Before the

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)**

**BRIDGESTONE LICENSING SERVICES, INC.,**

**BRIDGESTONE AMERICAS, INC.,**

**Claimants**

**V**

**REPUBLIC OF PANAMA,**

**Respondent**

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# APPLICATION TO REMOVE THE RESPONDENT'S EXPERT WITNESS AS TO PANAMANIAN LAW

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| **CLA-0134 (ENG)** | IBA Guidelines on Conflicts of Interest in International Arbitration (23 Oct 2014) | IBA Guidelines on Conflicts of Interest in International Arbitration |

**Exhibit List**

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| **Exhibit C-0262 (ENG)** | Letter from Akin Gump to Arnold & Porter dated 9 October 2018 |
| **Exhibit C-0263 (ENG)** | Letter from Arnold & Porter to Akin Gump dated 16 October 2018 |
| **Exhibit C-0264 (ENG/SPA)** | Article 760 of the Panamanian Judicial Code |

1. This is an application to the Tribunal for an order that Mr. Jorge Federico Lee be removed as the Respondent's expert witness, that the Respondent be permitted to file a report from a replacement independent expert in Panamanian law within 30 days of the Tribunal's order and that the procedural calendar be adjusted accordingly.

**Introduction and Summary**

2. In September 2018 the Respondent filed an independent expert's report on Panamanian law produced by Mr. Lee. Prior to that, between November 2017 and March 2018, Mr. Lee had been in discussions with the Claimants' counsel about him being engaged by the Claimants to advise on Panamanian law and to provide expert evidence on behalf of the Claimants. In the course of those discussions, confidential and privileged information was provided to Mr. Lee, the merits of the case were discussed and Mr. Lee in turn expressed his own opinions on the merits. In his report, Mr. Lee certifies that he has no relationship with the parties or the tribunal, but he does not mention his prior contacts and dialogue with the Claimants' counsel.

3. The above matters give rise to serious concerns: (a) Mr. Lee has a substantial conflict of interest, (b) Mr. Lee has failed to disclose in his report his prior relationship with the Claimants' counsel and his receipt of confidential and privileged information, and (c) Mr. Lee has given certification of two of the elements of independence specified under the IBA Rules on the Taking of Evidence (the "**IBA Rules**")[1] (i.e. no relationship with the parties or the tribunal) but has stayed silent on the third (i.e. no relationship with the parties' counsel) for which he would have been unable to give a clear certification. The Claimants submit that in considering whether a conflict of interest arises, it is appropriate to take into account the issues at (b) and (c).

4. In light of the above, the Claimants have sought to engage the Respondent in correspondence to seek to resolve the above concerns without troubling the Tribunal. Specifically, Claimants' counsel wrote explaining the situation and asked Respondent's counsel if it could be agreed that Mr. Lee stand down or, alternatively, if it could be

[1] **CLA-0132 (ENG) -** IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010).

explained why that was not the appropriate course.[2] Unfortunately, the response was aggressive and uncooperative. The Respondent's counsel were willing to say only that what we had said was "*misleading or false*" (but without explaining why or in what respect) and that raising these concerns was "*unprofessional conduct*".[3] It is apparent, therefore, that the Respondent (no doubt having spoken to Mr. Lee) takes the view that no issue of conflict arises and that nothing should have been or should now be disclosed by Mr. Lee. Again, the Claimants submit that in considering whether a conflict of interest arises, it is relevant to take into account how Mr. Lee and the Respondent have dealt with concerns raised by the Claimant.

5. For the reasons developed below, and in light of the unexplained rejection by the Respondent of the Claimants' concerns, the Claimants have no option but to seek the assistance of the Tribunal.

**Reservation**

6. In order to enable the Tribunal to resolve this matter, it is necessary for information to be provided as to the nature and substance of the communications between the Claimants' legal advisers and Mr. Lee. However, the very basis of the Claimants' concern is that those communications are confidential and privileged. Therefore the Claimants are faced with the invidious task of having to say enough for the Tribunal to be able to deal with the present application, but without saying so much that the confidentiality and privilege which they are endeavouring to protect is thereby lost. This is made especially difficult in circumstances where the Respondent's counsel has (we say, unreasonably) declined to say what facts it disputes and why, and indeed has not engaged on the substance at all. In these circumstances the description of the facts given below attempts to walk this fine line. To be clear, nothing stated in this document is intended to or does waive confidentiality or privilege in relation to the communications between the Claimants' legal advisers and Mr. Lee.

