

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc.

v.

Republic of Panama

(ICSID Case No. ARB/16/34)

PROCEDURAL ORDER No. 3

Members of the Tribunal

Lord Nicholas Phillips Baron of Worth Matravers, President of the Tribunal

Mr. Horacio A. Grigera Naón, Arbitrator

Mr. J. Christopher Thomas, QC, Arbitrator

Secretary of the Tribunal

Ms. Luisa Fernanda Torres

29 August 2017

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I. PROCEDURAL HISTORY

1. On 1 August 2017, the Parties were informed that, pursuant to Section 20.1 of Procedural Order No. 1, the President of the Tribunal was available on 18 August 2017 to hold a pre-hearing organizational call (the “**Pre-Hearing Call**”) with the Parties to resolve any outstanding procedural, administrative or logistical matter in preparation for the Hearing on Expedited Objections (the “**Hearing**”). The Parties were invited to confirm their availability for the Pre-Hearing Call, and to convey their views regarding certain logistical items related to the Hearing.
2. On 3 August 2017, the Parties confirmed their availability for the Pre-Hearing Call, and conveyed their views on the requested logistical items.
3. On 14 August 2017, a draft agenda for the Pre-Hearing Call was circulated to the Parties. The Parties were invited to submit a joint statement advising the Tribunal of any agreements reached on the open items, of their respective positions where no agreement was reached, and of any item either wished to add to the agenda. The Tribunal further invited the Parties to make certain submissions regarding a procedural evidentiary issue.
4. On 15 August 2017, the Respondent requested clarification of the Tribunal’s message. The Tribunal responded on 17 August 2017.
5. On 17 August 2017, the Parties presented a joint submission on the open items in the agenda for the Pre-Hearing Call. On that same date, each Party filed individual submissions regarding (i) the areas of disagreement in the agenda items, and (ii) their respective answers on the procedural evidentiary issue.
6. Pursuant to Section 20.1 of Procedural Order No. 1, the Pre-Hearing Call between the Parties and the President of the Tribunal was held by telephone conference on 18 August 2017. Participating in the telephone conference were:

President of the Tribunal:

Lord Nicholas Phillips, President of the Tribunal

ICSID Secretariat:

Ms. Luisa Fernanda Torres, Secretary of the Tribunal

On behalf of the Claimants:

Mr. Justin Williams, Akin Gump Strauss Hauer & Feld (London)

Ms. Katie Hyman, Akin Gump Strauss Hauer & Feld (Washington, DC)

On behalf of the Respondent:

Mr. E. Whitney Debevoise, Arnold & Porter Kaye Scholer LLP

Ms. Gaela Gehring Flores, Arnold & Porter Kaye Scholer LLP

Ms. Mallory Silberman, Arnold & Porter Kaye Scholer LLP

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Ms. Katelyn Horne, Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena, Arnold & Porter Kaye Scholer LLP
Ms. Bailey Roe, Arnold & Porter Kaye Scholer LLP
Mr. Aristides Valdonedo, Ministry of Economy and Finances

7. An audio recording of the Pre-Hearing Call was made and deposited in the archives of ICSID. The recording was made available to the Members of the Tribunal and the Parties on 21 August 2017.
8. On 21 August 2017, the Respondent submitted (i) an application under Section 5.2 of Procedural Order No. 1, for reconsideration by the full Tribunal of the Respondent's procedural request made during the Pre-Hearing Call that a session be held between the Parties and the full Tribunal before the first day of the Hearing, in order to resolve the procedural evidentiary issues and their impact on the conduct of the Hearing (the "**Request for Reconsideration**"); and (ii) a further request that "*irrespective of the Tribunal's ruling*" on the Request for Reconsideration, "*the full Tribunal issue a formal order, identifying the specific questions that the Tribunal would like for the parties to address before opening arguments at the Hearing*" (the "**Request for Questions**").
9. On 24 August 2017, the full Tribunal issued Procedural Order No. 2, addressing Respondent's Request for Questions mentioned above. The Claimants were invited to file observations on Respondent's Request for Reconsideration.
10. On 25 August 2017, the Claimants filed their observations on the Request for Reconsideration.

