expedited Objections, ¶ 171.

<sup>492</sup> Expert Report of Roberta Jacobs-Meadway dated 11 May 2018 ¶ 39.

tried to sell tires under those brands. The notion that simply bringing a trademark opposition action is itself abusive or reckless, just because that brand is already in the market, entirely undermines the intellectual property rights that BSLS and BSJ have.<sup>493</sup> This idea is simply wrong in Panamanian law.<sup>494</sup>

**XVI. PANAMA IS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLES 10.3 AND 10.4 OF THE TPA**

216. Panama is prohibited from discriminating against BSLS and BSAM in favour of either Panamanian investors and investments, or investors and investments of non-Parties, pursuant to Articles 10.3 and 10.4 of the TPA.

217. Article 10.3 of the TPA provides:

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

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

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

218. Article 10.4 of the TPA provides:

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

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<sup>493</sup> *Id.* ¶ 40.

<sup>494</sup> Expert Report of Adán Arnulfo Arjona L. dated 11 May 2018 ¶ 75.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>495</sup>

219. As stated by the tribunal in *Saluka v. Czech Republic*, “[s]tate conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.”<sup>496</sup>

220. Investment treaty tribunals have consistently ruled that investors are protected against *de jure* and *de facto* discrimination without a need to establish discriminatory intent on the part of the host State.<sup>497</sup> In *Siemens v. Argentina*, for instance, the tribunal confirmed that:

“[I]ntent is not decisive or essential for a finding of discrimination, and [...] the impact of the measure on the investment would be determining factor to ascertain whether it had resulted in non-discriminatory treatment.”<sup>498</sup>

221. Moreover, tribunals in other fora reviewing similar discrimination claims have made clear that “*treatment less favorable*” need not be applied to every single product or entity, but such treatment to some “*may still be found to accord treatment less*

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<sup>495</sup> To the extent it is necessary, the Claimants hereby make an ancillary claim for breach of Article 10.4 of the TPA, since that was not included in the Claimants’ Request for Arbitration., pursuant to Article 46 of the ICSID Convention and ICSID Arbitration Rule 40.

<sup>496</sup> **CLA-0094** – *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, ¶ 313.

<sup>497</sup> See, for instance, **CLA-0095** – *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award of 1 July 2004 ¶ 177 (finding a violation of the national treatment standard even though there was no intent to discriminate on the basis that “the result of the policy enacted and the interpretation followed by the SRI in fact has been a less favorable treatment of” the claimant); **CLA-0096** – *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002 ¶ 183:

“If Article 1102 violations are limited to those where there is explicit (presumably *de jure*) discrimination against foreigners, for instance, through a law that treats foreign investors and domestic investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors.”

See also **CLA-0097** – *Bayindir Insaat Turizm Ticaret ve Sanayi AŞ v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005 ¶ 206:

“The mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors. In other words, as is evident from the broad wording of Article II(2) of the BIT, the treatment the investor is offered under the MFN clause is not limited to “regulatory treatment[.]”

<sup>498</sup> **CLA-0098** – *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007 ¶ 321

*favourable to the whole . . .*”<sup>499</sup> This notion that a single act is sufficient for a violation of international obligation is further confirmed by Article 12 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (2002), which states: “*There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*”<sup>500</sup>

222. The Claimants are not aware of any decisions like the Supreme Court Judgment against any other investor, whether Panamanian or from any other country. Yet there are hundreds of trademark opposition actions every year in Panama and the facts of the case involving BSLS, BSJ and Muresa cannot be unique: a trademark opposition action in which the trademark applicant argues that it has been using the mark without confusion to consumers, and a court of first instance that finds in favour of the trademark applicant but records the good faith of the opposition. The absence of any decisions like this against any Panamanian entities (or other foreign entities) highlights the differential treatment accorded to BSLS and BSJ by Panama.

