

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. 10

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

23 April 2019

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I. INTRODUCTION

1. Further differences have arisen between the Parties in relation to the implementation of Procedural Orders Nos. 8 and 9. This Order addresses those differences.
2. On 12 April 2019, the Claimants filed an application seeking authorization to file a Supplemental Reply, and to allow the Claimants' counsel to share Restricted Information produced to Akin Gump under Procedural Orders No. 8 and 9 with two individuals (Mr Thomas Kingsbury and Mr Adán Arnulfo Arjona). On 18 April 2019, the Respondent filed a response to this application. On 23 April 2019, the Claimants filed a communication confirming Mr Arjona's role as the Claimants' expert on Panamanian law.
3. On 12 April 2019, the Respondent provided responses requested by the Tribunal in Procedural Order No. 8 in connection with the Claimants' Document Production Request No. 2 ("**Request No. 2**"). On 17 April 2019, the Claimants filed an application to the Tribunal requesting that further orders be made in connection with Request No. 2.

II. ANALYSIS

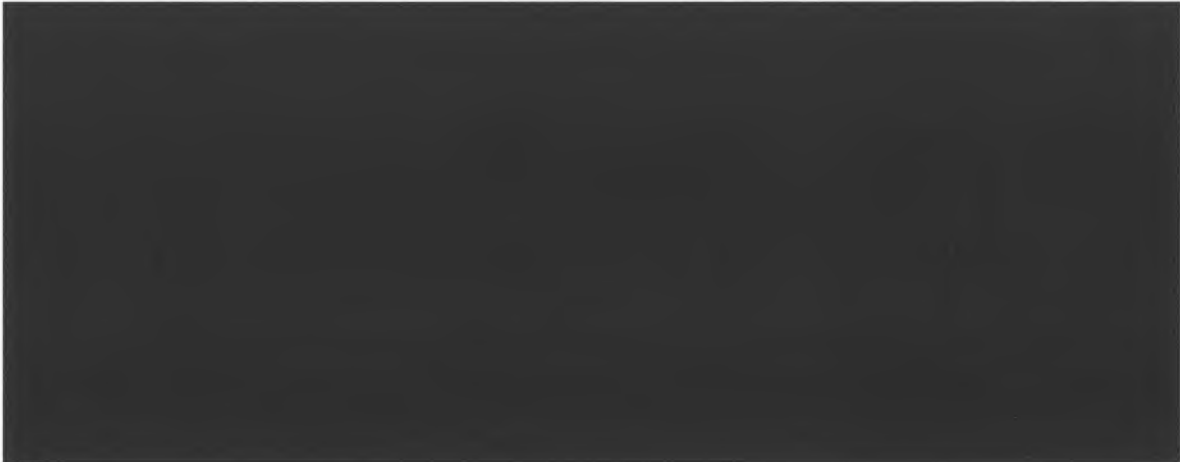
A. Procedural Order No. 8 (Claimants' Document Production Request No. 2)

4. In their letter of 12 April 2019, Arnold & Porter has explained the basis on which the Respondent stated that no responsive documents existed in relation to Request No. 2.
5. In their letter of 17 April 2019, Akin Gump submits that the Respondent's enquiry into the existence of the documents subject to Request No. 2 was inadequate, for the reasons set out in that letter. The Tribunal considers that there may well be force in that submission.
6. The Tribunal does not, however, consider it would be appropriate or useful to order the Respondent's external counsel to seek further information from Justices Ortega and Mitchell, having particular regard to the fact that each of these Justices has now retired.
7. Nor does the Tribunal consider that the Tribunal has the power to order the Respondent's external counsel to carry out the searches suggested by Akin Gump in its letter of 17 April.
8. In these circumstances the Tribunal does not need to trouble the Respondent to respond to Akin Gump's letter of 17 April.
9. It will be open to the Claimants in due course to make such submissions as they consider appropriate in relation to the adequacy, or lack of adequacy, of the Respondent's response to Request No. 2, and to the Respondent to respond to any such submission.

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B. Procedural Order No. 9 (Claimants' Document Production Requests Nos. 6, 7 and 9)

10. The Respondent has now disclosed documents pursuant to Requests Nos. 6, 7 and 9 (the "**Restricted Information**") on the terms as to confidentiality set out in Procedural Order No. 9.