II. ON THE RESPONDENT'S REQUEST FOR RECONSIDERATION

11. Having considered the Parties' positions, the full Tribunal has decided to hold a preliminary in-person session at the World Bank facilities in Washington, DC on **Sunday, 3 September 2017**, to hear the Parties' oral submissions on the procedural evidentiary issue, following which the Tribunal will provide guidance to the Parties. The Tribunal proposes to start this session at 1:00 PM (EDT). Counsel are therefore requested to confirm their availability by **COB Washington, DC on Wednesday, 30 August 2017**.
12. As discussed during the Pre-Hearing Call, the arguments during this preliminary session will proceed in the following order: the Claimants' argument (1 hour and 30 minutes, including Tribunal questions), the Respondent's argument (1 hour and 30 minutes, including Tribunal questions), the United States of America's presentation (if any) (30 minutes), the Claimants' reply (10 minutes) and the Respondent's rejoinder (10 minutes). The time allotted for the Parties' arguments has been increased to 1 hour and 30 minutes, in the understanding that the additional time is intended to accommodate questions from the Tribunal (if any).
13. Accordingly, and subject to any further discussion between the Parties and the Tribunal during the 3 September session, in order to permit the Parties to adjust their submissions as

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necessary in light of the preliminary session, the Tribunal proposes that the Hearing would then begin on Monday, 4 September 2017 at 1:00 PM (EDT) with the Parties' respective oral opening arguments. The remainder of the schedule is further discussed at Section III *infra*.

14. The Tribunal will inform the United States of America (the "U.S.") of the above schedule updates, bearing in mind the U.S. letter of 24 August 2017 indicating that it was considering to make oral submissions pursuant to Article 10.20(2) of the U.S.-Panama TPA.

III. ON THE ORGANIZATION OF THE HEARING

15. Having considered the Parties' positions, this section sets out the Procedural Rules that the Parties have agreed upon and/or the Tribunal has determined will govern the conduct of the Hearing.

A. Date and Venue

16. The Hearing is scheduled to take place from 4 to 6 September 2017, at the World Bank facilities in Washington, DC.

B. Order of Proceedings

17. Subject to any discussion between the Tribunal and the Parties during the 3 September session, the general structure of the Hearing will be as follows:

- Introductions/Housekeeping.
- Opening arguments, in the following order: the Respondent's argument, the Claimants' argument.
- Oral presentation by the United States of America (if any).
- Witness(es) examination.
- Tribunal's questions for the Parties' closing arguments (if any).
- Closing arguments, in the following order: the Respondent's argument, the Claimants' argument.

C. Time Allocation

18. The time at the Hearing shall be allocated based on the following principles:

- Opening arguments: each Party shall not exceed 2 hours for its opening.
- Closing arguments: each Party shall not exceed 1 hour and 30 minutes for its closing.
- The duration of witness direct examination(s) (if any) is governed per Section 19.8.3 of Procedural Order No. 1.
- The time allowed for cross-examination and re-examination of witnesses will be determined on 3 September.

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- The time taken by the Tribunal for its own questions during the Parties' presentations or examination(s) shall not be counted against the Parties' time, subject to what is stated at ¶ 12 *supra* concerning the timing of arguments during the preliminary session.
19. The Secretary of the Tribunal shall keep the time, under the direction of the Tribunal.

D. Daily Schedule

20. Bearing in mind the above principles, a proposed tentative daily Agenda reflecting estimated times for presentations, examinations and breaks is provided as Annex A, subject to any further discussion between the Tribunal and the Parties at the conclusion of the preliminary session on 3 September. Should the Parties wish to submit any observations on the tentative Agenda in advance of the 3 September session, the Tribunal would be grateful to receive them **no later than COB, Friday, 1 September 2017**. However, the Parties are advised that given that the proceeding is being commenced during a holiday weekend, it will not be possible to make significant changes to the Hearing logistics.

E. Documents for Use at the Hearing

1. Core Bundle – Hard Copy

21. As agreed during the Pre-Hearing Call, there shall be one Core Bundle in hard copy, including all written submissions and their accompanying materials filed to date. It shall not contain any document not previously filed.
22. At least seven (7) hard copies of the Core Bundle (A4 format) shall be prepared to be distributed at the Hearing site for use by: each Member of the Tribunal (3); the Secretary of the Tribunal (1); opposing counsel (1); any witness being examined in person (1); and the court reporter (1).
23. The hard copies of the Core Bundle will be prepared by the Respondent, as agreed. However, the costs relating to its preparation shall be evenly split between both Parties, without prejudice to any final order of the Tribunal regarding costs. The hard copies of the Core Bundle will be made available at the Hearing site on **1 September 2017** (the set-up day).

2. Core Bundle – Electronic

24. This Order records the Parties' agreement that there shall also be a single Core Bundle in electronic format, to be prepared by the Respondent in consultation with the Claimants. The Parties have further agreed that the vendor costs relating to the preparation of this electronic Core Bundle shall be evenly split between the Parties.

