

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. 8

– Production of Documents –

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 March 2019

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I. PROCEDURAL HISTORY

1. By Procedural Order No. 7 the Tribunal ordered the production of documents responsive to the Claimants' Document Production Requests Nos. 2, 6, 7 and 9 by 14 February 2019.
2. Differences have arisen between the Parties in respect of Panama's compliance with this Order. On 12 March 2019, the Claimants filed an application seeking a number of orders from the Tribunal in connection with Requests No. 2, 6, 7 and 9, and requesting an extension of time to file their Reply. On 14 March 2019, the Tribunal invited the Respondent to provide observations on the Claimants' application, and it directed that the Claimants' Reply be filed by 22 March 2019, and it granted the Claimants "*leave to apply to the Tribunal for authorization to submit a supplement to Claimants' Reply if that becomes necessary in order address any potential further document production by the Respondent.*" The Respondent filed its response to the Claimants' application on 21 March 2019. The present Order addresses the differences between the Parties.

II. ORDER

1. Request No. 2

3. This Request seeks documents and communications ("documents") between the Magistrates of the Supreme Court of Panama and third parties related to the *Muresa* Tort Case.
4. On 14 February 2019 Panama's lawyers wrote stating that "*Panama has requested such documents of the Supreme Court of Panama, and the latter has confirmed that no responsive documents exist.*"
5. On 27 February 2019 the Claimants' lawyers wrote, both to the Tribunal and to Panama's lawyers asserting that this was "*most unlikely to be correct*" as at the very least there would be communications with Court staff relating to logistical matters in relation to the case. The Claimants' lawyers called on Panama's lawyers to answer a series of questions in relation to the enquiries carried out by or on behalf of the Supreme Court in relation to the existence of responsive documents.
6. Panama's lawyers have asserted that communications passing between the Magistrates and Court staff do not constitute communications between the Magistrates and third parties. They have declined to answer the questions posed, asserting by way of additional justification that no such requirement was imposed on the Claimants in respect of documents requested from them.
7. The Tribunal considers that the Claimants are justified in seeking clarification as to the identity of the individuals personified in the expression "*the Supreme Court of Panama*" and the basis upon which they have been able to say that no responsive documents exist. The Tribunal wishes to be satisfied that there has been an adequate enquiry as to the

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possible existence of communications made some five years ago. Accordingly, the Tribunal Orders that:

By 1800 (EST) on Friday 12 April 2019 Panama shall provide particulars of:

- (i) the individuals who were requested to produce such documents and the responses made by those individuals;
- (ii) the searches that were made of hard copy files and computer records in order to identify whether such documents existed;
- (iii) confirmation that any communications between the Magistrates and Court staff in relation to this case were purely administrative.

2. Requests Nos. 6, 7 and 9

8. Each of these Requests relates to documents relating to or arising out of a complaint made against Justice Ortega. In the case of Request No. 9 the complaint was also made against Justice Mitchell. Such complaints fall within the exclusive jurisdiction of the National Assembly.
9. After some delay, the National Assembly has provided documents responsive to these three Requests to those members of the Executive responsible for the conduct of this Arbitration. They have asserted that the documents are sensitive and confidential and have declined to produce them unless and until the Claimants agree to and sign and the Tribunal issues a proposed “*Confidentiality Order*.”
10. The Claimants’ lawyers have objected to the terms of this Confidentiality Order in that they preclude them from communicating to their clients the content of the documents in question. They have submitted that appropriate protection in respect of the documents can be provided by the use of the procedure provided for by Article 10.21.4 of the TPA.
11. The Tribunal appreciates the potential sensitivity of the documents in question, but does not consider that Article 10.21.4 of the TPA provides an appropriate procedure, for it relates to documents produced by a party in support of its own case. Equally, the Tribunal is not presently persuaded that it is necessary to make an Order that deprives the Claimants’ lawyers of the possibility of taking instructions from their clients in relation to the documentation in question.
12. Accordingly, the Tribunal makes the following Order:

By 1800 (EST) on Friday 5 April 2019 Panama to disclose the relevant responsive documents to the Claimants’ lawyers on terms,

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to be agreed to by the Claimants, that in the first instance the disclosure will be for the lawyers' eyes only. Should the Claimants' lawyers wish to use the documents as evidence in this Arbitration, or to take instructions from the Claimants in relation to their content they must, by 1800 (EST) on Friday 12 April 2019, apply to the Tribunal for appropriate directions.

13. The Claimants' lawyers contend that Panama should make enquiries of other State organs in respect of documents responsive to these requests. As the relevant complaints fall within the exclusive jurisdiction of the National Assembly the Tribunal sees no justification for this.

For and on behalf of the Tribunal,

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