**Factual background**

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[2] **Exhibit C-0262 (ENG) -** Letter from Akin Gump to Arnold & Porter dated 9 October 2018.

[3] **Exhibit C-0263 (ENG) -** Letter from Arnold & Porter to Akin Gump dated 16 October 2018.

7. The following is based on the evidence contained in the accompanying witness statement of Katie Hyman.

8. On 3 November 2017, the Claimants' legal advisers first made contact with Mr. Lee in relation to whether he might be engaged by the Claimants to advise them and to give evidence on Panamanian law on behalf of the Claimants in this arbitration.

9. At 2:30pm (EST) on 7 February 2018, Mr. Lee participated in a telephone conference call with two lawyers from this firm, Katie Hyman and Johann Strauss, and two lawyers from the Claimants' Panamanian law firm, Morgan & Morgan, Jose Carrizo and Inocencio Galindo. The information provided and the matters discussed in that call were as follows:

   9.1 The Claimants' lawyers provided a description of the background to these proceedings and the claims. That information was either public and/or was known to the Respondent.[4]

   9.2 The Claimants' lawyers described certain of the fact evidence that the Claimants had at that stage obtained and discussed with Mr. Lee what facts and evidence each were aware of as to judicial corruption in the Panama Supreme Court and possible further lines of enquiry. The evidence the Claimants' lawyers indicated they had obtained was not public. The facts of what evidence the Claimant had obtained and the facts as to what further evidence the Claimants were seeking and what further lines of enquiry might exist were not public, were not known to the Respondent and were confidential – and this would have been abundantly clear to Mr. Lee, a very experienced lawyer and judge. Some of the factual matters to which Mr. Lee referred were public and some concerned his work on behalf of clients in Panamanian litigation and were not public and the Claimants' lawyers understood they were confidential.[5]

   9.3 There was discussion of the merits of the Claimants' claims in the present arbitration. Mr. Lee gave his own initial view of the merits of those claims,

[4] Witness Statement of Katie Hyman dated 29 October 2018, ¶ 8.

[5] Witness Statement of Katie Hyman dated 29 October 2018, ¶ 9.

based on his knowledge of the Panamanian proceedings and the Panamanian Supreme Court. None of his views expressed were public nor were they known to the Respondent.[6]

10. The conversation and the information provided to Mr. Lee was confidential. Ms. Hyman's evidence is that although she may not have expressly stated that the conversation was confidential, there is no doubt that this was the common understanding and intent. This was because (a) the discussion was expressly for the purpose of engaging Mr. Lee to advise and for the Claimants to obtain evidence for use in adversarial legal proceedings; (b) in the course of that discussion, information was provided to Mr. Lee that was not public and was obviously confidential (as described above and in the witness statement of Katie Hyman); and (c) Mr. Lee provided information that was that was not public and that was confidential (as described above and in the witness statement of Katie Hyman). As a lawyer and judge of 42 years' experience, it is certain that Mr. Lee understood his obligations as to confidentiality, and that the information he received and that was discussed was subject to a duty of confidentiality.[7]

11. After that call, there were further communications between Mr. Lee and the Claimants' counsel, culminating in Mr. Lee indicating on 6 March 2018 that, after careful consideration of the characteristics of this matter, he and his partners had concluded that he would be unable to issue any opinion which may put in doubt the integrity of sitting justices of the Supreme Court, and therefore he could not assist the Claimants as an expert witness in this case.

12. It is not known to the Claimants to what extent the substance of the above discussions has been communicated by Mr. Lee to the Respondent or its legal advisers. In order to protect the integrity of these proceedings, it is important that this be clarified.

13. On 14 September 2018, the Respondent submitted its Counter Memorial, together with the expert report of Mr. Lee in Spanish. An English translation of his expert report was sent by the Respondent to the Claimants on 28 September 2018. Mr. Lee did not refer

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[6] Witness Statement of Katie Hyman dated 29 October 2018, ¶ 10.