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25. The electronic Core Bundle shall be prepared in the form of a USB with a hyperlinked index, and it shall include all pleadings, witness statements, exhibits and legal authorities on file to date. It shall not contain any document not previously filed.
26. As agreed by the Parties during the Pre-Hearing Call, the electronic Core Bundle USB shall be distributed by the Respondent as follows:
 - One (1) copy for counsel for the Claimants, to be provided during the week ending on 27 August 2017, to the addresses provided in Procedural Order No. 1, Section 8.1.
 - One (1) copy for use by any witness(es) to be examined by video link, to be provided in advance of the Hearing, and to be delivered in a manner to be arranged between the Parties.
 - Five (5) copies to be delivered to the Secretary of the Tribunal on the day of the set up (**1 September 2017**), intended for use during the Hearing by the Members of the Tribunal (3), the Secretary of the Tribunal (1) and the court reporter (1).

3. Examination Bundles

27. Without prejudice to ¶ 22 *supra*, a Party may also if it so wishes prepare hard copies of examination bundles (“the Examination Bundles”) for witness(es) to be examined in person.
28. The Examination Bundles shall contain a copy of the relevant witness statement(s), and shall only contain documents already on the record. Each document shall be separated with a numbered tab., and the bundle shall be accompanied with an index that cross-references to the corresponding Exhibit (C- or R-) or Legal Authority number (CL- or RL-). During the Hearing, the Parties shall refer to the documents in the Examination Bundles by their corresponding Exhibit (C- or R-) or Legal Authority number (CL- or RL-).
29. The Examination Bundles shall be distributed at the beginning of the relevant examination.
30. The Party using Examination Bundles shall have seven (7) copies available for distribution to: each Member of the Tribunal (3); the Secretary of the Tribunal (1); opposing counsel (1); witness(es) being examined in person (1); and the court reporter (1).
31. For any examination by video link, as indicated at ¶ 26 *supra*, a copy of the full electronic Core Bundle will be provided to the witness(es) in advance of the Hearing, *in lieu* of Examination Bundles.

4. Demonstrative Exhibits

32. The provisions of Procedural Order No. 1, Section 17.8 concerning Demonstrative Exhibits apply. These Demonstrative Exhibits are to be distributed to opposing counsel at the Hearing 30 minutes before they are presented to the Tribunal. The Tribunal understands that Power

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Points presented as Demonstrative Exhibits are not intended to be used as supplementary briefs.

33. Each Party shall have at least six (6) hard copies of any Demonstrative Exhibit available for distribution to: each Member of the Tribunal (3), the Secretary of the Tribunal (1), opposing counsel (1), and the court reporter (1).
34. In addition, and without prejudice to *supra* ¶ 32, promptly after the conclusion of the Hearing day in which the corresponding Demonstrative Exhibit(s) is(are) used, the Parties are requested to upload Demonstrative Exhibits to the case folder in the electronic file sharing system (“BOX”), with the required CD-__ or RD-__ number.

F. Examinations

35. The Tribunal notes that (i) the Respondent has requested that Mr. Thomas Kingsbury and Ms. Audrey Williams be made available for cross-examination; and (ii) the Claimants have confirmed that Mr. Kingsbury and Ms. Williams would be available, except that Ms. Williams is only available by video link.¹ The Tribunal also notes that the Respondent has not opposed the use of the video-link regarding Ms. Williams.²
36. As agreed in the course of the Pre-Hearing Call, the denial of benefits issue will be definitively heard at the Hearing on the basis of the evidence that relates to that issue, including the evidence of Mr. Kingsbury, who will be called for examination. Whether Ms. Williams is examined, and in what capacity, will be determined after the hearing of the procedural issues on 3 September.
37. The rules and procedure concerning the conduct of witness examination and sequestration are established in Procedural Order No. 1, Section 19.

G. Interpretation

38. This Order records the Parties’ joint statement that no interpretation is required for this Hearing.

H. Audio Recording and Transcripts

39. The provisions of Procedural Order No. 1, Section 22.1 concerning audio recording apply.
40. The provisions of Procedural Order No. 1, Sections 22.2 and 22.3 concerning transcripts apply.

¹ Parties’ Joint Submission of 17 August 2017, p. 4.

² Respondent’s Submission of 17 August 2017, p. 3.

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41. As no interpretation is required, the transcript shall be made in the procedural language (English) only, as agreed by the Parties.
42. This Order further records the Parties' joint statement that there will be no "protected information" to redact from the transcript of this Hearing.

I. Post-Hearing Briefs

43. This Order records the Parties' agreement that the final decision over the need for Post-Hearing Briefs (and if so, their due date, length and format) shall be left to the discretion of the Tribunal, to be discussed with the Parties at the end of the Hearing.

