Before the

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

BRIDGESTONE LICENSING SERVICES, INC.,
BRIDGESTONE AMERICAS, INC.,
Claimants,

v.

REPUBLIC OF PANAMA,
Respondent.

ICSID CASE NO. ARB/16/34

PANAMA'S RESPONSE TO CLAIMANTS' APPLICATION TO REMOVE JORGE LEE AS EXPERT WITNESS

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9 November 2018

Arnold&Porter

TABLE OF CONTENTS

Page

I. Introduction

1. In their submission of 29 October 2018 ("**the Application**"), Claimants Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. ("**Claimants**") level various accusations against one of the experts of the Republic of Panama ("**Panama**"), Mr. Jorge Federico Lee. The accusations are serious, and Panama's counsel has taken them seriously. As discussed below, however, the accusations are unfounded, unsupported, vehemently refuted by Mr. Lee,[1] and involve exaggeration, overreaction, and baseless insinuations. In the end, as the Tribunal will find, Claimants have not come anywhere close to demonstrating the type of impropriety that an investment tribunal must require before it takes the extreme and unusual step of publicly denouncing a person's integrity by denying a party its right to put an individual forward as an expert.

II. Relevant Background

2. On 14 September 2018, Panama transmitted its Counter-Memorial submission to Claimants and the Tribunal. Included in the submission was an expert report by Mr. Lee — a Panamanian lawyer, and former Supreme Court judge, who had been "asked . . . to render an expert report in [his] capacity as expert in Panamanian Procedural Law . . . ."[2] Three weeks later, on 9 October 2018, Claimants' counsel sent a letter to Panama alleging "that Mr. Lee has a conflict of interest . . . [that] should prevent [him] properly from accepting an engagement to act on behalf of the Respondent and from giving evidence."[3]

3. This allegation was predicated upon the following three assertions:

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[1] Mr. Lee responds directly to Claimants' accusations in a witness statement appended to the present submission.
[2] **First Lee Report**, ¶ 2.
[3] **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 1.

a. that "Mr. Lee was engaged in discussions with the Claimant's [sic] legal advisers from 3 November 2017 to 6 March 2018 in relation to him giving expert evidence on behalf of the Claimants in this arbitration";[4]

b. that "[t]hose discussions were confidential, involved the provision to Mr. Lee of confidential information[,] were for the purpose of the Claimants obtaining evidence for use in these proceedings[, and accordingly] were privileged";[5] and

c. that Mr. Lee was *required* "to disclose in his Report the fact of his discussions with the Claimants' legal advisers and of his receipt from them of confidential information"[6] — and *understood* that such a disclosure was required[7] — but deliberately "decided to keep quiet about . . . the relationship with the Claimants' legal advisers."[8]

4. Upon receipt of the letter, Panama's counsel reached out to Mr. Lee to reconfirm and deepen the diligence it had conducted when it first retained Mr. Lee. Mr. Lee explained — as he explains again in his witness statement, which accompanies this submission — that he *was* approached by Claimants' counsel in connection with this case.[9] However, the insinuation that there had been several months of privileged and confidential discussions about confidential information was misleading and false,[10] and the notion that he would intentionally shirk a

[4] **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 1.
[5] **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 1.
[6] **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 2.
[7] *See* **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 2.
[8] **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 1.
[9] **First Lee Statement**, ¶ 9.
[10] **First Lee Statement**, ¶¶ 4-6 .

disclosure obligation was equally unfounded.[11] Rather, as confirmed by the email exchanges appended hereto as Exhibits 0087-0093 (which Mr. Lee shared with Panama's counsel following receipt of the Application), the reality is as follows.

5. On 30 October 2017, Claimants' counsel (Akin Gump) sent an email to a Panamanian law firm (Morgan & Morgan),[12] inquiring as to "any other experts apart from [then-candidate] Mr. Hoyos" who could serve as an "expert[] on Panamanian law[.]"[13] When Morgan & Morgan responded by "recommend[ing] Adan Arnulfo Arjona and Jorge Federico Lee,"[14] Akin Gump asked "if Mr. Arjona and Mr. Lee are available for a quick call about their capabilities to serve as an expert."[15]

6. On 16 November 2017, this exchange was forwarded without reservation by Morgan & Morgan to Mr. Lee (a partner in a separate law firm), under a cover email that inquired as to Mr. Lee's availability for a call with Akin Gump.[16] Mr. Lee responded that same day (November 16), and Morgan & Morgan proceeded to set up a call for November 20.[17] The call was postponed on November 20, however,[18] and the email traffic ceased — likely due to the

[11] **First Lee Statement**, ¶¶ 30-34.