[7] Witness Statement of Katie Hyman dated 29 October 2018, ¶ 11.

anywhere in his report to the discussions he had had with the Claimants' legal advisors, and included the following certification at paragraph 14 of his expert report: "*I certify that I have no relationship with the parties to the arbitration, or with the members of the Arbitral Tribunal*."

**Applicable standards on conflicts of interest**

14. There is little guidance in reported ICSID decisions on precisely what may constitute a conflict of interest for an independent expert witness in ICSID proceedings. However, the tribunal's decision in *Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v Republic of Venezuela* (ICSID Case No. ARB/10/19) directly concerns the issue, and the facts are to a significant extent on all fours with those under consideration here. In the *Flughafen* case, the claimants requested that the respondent's independent expert witness be excluded because the claimants had communicated with the expert prior to his appointment by the respondent, and had sent him various confidential documents by email. The respondent in turn sought an order that the claimants abstain from aggravating and obstructing the proceedings. In determining first whether the claimants had a valid complaint, the tribunal held that the question of whether an expert had received confidential information was "*certainly relevant*" and "*fully justified*".[8] The tribunal noted that a situation in which an expert was approached by one party and then eventually appointed by the other party is rare and that they understood and shared the concern expressed by the claimants. When the tribunal considered the substance of the conflict, it focused on what the information was and whether it had been received by the potential expert witness. The tribunal concluded that the documents (which were not marked confidential) were not confidential or privileged, and that in any case, the expert did not have knowledge of their contents because he had affirmed that he had not read any of them.

15. While Panamanian law does not apply to the procedure of these proceedings, Mr. Lee is presumably subject to and aware of the conflicts rules under Panamanian law. Article 760(5) of the Panamanian Judicial Code (which specifically applies to judges, but is

[8] **CLA-0133 (ENG/SPA) -** *Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v Republic of Venezuela* (ICSID Case No. ARB/10/19), Decisíon sobre la inhibilitacíon del Sr. Ricover como expert en este procedimiento, sobre la exclusíon del Informe Ricover-Winograd y sobre la Peticíon Documental, 29 August 2012, ¶ 30.

applicable by analogy to experts as well) provides that a judge (or expert) would be conflicted if they had previously expressed their opinion on the merits of the case – "*No Magistrate or Judge shall have knowledge of a matter for which he is conflicted. The following are causes for conflict:… (5) As a judge, magistrate, spouse or kin within the fourth degree of consanguinity, or second degree by affinity, having intervened in the process as a judge, agent of the Public Ministry, witness, counsel, or advisor, or having made determinations by writing regarding the facts that gave standing to the process.*"[9] As described above, Mr. Lee did express his opinion on the merits of the case during the telephone call on 7 February 2018.

**Applicable standards on Disclosure**

16. Section 16.1 of Procedural Order No. 1 provides that the IBA Rules on the Taking of Evidence (the "**IBA Rules**") are to guide the Tribunal and Parties in these proceedings. Article 5(2)(a) of the IBA Rules specifies that an Expert Report shall contain "*a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal*" (emphasis supplied). The purpose of such statement is in order to ensure that the Parties and the Tribunal are made aware of any possible conflicts of interest that each expert may have and to ensure that they are properly independent. The mere fact that an expert might have communicated with a party or member of the tribunal prior to his appointment as expert would not necessarily constitute a conflict of interest, but disclosure of the relationship is essential so that the parties and tribunal can take an informed view on whether or not there is a conflict or any appearance of conflict.

17. Whilst Article 5(2)(a) of the IBA Rules specifies disclosure of any past or present relationship with *any of the Parties, their legal advisors and the Arbitral Tribunal*, Mr. Lee's report deals only with his relationship with the parties and the Tribunal: "*I certify that I have no relationship with the parties to the arbitration, or with the members of the Arbitral Tribunal.*"[10] He gives no certification as to his relationship with the Claimants' legal advisors, and indeed makes no mention whatever of his

[9] **Exhibit C-0264 (ENG/SPA) -** Article 760 of the Panamanian Judicial Code.

[10] First Expert Report of Jorge Federico Lee dated 14 September 2018, ¶ 14.

communications with them over the course of four months that had ended only in March this year.