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<sup>499</sup> **CLA-0131**— Peter Van den Bossche and Werner Zdouc, “The Law and Policy of the World Trade Organization,” (3<sup>rd</sup> ed.), Cambridge University Press (2013), p. 397-398. The authors further noted, “*In US-Gasoline (1996), the panel rejected the US contention that the regulation at issue was not inconsistent with [a claim of discrimination] because it treated imported products and domestic products ‘equally overall.’ The panel noted that:*

*“The argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others.”*

*The panel rejected this argument, recalling that the panel in US – Section 337 Tariff Act (1989) had already held that:*

*“the ‘no less favourable’ treatment requirement . . . has to be understood as applicable to each individual case of imported products. The panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a [Member] to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one [Member], on the ground that it accords more favourable treatment in some other case, or to another [Member]. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of [the discrimination claim].”*

<sup>500</sup> **CLA-0099** – International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001).

## **XVII. CLAIM FOR DAMAGES**

223. At a minimum, as result of Panama's actions, BSLS have suffered loss of USD 5,431,000 – the amount that it was ordered to pay Muresa by the Supreme Court Judgment. BSLS paid this sum in full on 19 August 2016.<sup>501</sup>
224. In the Decision on Expedited Objections (as part of the decision that there was no abuse of process by BSLS) the Tribunal noted, *obiter*, that “*the consequences of BSLS's payment is an issue that will fall to be resolved if and when quantum comes to be considered. It does not follow that the whole of the payment will be recoverable as loss sustained by BSLS.*”<sup>502</sup> The Tribunal determined that there was “*nothing improper or colorable in BSLS discharging the whole of the judgment debt for which it was jointly liable when it did. Where two related companies are under a joint liability against which one is insured and one is not, it may make sound commercial sense for the one that is insured to discharge the entire liability in the hope that this may be covered by its insurance, whether at the end of the day this proves to be the case or not.*”<sup>503</sup>
225. The question, then, is whether BSLS can recover the whole of the sum that it paid to Muresa. As explained at paragraph 139 above, BSLS is the entity within the Bridgestone group that is tasked with protecting the FIRESTONE trademark outside of the United States. BSAM is the entity responsible for the use of the BRIDGESTONE and FIRESTONE marks in the Americas.
226. International law requires states to provide full reparation to investors for harm caused by internationally wrongful acts. The standard was set out in the *Chorzów* case as follows:
- “The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or,*

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<sup>501</sup> **Exhibit C-0126** – BSLS JPM Statement dated August 2016.

<sup>502</sup> Decision on Expedited Objections ¶ 329.

<sup>503</sup> Decision on Expedited Objections ¶ 330.

*if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.”*<sup>504</sup>

227. The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Act provide at Article 31:

*“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*

*2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”*<sup>505</sup>

228. The standard articulated in *Chorzów* has been found by numerous tribunals to apply not just to expropriation, but to other breaches such as the fair and equitable treatment standard. In *BG Group v. Argentina*,<sup>506</sup> the Tribunal held that the scope of the standard discussed in *Chorzów* had been broadened beyond expropriation. In *Murphy* the Tribunal stated:

*“The violation of an obligation under international law by a State entails the State’s international responsibility. The Tribunal is satisfied that the above principle of full reparation applies to breaches of investment treaties unrelated to expropriations. This is reflected in the practice of investment tribunals. The full reparation standard aims at “full reparation” of the concrete and actual damage incurred. It provides a large margin of appreciation to tribunals with respect to the selection of an appropriate valuation method.”*<sup>507</sup>

## **XVIII. DAMAGES IN EXCESS OF USD 5,431,000**

229. In their Request, the Claimants sought damages in excess of USD 5,431,000, which was estimated to be in excess of around USD 10,000,000. The Claimants explained

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<sup>504</sup> **CLA-0086** – *Factory at Chorzów* (Germany v. Poland), Merits, 1928 PCIJ (Ser. A) No. 17 (13 September 1928) ¶ 125.

<sup>505</sup> **CLA-0099** – International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001).

<sup>506</sup> **CLA-0087** – *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award (24 December 2007).