13. In the letter of 18 April 2019, Arnold & Porter describes the disclosed documents as:

"inherently-sensitive documents concerning allegations of criminal conduct against individuals entitled to the presumption of innocence."

14. In the letter of 12 April 2019, Akin Gump requests:

- (i) authorisation to submit a Supplemental Reply "*referring to and exhibiting the Restricted Information*" within 7 days;
- (ii) expansion of the list of persons with access to the Restricted Information to include Mr Thomas Kingsbury of the Claimants;
- (iii) expansion of the list of persons with access to the Restricted Information to include Mr Adán Arnulfo Arjona, the Claimants' expert on Panamanian Law.

1. The Supplemental Reply

15. In the letter of 18 April 2019, Arnold & Porter questions the relevance of the proposed Supplemental Reply. The Tribunal is of the view that this is a question to be raised, if at

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all, after the pleading has been submitted, not at this stage. Permission to submit a Supplemental Reply is granted.

16. In the first instance the Supplemental Reply is to be treated as subject to the same confidentiality as the Restricted Information. The Tribunal anticipates that further consideration will have to be given to the treatment of the Restricted Information and pleadings that refer to this and will give procedural directions in relation to this in due course.

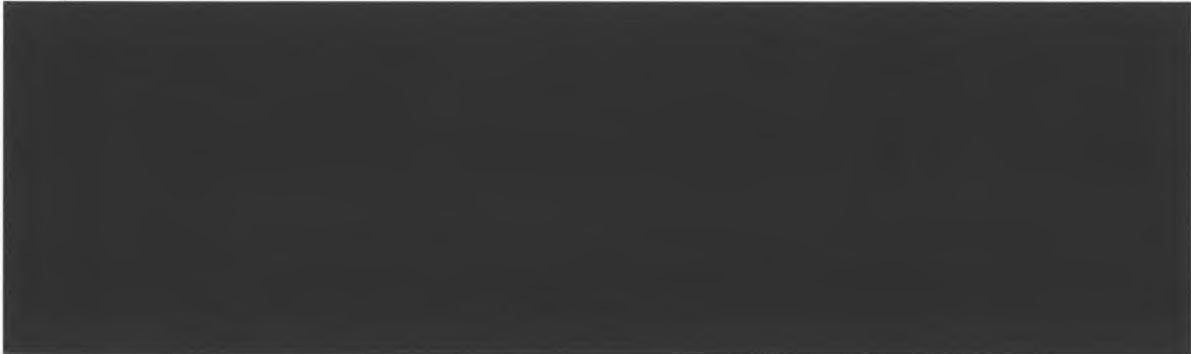
2. Disclosure to Mr Kingsbury

17. The Claimants apply to have Mr Kingsbury included in the “Confidentiality Club” so that they can take instructions from him, as the representative of the Claimants, in relation to the Restricted Information. Mr Kingsbury is Chief Counsel for Intellectual Property for BSAM and Assistant Secretary for BSLS. He also has other responsibilities within other parts of the Bridgestone Group of Companies. Akin Gump receives their instructions from him. Mr Kingsbury is a member of the Ohio Bar.
18. Arnold & Porter has devoted five pages of its letter of 18 April 2019 to resisting this application. They contend “Attorneys Eyes Only” (“AEO”) orders are commonplace, including in investor-State cases, citing in particular the fields of international trade, government contracts and intellectual property. They contend that because Mr Kingsbury wears multiple hats in the Bridgestone Group “*it is plainly not possible to prevent disclosure to third parties.*” They go on to make personal aspersions against Mr Kingsbury’s integrity, alleging that he made allegations against Panama at a public hearing that were “*manifestly untrue.*”
19. The Tribunal does not consider that the particulars provided in support of this allegation justify the attack made on Mr Kingsbury. Nor does it accept that disclosure of the Restricted Information to Mr Kingsbury is liable to result in the information entering the public domain. While the information in question is sensitive because it may affect the reputation of the Justices to which it relates, it is not information of general interest or of commercial value, in contradistinction to intellectual property or trade secrets, which are the types of information that normally justify an AEO order. We can see no reason why Mr Kingsbury should be tempted to disseminate the Restricted Information in a manner that infringes the terms upon which he receives it. We accept the Claimants’ submission that, as a member of the Ohio Bar, Mr Kingsbury will have well in mind the ethical obligations of an attorney.
20. The Tribunal considers it desirable that Mr Kingsbury, as the representative of the Claimants with charge of the conduct of this arbitration, should be fully informed of the actions being taken by the Claimants’ lawyers on behalf of the Claimants. This is not merely in order to put Mr Kingsbury in a position to give instructions on behalf of the Claimants, although it is desirable that he should be able to do this. More fundamentally, it is undesirable that a party should be constrained to entrust the conduct of litigation to