J. Statement on Costs

44. This Order records the Parties' agreements that: each Party shall submit a Statement of Costs by **16 October 2017**; no substantive argument shall be included therein; and guidance on length, format and required level of detail is to be provided by the Tribunal at the end of the Hearing.

K. Attendance of the "non-disputing Party"

45. As agreed by the Parties, representatives of the United States of America (the "non-disputing Party" under the U.S.-Panama TPA) are allowed in the Hearing room.
46. The Tribunal records that on 24 August 2017, the United States informed the Tribunal that, pursuant to Article 10.20(2) of the U.S.-Panama TPA, it was "*considering whether to make an oral submission regarding the interpretation of the Agreement*" which "*will be influenced largely by issues of treaty interpretation that arise during the hearing.*"

L. Transparency

47. In accordance with Article 10.21(2) of the U.S.-Panama TPA, and Section 21.6 of Procedural Order No. 1, the Hearing shall be public. As agreed by the Parties, the Hearing will be made public via real-time streaming in the English language on the ICSID Website. An announcement to this effect shall be published on the ICSID Website.
48. This Order records the Parties' joint statement that there will be no "protected information" to protect from disclosure during this Hearing. Accordingly, there is no need to establish a protocol for this matter in this Order.

M. Other Matters

49. The logistical details (*e.g.*, confirmation of Hearing room and break-out room, list of Hearing participants, set up details, court reporting arrangements, internet access, audio-visual equipment and catering orders) will be handled through correspondence directly by the ICSID Hearing Organization Team.

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_____[Signed]_____
Lord Nicholas Phillips Baron of Worth Matravers
President of the Tribunal

_____[Signed]_____
Mr. Horacio A. Grigera Naón
Arbitrator

_____[Signed]_____
Mr. J. Christopher Thomas, QC
Arbitrator

TENTATIVE AGENDA
HEARING ON EXPEDITED OBJECTIONS

Sunday, 3 September 2017 (Preliminary Session)

Claimants: 1h.40m. (including Tribunal questions)

Respondent: 1h.40m. (including Tribunal questions)

U.S.: 30m.

TIME		PROCEDURAL STEP
01:00 PM	15m.	Introductions/Housekeeping
01:15 PM	1h.30m.	Claimants' Argument on Preliminary Issue (including Tribunal questions)
02:45 PM	1h.30m.	Respondent's Argument on Preliminary Issue (including Tribunal questions)
04:15 PM	30m.	U.S. Presentation on Preliminary Issue (if any) ¹
04:45 PM	15m.	Break
05:00 PM	10m.	Claimants' Reply on Preliminary Issue
05:10 PM	10m.	Respondent's Rejoinder on Preliminary Issue
05:20 PM		Break
{TBD}		Tribunal's Instructions
		End Day

Monday, 4 September 2017

Claimants: 2h.

Respondent: 2h.

U.S.: 30m.

TIME		PROCEDURAL STEP
01:00 PM	15m.	Housekeeping
01:15 PM	2h.	Respondent's Opening Argument
03:15 PM	15m.	Break
03:30 PM	2h.	Claimants' Opening Argument
05:30 PM	30m.	U.S. Presentation (if any)
06:00 PM~		End Day

¹ The Tribunal has taken note of the U.S. statement that it “is also considering whether to make an oral submission regarding the interpretation of the Agreement” which “will be influenced largely by issues of treaty interpretation that arise during the hearing.” U.S. Letter (24 August 2017).

Tuesday, 5 September 2017²

Claimants: TBD

Respondent: TBD

TIME		PROCEDURAL STEP
09:00 AM	15m.	Housekeeping
09:15 AM	1h.15m.	Witness examination
10:30 AM	15m.	Break
10:45 AM	2h.	Witness examination (cont'd)
12:45 PM	1h.	Lunch
01:45 PM	2h.	Witness examination (cont'd)
03:45 PM	15m.	Break
04:00 PM	30m.	Tribunal to identify questions for Parties to address in closing
04:30 PM~		End Day

Wednesday, 6 September 2017

Claimants: 1h.30m.

Respondent: 1h.30m.

TIME		PROCEDURAL STEP
09:00 AM	15m.	Housekeeping
09:15 AM	1h.30m.	Respondent's Closing Argument
10:45 AM	15m.	Break
11:00 AM	1h.30m.	Claimants' Closing Argument
12:30 PM	30m.~	Housekeeping
1:00 PM~		End of Hearing: no later than 3:00 PM (EDT)

² The Tribunal understands from the Parties' 17 August proposals that it is estimated that an approximate total of 5h 15m would be required for witness(es) examination.