[12] Although Morgan and Morgan had represented Bridgestone Licensing in the Panamanian Supreme Court proceeding, the Firm has never appeared as counsel herein. *See* **Ex. C-0001**, Power of Attorney and Internal Approval Statement for BSLS; *see also* **Ex. C-002**, Power of Attorney and Approval Statement for BSAM.

[13] **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 7-8.

[14] **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), p. 7.

[15] **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), p. 7.

[16] *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 6-8.

[17] *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 5-6.

[18] *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 4-5; *see also* **Ex. R-0088**, Email From Jorge Federico Lee to Mariam Abulaila (20 November 2017).

holidays. On 3 January 2018, the scheduling emails resumed,[19] and the call was eventually held on 7 February 2018, nearly two and a half months following the original email of inquiry.[20]

7. In their Application, Claimants contend that the 7 February 2018 call consisted of: (1) "a description," based on "information [that] was either public and/or was known to the Respondent,"[21] of "the background to these proceedings and the claims,"[22] (2) a description by Akin Gump of "certain of the fact evidence that the Claimants had at that stage obtained,"[23] and "possible further lines of enquiry,"[24] (3) a discussion between Akin Gump and Mr. Lee of "what facts and evidence each were aware of as to judicial corruption in the Panama Supreme Court,"[25] and (4) a "discussion of the merits of the Claimants' claims in the present arbitration,"[26] during the course of which Mr. Lee supposedly "gave his own initial view of the merits of those claims . . . ."[27]

8. Mr. Lee agrees with certain aspects of this account. He agrees that the conversation included a general description of the Muresa proceedings,[28] that it touched on the issue of corruption in the Panamanian judiciary,[29] and that Claimants expressed a desire to argue

[19] *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 4-5; *see also* **Ex. R-0089**, Email From Jorge Federico Lee to Mariam Abulaila (3 January 2018); **Ex. R-0090**, Email Exchange Between Jorge Federico Lee and Mariam Abulaila (7 February 2018).

[20] *See* **First Lee Statement,** ¶ 14; *see also*, *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018); **Ex. R-0090**, Email Exchange Between Jorge Federico Lee and Mariam Abulaila (7 February 2018).

[21] **Application**, ¶ 9.1.

[22] **Application**, ¶ 9.1.

[23] **Application**, ¶ 9.2.

[24] **Application**, ¶ 9.2.

[25] **Application**, ¶ 9.2.

[26] **Application**, ¶ 9.3.

[27] **Application**, ¶ 9.3.

[28] *See* **First Lee Statement,** ¶¶ 16, 27.

[29] *See* **First Lee Statement,** ¶ 17.

that the 28 May 2014 Supreme Court Judgment had been arbitrary.[30] But he emphatically denies that there was any discussion of Claimants' strategy,[31] any discussion of any evidence pertaining to the Muresa proceedings specifically,[32] or any exchange of confidential information.[33] On the issue of confidentiality, Mr. Lee explains that Claimants' counsel never stated that the conversation was confidential,[34] and that there was not any reason to consider it to be such.[35] The conversation was simply an initial discussion about his qualifications, willingness, and ability to serve as an expert,[36] and would not be considered privileged under Panamanian law.[37] Further, given that, at the time of the call, Claimants' counsel had not even given Mr. Lee the information that he would need in order to check for conflicts — such information was transmitted two days *after* their 7 February telephone conversation, on 9 February 2018[38] — it seems highly unlikely and unprofessional that attorneys from a major global law firm would have disclosed confidential information during the course of the conversation.