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lawyers on its behalf without the right to know the steps being taken by those lawyers, or the ability to give instructions in relation to those steps. Only in the most exceptional circumstances can such a course be justified.

21. No such circumstances exist in the present case. The Claimants seek to include Mr Kingsbury in the Confidentiality Club on terms that he does not disclose the Restricted Information that he receives to anyone. The Tribunal is confident that Mr Kingsbury will abide by those terms, unless released from them by order of the Tribunal, and grants this part of the Application.



23. Arnold & Porter does not object to this application in principle. It submits, however, that Akin Gump should be asked to clarify the manner in which Mr Arjona would provide his advice and input.

“[...] Claimants have presented Mr. Arjona as an expert in these proceedings. If the intention is to consult Mr. Arjona in that capacity, then he should be required to submit his opinions in the form of an expert report, so that Panama can isolate Mr. Arjona’s testimony and cross-examine him on such. Provided that such a report is appended to the supplemental Reply, Panama would have no objection. If, however, the intention was to have Mr. Arjona assist Akin Gump in crafting arguments for and drafting the supplemental Reply (as the Application implies), then Akin Gump should designate Mr. Arjona as counsel for Claimants, and Mr. Arjona’s purported expert reports should be stricken.”

24. The Tribunal considers the conditions that Arnold & Porter seeks to impose on the disclosure to Mr Arjona of the Restricted Information to be misconceived. Akin Gump’s Application does not imply that they wish to have Mr Arjona assist in “*crafting arguments for and drafting the supplemental Reply*.” Nor is the Tribunal persuaded that such assistance would be incompatible with Mr Arjona’s role as an expert witness. Akin Gump’s request is, however, based on the need to have expert advice on Panamanian law in order to understand the legal element of the Restricted Information. Such advice may or may not result in their wishing to introduce additional evidence of Panamanian law in

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the form of a supplementary expert report. The Tribunal grants this part of the application.

III. ORDER

25. In light of the foregoing the Tribunal orders that:

- (a) Within 7 days of this Order (*i.e.* by **30 April 2019**), the Claimants may file a Supplemental Reply, which may include references to and exhibit the Restricted Information.
- (b) Subject to further directions from the Tribunal the Supplemental Reply is to be treated as subject to the same confidentiality as the Restricted Information.
- (c) Time for submission of the Respondent's Rejoinder is postponed to a date to be fixed. The Tribunal takes note that "*Panama commits — upon receipt of the supplemental Reply — to propose a revised deadline that would allow sufficient time to prepare for the upcoming hearing.*" No later than **7 May 2019**, the Respondent shall submit for consideration by the Tribunal its proposed revised deadline for the Rejoinder.
- (d) No further Order is made in respect of documentary Request No 2.
- (e) Procedural Order No. 9 is amended so as to permit Akin Gump to share the Restricted Information with Mr Thomas Kingsbury of the Claimants, provided that he agrees to keep the Restricted Information confidential and not to share the Restricted Information with anyone else at the Claimants or any third party without the Tribunal's permission.
- (f) Procedural Order No. 9 is amended so as to permit Akin Gump to share the Restricted Information with Mr. Adán Arnulfo Arjona, Claimants' expert on Panamanian law, provided that he agrees to keep the Restricted Information confidential and not to share the Restricted Information with the Claimants or any third party without the Tribunal's permission.

For and on behalf of the Tribunal,

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