<sup>507</sup> **CLA-0088** – *Murphy Exploration & Production Company – International v. The Republic of Ecuador* (II) (PCA Case No. 2012-16), Partial Final Award 6 May 2016 ¶ 425.



that this was “*an estimate of the loss that has been and will be incurred by BSLS and BSAM as a result of the decision.*”<sup>508</sup>

230. The Claimants further provided examples of “*a number of inter-related factors*” out of which such loss arose.<sup>509</sup> Since the date of the Request, the Claimants have continued to explore how they have been affected by the Supreme Court Judgment, and have identified that the key area of loss (in excess of the USD 5,431,000 incurred by BSLS) is damage to the value of the trademark rights owned by BSLS and BSAM.<sup>510</sup>
231. The Claimants consider that such claim was included in their Request, although the details were not specifically pleaded at that stage. Claimants are not required to fully particularise their claims at the stage of the request for arbitration, because it is anticipated that claims will be fully particularised in their Memorial, which gives adequate time for the respondent to address such claims.<sup>511</sup>
232. However, to the extent that the Tribunal considers that this claim was not made in the Request, the Claimants hereby make an ancillary claim for damages of up to USD 12,981,656 arising out of the Supreme Court Judgment, pursuant to Article 46 of the ICSID Convention and ICSID Arbitration Rule 40.<sup>512</sup>
233. BSLS and BSAM have incurred damages of between USD 498,293 and USD 12,812,952 caused by the Supreme Court Judgment. As explained above at paragraph 16, the right of a trademark is a negative right – it is the right to exclude others from using it. If the ability to exclude is diminished, the value of the trademark is diminished. A change in the law, or a court decision can have an impact on the value of a trademark – “*This loss would result from the impairment of BSLS and BSAM’s trademark rights and diminish their economic value, not only through continued use*

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<sup>508</sup> Request for Arbitration ¶ 54

<sup>509</sup> *Id.*

<sup>510</sup> Such loss is quantified in the Expert Report of Brian Daniel dated 11 May 2018.

<sup>511</sup> See **CLA-0019** *Pac Rim v. El Salvador*, para 96: “*There is however an essential difference between the initial pleading by a claimant, such as a notice of arbitration, and a claimant’s full presentation of its case at a hearing on the merits under the ICSID Convention. The initial pleading cannot and is not required to be a complete documentary record of the claimant’s factual evidence and legal argument.*”

<sup>512</sup> See also **CLA-0089** – *Metalclad Corporation v. Mexico* ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000, ¶¶ 67-69, referring to Article 48 (now Article 47) of the Arbitration (Additional Facility) Rules allowing amendments to claims in substantially identical terms to Arbitration Rule 40.

by Claimants but also to potential purchasers of the business and investors who would view the decision as increasing risk, and accordingly, reducing value.”<sup>513</sup> If a court found a trademark invalid, that would result in the trademark having zero value. Here, the Supreme Court did not find the trademark invalid, but it found that BSLS and BSJ had filed their trademark opposition not in good faith<sup>514</sup> and unlawfully in breach of Article 217 and it held BSLS and BSJ liable for a damages award in an amount far in excess of any damages that could possibly have been incurred by Muresa. This creates uncertainty for a potential purchaser of BSLS or BSAM’s trademark rights: how would future courts deal with trademark registrations by competitors? Would competitors file similar damages claims? Would future courts grant those claims, on the basis of the precedent set in the Supreme Court Judgment?

234. Such uncertainty may not impact revenues from sales to consumers, because consumers are unlikely to be aware of the Supreme Court Judgment, except to the extent that tires under confusingly similar “-STONE” marks enter the marketplace and divert sales because consumers are confused. However, potential sublicensees, distributors and other business partners and potential acquirers of the trademark rights in Panama would likely be aware of the Supreme Court Judgment, and the cloud of uncertainty with respect to trademark scope and enforceability created by the Court’s decision can be expected to impact the economics of any transactions involving the BRIDGESTONE and FIRESTONE trademarks in Panama. Essentially, the BRIDGESTONE and FIRESTONE marks have become diluted<sup>515</sup> by the Supreme Court Judgment, and because they are famous marks, the impact on revenue is even greater.
235. The Claimants’ valuation expert, Brian Daniel, has calculated the loss in value of BSLS and BSAM’s trademark rights resulting from the Supreme Court Judgment.

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<sup>513</sup> Expert Report of Brian Daniel dated 11 May 2018 ¶ 40, and **CLA-0052** – Heath, Davidson and Mace, Christopher, “What’s a Brand Worth? Trademark Protection, Profits and Strategy”, 20 October 2017, at 1-2.