9. On 16 October 2018 (one week after Claimants had written to Panama to demand that Panama "withdraw Mr. Lee's evidence from the record or explain in detail on what basis it declines to do so"),[39] Panama informed Claimants' counsel that, "[a]fter conducting its due diligence, [it] ha[d] concluded that the allegations made in Claimants' 9 October letter are

[30] *See* **First Lee Statement,** ¶ 16.
[31] *See* **First Lee Statement,** ¶ 6.
[32] *See* **First Lee Statement,** ¶¶ 6, 27.
[33] *See* **First Lee Statement,** ¶¶ 4, 5, 10, 28.
[34] *See* **First Lee Statement,** ¶¶ 20, 28.
[35] *See* **First Lee Statement,** ¶ 20, 27-29.
[36] *See* **First Lee Statement,** ¶ 15.
[37] *See* **First Lee Statement,** ¶ 28.
[38] *See* **First Lee Statement,** ¶ 21; *see also* **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018), pp. 2-3.
[39] **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 2.

misleading or false and not support the relief Claimants seek."[40] Undeterred, Claimants submitted their Application to the Tribunal, ever more resolute in their misrepresentations and falsehoods, insisting that Mr. Lee should be removed from these proceedings. As discussed below, there is no basis for such relief.

III. Claimants Have Failed To Establish The Existence Of A Conflict Of Interest

10. In their Application, as in their initial letter to Panama, Claimants contend that "Mr. Lee has a substantial conflict of interest,"[41] that justifies his "remov[al] as the Respondent's expert witness . . . ."[42] According to Claimants, such conflict of interest arose from the "discussions with the Claimants' counsel", "between November 2017 and March 2018", "about being engaged by the Claimants to advise on Panamanian law and to provide expert evidence on behalf of the Claimants."[43]

11. The vast majority of such "discussions", however, were logistical in nature — discussions about ***scheduling*** a call. The only exchange that could have been considered to meet the minimal requirements of a "discussion" was a 7 February 2018 telephone call between Mr. Lee and counsel for Claimants in this proceeding, Akin Gump.[44] After that 7 February telephone call (which is discussed in more detail below), Akin Gump sent Mr. Lee (1) a list of names to include in a conflicts check, (2) an email inquiring "as to [his] availability to serve as an expert in this matter as well as estimated fees," and (3) a "follow[] up . . . email."[45] Communications ceased on 6 March 2018, after Mr. Lee informed Akin Gump that, upon "discuss[ing] this matter

[40] **Ex. C-263**, Letter from Arnold & Porter to Akin Gump, 16 October 2018.
[41] **Application**, ¶ 3.
[42] **Application**, ¶ 1.
[43] **Application**, ¶ 2.
[44] **Application**, ¶ 9.
[45] **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018), pp. 2-3.

with [his] partners," and "after careful consideration of the characteristics of this matter, we have concluded that it would be extremely difficult to issue any opinion which may put in doubt the integrity of sitting justices of the Supreme Court."[46]

12. Claimants assertions regarding Mr. Lee's supposed conflict of interest suffer from numerous conceptual and factual flaws, not the least of which is that no confidential information was ever exchanged between Mr. Lee and Claimants' counsel.

A. No Confidential Information Was Exchanged Between Mr. Lee and Claimants' Counsel

13. No confidential information was ever exchanged between Mr. Lee and Claimants' counsel. This becomes clear once the Tribunal considers that Claimants' accusations are **(1)** unsupported; **(2)** inconsistent and contradictory; **(3)** refuted by Mr. Lee, whose affirmations are corroborated by documentary evidence; **(4)** not subject to a favorable presumption due to Claimants' lackadaisical attitude toward confidential information; and **(5)** rest entirely on Claimants' counsel's account of one telephone call.

1. No Confidential Information was Exchanged Via Email

14. Despite Claimants' attempts to insinuate otherwise — ***none*** of the email exchanges between Mr. Lee and Claimants' counsel contains any confidential or privileged information.[47] Nor were the emails ever designated as confidential.[48] As a practical matter, this

[46] **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018) p. 1.

[47] *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 4-5; *see also* **Ex. R-0088**, Email From Jorge Federico Lee to Mariam Abulaila (20 November 2017); **Ex. R-0089**, Email From Jorge Federico Lee to Mariam Abulaila (3 January 2018); **Ex. R-0090**, Email Exchange Between Jorge Federico Lee and Mariam Abulaila (7 February 2018); **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018); **Ex. R-0092**, Email From Jose Carrizo to Mariam Abulaila (2 March 2018); **Ex. R-0093**, Email From Jose Carrizo to Jorge Federico Lee (6 March 2018); **First Lee Statement**, ¶¶ 5, 13, 25.