18. In examining the nature of the requirement for disclosure by an independent expert witness, the Tribunal may also be assisted by the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**").[11] These guidelines are concerned with arbitrators and not experts, but because both arbitrators and experts are subject to duties of independence they may have some utility. General Standard 3 of the IBA Guidelines provides for prompt disclosure of any possible conflicts of interest by arbitrators:

> "*(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment, or, if thereafter, as soon as he or she learns of them…*
>
> *(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.*"

It is submitted that a similar standard should apply to independent expert witnesses.

19. As noted in General Standard 3 of the IBA Guidelines, the existence of conflict of interest is to be assessed not merely by reference to whether there <u>is</u> a real possibility of conflict, but also by reference to whether a reasonable and independent observer would consider that there <u>might</u> be such a possibility.

**<u>Relevance of non-disclosure to the assessment of conflict of interest</u>**

20. In *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, the Claimant objected when the Respondent included as one of its legal advisors a member of the same chambers as the president of the tribunal. The tribunal in that case found that "*the Respondent's conscious decision <u>not</u> to inform the Claimant or the Tribunal*"[12] of the counsel in the

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[11] **CLA-0134 (ENG) -** IBA Guidelines on Conflicts of Interest in International Arbitration (23 Oct 2014).

[12] **CLA-0135 (ENG) -** *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal's ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008 ¶ 31.

case was one of the key factors which led to its finding that the involvement of the counsel in question was inappropriate and improper.

21. The same approach has been taken in certain domestic legal systems. For example in the English Court of Appeal's recent decision in *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 the court confirmed that an arbitrator's failure to disclose and how he or she deals with concerns raised by a party are relevant in determining whether apparent bias exists; such factors will inevitably "*colour the thinking of the observer and may fortify or lead to an overall conclusion of apparent bias*". [13]

22. It is submitted that in the present case, in considering whether Mr. Lee has a conflict of interest, the Tribunal should take into account both his failure to disclose his relationship and the response of the Respondent (no doubt having spoken to Mr. Lee) once concerns were raised.

**The Tribunal's powers in the event of conflict of interest and/or non-disclosure**

23. The ICSID Convention, the ICSID Rules and the IBA Rules are silent on the consequences of an expert not making the appropriate statement of independence, and on conflicts of interest of an expert more generally.

24. However, the Tribunal has the power to determine the admissibility of expert evidence under Rule 34(1) of the ICSID Rules: "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value*." Additionally, under Article 44 of the ICSID Convention the Tribunal is empowered to decide any rules of procedure that are not otherwise covered: "*If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question*."

25. Under Article 9.2(b) of the IBA Rules, the Tribunal must exclude evidence at the request of a party if there is a legal impediment or privilege to that evidence being used:

[13] **CLA-0136 (ENG) -** *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 (19 April 2018).

"*2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:*

…

*(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.*"

26. Article 9.3 of the IBA Rules further provides:

"*In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:*

*(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;*

*(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;*

*(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;*

*(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and*

*(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules*."

27. Finally, the Tribunal has an obligation to ensure the legitimacy of the process, to ensure that the Award is soundly based and not affected by procedural impropriety. As the tribunal stated in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), "*The Tribunal is concerned - indeed, compelled - to preserve the integrity of the proceedings and, ultimately, its Award*."[14]

**Application of the law to the facts**

[14] **CLA-0135 (ENG) -** *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal's ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008 ¶ 30.

28. There are two issues of concern here. The first is the conflict of interest itself, brought about by the discussions held between Mr. Lee and the Claimants. As described in the Factual Background section above, Mr. Lee was provided with information by the Claimants that is impressed with an obligation of confidentiality. Mr. Lee, a lawyer of some 42 years' experience who must be familiar with the duty of confidentiality, received that information knowing that it was subject to a duty of confidentiality, and that he is unable to share that information, because it is not his information to share. In particular, he is unable to share that information with the Respondent. However, Mr. Lee has been hired by the Respondent, and as a result he has an obligation to provide to the Respondent any relevant information of which he is aware. This places Mr. Lee into an impossible position. But of equal importance, the information that he was given by the Claimants is in his head, and cannot be removed. This will inevitably inform his views and his approach to the case, such that he cannot properly perform his obligations as an independent expert.