<sup>514</sup> **Exhibit C-0027** – Judgment of the Supreme Court of Justice, Civil Division, at 21.

<sup>515</sup> “Dilution” is defined by the International Trademark Association as “*The lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of competition between the owner of the famous mark and other parties, or of likelihood of confusion. Typically occurs as the result of blurring or tarnishment of the famous mark.*” – see **CLA-0090** – “Dilution” International Trademark Association (2018).

236. There are a number of different commonly accepted valuation methods that may be used to calculate the value of assets and business interests. Mr Daniel describes these in his expert report at paragraphs 44 to 77, and explains his view that the most appropriate methodologies to calculate BSLS and BSAM's loss – the diminished values of the BRIDGESTONE and FIRESTONE trademarks - is the Income Approach<sup>516</sup> and, specifically, the Relief-from-Royalty Approach.<sup>517</sup> He also used some aspects of the Market Approach.<sup>518</sup>
237. Mr Daniel used these methodologies to calculate first the value of the BRIDGESTONE and FIRESTONE trademarks in Panama and in the region (the “**BSCR Region**”)<sup>519</sup> before the Supreme Court Judgment, and then the value of the trademarks in Panama and the BSCR Region after the Supreme Court Judgment.
238. To calculate the value of the BRIDGESTONE and FIRESTONE trademarks in Panama and the BSCR Region before the Supreme Court Judgment, Mr Daniel:
- a. Calculated historical and projected future revenues from sales of BRIDGESTONE and FIRESTONE tires in Panama and the BSCR Region;
  - b. Multiplied the result in (a) above by the appropriate exclusive royalty rate, which he determined to be 1 percent;
  - c. Multiplied the result in (b) above by 1 minus the corporate tax rates in Panama and Costa Rica (for the BSCR Region); and

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<sup>516</sup> The Income Approach “values an asset based on the present value of the future income streams expected from that asset. This valuation method is suitable for assets that have a clear role as drivers of income or economic gain for their users, and in contexts where the income or economic gain varies proportionally with the extent of the asset’s use.” – See Expert Report of Brian Daniel dated 11 May 2018 ¶ 58

<sup>517</sup> The Relief-from-Royalty Approach “is based on the following premise: a property’s value can be measured by what the owner of the property would pay in royalties if it did not own the property and had to license it from a third-party (i.e., the licensing costs avoided by virtue of owning the property). Conversely, this method may also quantify the amount of income that the property’s owner would generate by licensing it to others. Hence, the cash flows attributable to or resulting from the asset under consideration are quantified as a royalty stream avoided (or received) in connection with the use of that asset.” – See Expert Report of Brian Daniel dated 11 May 2018 ¶ 73

<sup>518</sup> The Market Approach “values assets based on the economic terms of arm’s length transactions between unrelated parties for comparable assets. The degree of reliance on guideline transactions depends upon an assessment of whether the transactions are sufficiently similar to provide an indication of the fair value for the asset under consideration” – See Expert Report of Brian Daniel dated 11 May 2018 ¶ 55

<sup>519</sup> The BSCR Region includes Panama, Costa Rica, Puerto Rico, Guatemala, and the Dominican Republic.

- d. Applied a discount rate to the result in (c) above to reflect the appropriate level of risk associated with cash flows in Panama and the BSCR region. Mr Daniel determined that the appropriate range for the discount rate was between 15.66 percent and 9.54 percent in Panama and 16.26 percent and 9.91 percent in the BSCR Region.<sup>520</sup> The table below, reproduced from Mr Daniel's report, presents these results:

<i>(Indicated Value of Subject Trademarks Before Supreme Court Decision)</i>	Panama		BSCR Region	
	Low	High	Low	High
Bridgestone Trademark	\$794,246	\$1,406,025	\$11,050,256	\$18,582,727
Firestone Trademark	113,019	183,072	2,109,218	2,998,117
<b>Total</b>	<b>\$907,264</b>	<b>\$1,589,096</b>	<b>\$13,159,474</b>	<b>\$21,580,844</b>

239. To calculate the value of the BRIDGESTONE and FIRESTONE trademarks in Panama and the BSCR Region after the Supreme Court Judgment, Mr Daniel:

- a. Applied the same historical and projected future revenues from sales of BRIDGESTONE and FIRESTONE tires in Panama and the BSCR Region as in paragraph 235(a) above;
- b. Multiplied the result in (a) above by the appropriate royalty rate, which he reduced to reflect the effect of the Supreme Court Judgment in diminishing the scope of the BRIDGESTONE and FIRESTONE trademark rights in Panama, and determined to be between 0.5 percent in Panama and 0.6 percent;
- c. Multiplied the result in (b) above by 1 minus the corporate tax rates in Panama and Costa Rica (for the BSCR Region); and
- d. Applied a discount rate to the result in (c) above to reflect the appropriate level of risk associated with cash flows in Panama and the BSCR region. Mr Daniel adjusted the appropriate discount to reflect the impairment to the trademarks, and determined that the appropriate range for the discount rate to be between 20.01 percent and 12.19 percent in Panama and 20.01

<sup>520</sup> Expert Report of Brian Daniel dated 11 May 2018 ¶¶ 81 – 91.

percent and 12.19 percent in the BSCR Region.<sup>521</sup> The table below, reproduced from Mr Daniel's report, presents these results:

	Panama		BSCR Region	
	Low	High	Low	High
<i>(Indicated Value of Subject Trademarks After Supreme Court Decision)</i>				
Bridgestone Trademark	\$355,264	\$531,561	\$5,324,963	\$7,480,363
Firestone Trademark	53,707	71,968	1,105,450	1,287,529
<b>Total</b>	<b>\$408,972</b>	<b>\$603,528</b>	<b>\$6,430,413</b>	<b>\$8,767,892</b>

240. The resulting difference in the value of the BRIDGESTONE and FIRESTONE trademarks in Panama and the BSCR Region represents the damage suffered by BSLs and BSAM as a consequence of the Supreme Court Judgment. The table summarising this in Mr Daniel's expert report is reproduced below. It indicates that the range of loss in Panama is between USD 498,293 and USD 985,568, and in the BSCR Region, the loss is between USD 6,729,061 and USD 12,812,952.

	Panama		BSCR Region	
	Low	High	Low	High
<i>(Indicated Value of Subject Trademarks)</i>				
<b>Bridgestone Trademark</b>				
Before Supreme Court Decision	\$794,246	\$1,406,025	\$11,050,256	\$18,582,727
After Supreme Court Decision	355,264	531,561	5,324,963	7,480,363
Difference	\$438,982	\$874,464	\$5,725,293	\$11,102,364
<b>Firestone Trademark</b>				
Before Supreme Court Decision	\$113,019	\$183,072	\$2,109,218	\$2,998,117
After Supreme Court Decision	53,707	71,968	1,105,450	1,287,529
Difference	\$59,311	\$111,104	\$1,003,769	\$1,710,588
<i>(Decrease in Indicated Value of Subject Trademarks as of 28 May 2014)</i>				
Bridgestone Trademark	\$438,982	\$874,464	\$5,725,293	\$11,102,364
Firestone Trademark	59,311	111,104	1,003,769	1,710,588
<b>Total</b>	<b>\$498,293</b>	<b>\$985,568</b>	<b>\$6,729,061</b>	<b>\$12,812,952</b>

## **XIX. REQUEST FOR RELIEF**

241. The actions and omissions of Panama constitute violations of Articles 10.5, 10.3 and 10.4 of the TPA, and have caused loss and damage to BSLs and BSAM.

242. For the reasons set out above, BSLs and BSAM respectfully request that the Tribunal render and award:

<sup>521</sup> Expert Report of Brian Daniel dated 11 May 2018 ¶¶ 92-106.

- a. Declaring that Panama has violated its obligations under the TPA;
- b. Ordering Panama to pay damages of between USD 5,929,293 and USD 18,243,952;
- c. Ordering Panama to pay interest on any amount awarded to BSLS and BSAM;
- d. Ordering Panama to pay attorney's fees and expenses arising from these proceedings; and
- e. Granting any further or other relief to BSLS and BSAM that the Arbitral Tribunal shall deem just and proper.

11 May 2018