29. As noted above, in the *Flughafen* case the facts are very similar to those in the present case: the claimants had had prior communications with an expert who was then hired by the respondent.[15] In that case, it was found that the expert had not by reason of his receipt of certain documents that he had not opened obtained information that was confidential. On that basis the tribunal determined that there was no conflict of interest. There was also no discussion in that case between the claimants and the potential expert of the merits of the claimants' claims or of any the information provided by the claimants to the expert.

30. Here, however, Mr. Lee has become aware of the substance of the confidential information because it was communicated to him orally, and was discussed by Mr. Lee and the Claimants' legal advisors: Mr. Lee cannot claim that he did not receive it. And as explained above, the information Mr. Lee has received is on any view confidential; it included (amongst other things) information on what evidence the Claimants had, what evidence they were seeking and legal opinions on the merits. Assuming that the Tribunal adopts the approach that communications directed to the obtaining of evidence

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[15] **CLA-0133 (ENG/SPA) -** *Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v Republic of Venezuela* (ICSID Case No. ARB/10/19), Decisíon sobre la inhibilitacíon del Sr. Ricover como expert en este procedimiento, sobre la exclusíon del Informe Ricover-Winograd y sobre la Peticíon Documental, 29 August 2012, ¶ 37.

for use in these proceedings attracts privilege, then the communications were not only confidential, but they were privileged too.

31. It is submitted, therefore, that Mr. Lee is hopelessly conflicted and cannot properly continue as an independent expert witness in this case.

32. Additionally, under the Panamanian law standard set out in Article 760(5) of the Panamanian Judicial Code, in which an expert could be excluded if they had previously expressed their opinion on the merits of the case, Mr. Lee should be excluded, as he expressed his opinion on the merits of the case to the Claimants during the telephone conversation on 7 February 2018.[16]

33. Therefore Mr. Lee is also conflicted under the domestic Panamanian law standard.

34. The above conflicts are compounded by Mr. Lee's failure to disclose his prior relationship with the Claimants' legal advisors. At paragraph 14 of his report, Mr. Lee states, "*I certify that I have no relationship with the parties to the arbitration, or with the members of the Arbitral Tribunal*." Mr. Lee therein certifies his independence from the Parties and the Tribunal, but under Article 5(2)(a) of the IBA Rules, he is also required to certify his independence from the Claimants' legal advisors. He failed to do so.

35. That failure is especially troubling since Mr. Lee was at pains to certify the two elements of the Article 5(2)(a) test that he was clear on (i.e. no relationship with the parties or the Arbitrators), but was silent on the third that he could not certify (i.e. no relationship with the parties' legal advisors). It must be assumed that the Respondents' legal counsel drew the Article 5(2)(a) disclosure requirement to Mr. Lee's attention, and if so then his decision to stay silent on the one element of the test on which he had a problem gives rise to concerns as to his candour.

36. This becomes yet more troubling in view of the letter from the Respondent's counsel of 16 October 2018, which appears to see nothing wrong with Mr. Lee's disclosure and

[16] **Exhibit C-0264 (ENG/SPA) -** Article 760 of the Panamanian Judicial Code.

says nothing as to the facts other than to make a bare denial.[17]

37. Applying the standard in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* to these facts, it is clear that a "*reasonable independent observer*" could (and in our submission, would) form a "*justifiable doubt*"[18] as to the independence of Mr. Lee.

**Order sought**

38. For the reasons set out above, the Claimants respectfully request that the Tribunal order pursuant to Rule 34(1) of the ICSID Rules, Article 44 of the ICSID Convention and Article 9.2(b) of the IBA Rules that: (a) that Mr. Lee be removed as the Respondent's expert in Panamanian law; (b) that the Respondent be permitted to file a report from a replacement independent expert in Panamanian law within 30 days of the Tribunal's order; and (c) that the procedural calendar be adjusted accordingly.

39. In the interests of time and procedural efficiency, the Claimants are content for this application to be dealt with on the papers.

[17] **Exhibit C-0263 (ENG) -** Letter from Arnold & Porter to Akin Gump dated 16 October 2018.

[18] **CLA-0135 (ENG) -** *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal's ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008 ¶ 30.