[48] *See* **Ex. R-0087**, Email Thread (30 October 2017 to 7 February 2018), pp. 4-5; *see also* **Ex. R-0088**, Email From Jorge Federico Lee to Mariam Abulaila (20 November 2017); **Ex. R-0089**, Email From Jorge Federico Lee to

suggests that Claimants' Application rests entirely on Claimants' characterization of the telephone call of 7 February 2018.

2. A Mere Telephone Call to a Potential Expert Cannot Be Confidential

15. Claimants contend that "[t]he conversation and the information provided to Mr. Lee was confidential." Claimants' contention is a compound one: that not only the information provided to Mr. Lee was confidential, but also the conversation in itself was confidential. Even if the first part of the contention were true — and the occurrence itself of the conversation was confidential — that alone cannot justify disqualifying Mr. Lee as an expert. If it could, then any party to an investment arbitration could thwart the other side, and preclude it from hiring all potentially qualified experts, simply by speaking to an array of candidates first. Claimants themselves concede that no conflict of interest arises from a mere conversation, stating that "[t]he 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 . . . ."[49]

3. Claimants' Contention that Mr. Lee was Provided Confidential Information is Unsupported and False

16. The second part of Claimants' contention — that "the information provided to Mr. Lee was confidential" — stands unsupported.

17. To recall, Claimants contend that, during the 7 February call, (1) their "lawyers provided a description of the background to these proceedings and the claims," using

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Mariam Abulaila (3 January 2018); **Ex. R-0090**, Email Exchange Between Jorge Federico Lee and Mariam Abulaila (7 February 2018); **Ex. R-0091**, Email Thread (9 February 2018 to 6 March 2018); **Ex. R-0092**, Email From Jose Carrizo to Mariam Abulaila (2 March 2018); **Ex. R-0093**, Email From Jose Carrizo to Jorge Federico Lee (6 March 2018).

[49] **Application**, ¶ 16.

"information [that] was either public and/or was known to the Respondent";[50] (2) "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";[51] and (3) "[t]here was discussion of the merits of the Claimants' claims in the present arbitration."[52]

18. Further according to Claimants, the "evidence" Claimants' lawyers indicated they had obtained was "not public", "[t]he 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 the "initial view of the merits" that Mr. Lee supposedly gave were neither "public nor were they known to the Respondent."[53]

19. Claimants contentions are false and unsound. The problems are myriad:

20. *First*, Mr. Lee disputes that any specific evidence pertaining to corruption in the Muresa proceedings was ever discussed.[54] He also disputes that he provided comments on the merits of the case.[55] Mr. Lee states that the purpose of the communications predating and postdating the 7 February Conversation was, respectively, to schedule the 7 February Conversation and assist him in conducting a conflicts check and confirm his availability.[56] No

[50] **Application**, ¶ 9.1.
[51] **Application**, ¶ 9.2.
[52] **Application**, ¶ 9.3.
[53] **Application**, ¶ 10.
[54] *See* **First Lee Statement,** ¶ 18.
[55] *See* **First Lee Statement,** ¶ 19.
[56] *See* **First Lee Statement,** ¶¶ 11-13, 21-25.

confidential information was transmitted during those exchanges.[57] As Mr. Lee explains, the 7 February Conversation itself involved some small talk and a general description of the underlying Panamanian proceedings, to provide Mr. Lee with a basic understanding of the Bridgestone Arbitration.[58] The parties to the 7 February Conversation also discussed Mr. Lee's qualifications to serve as a witness and his availability.[59] No confidential information was exchanged.[60] Specifically, there was no discussion of any of the following matters:

- Evidence regarding corruption specifically in the Panamanian tort case;[61]
- Claimants' strategy for the Bridgestone Arbitration;[62] or
- The merits of the Bridgestone Arbitration.[63]

21. *Second*, generalized discussions about alleged corruption cannot be considered legally protected information — especially when (1) Claimants contend that they discussed the same topic with the Panamanian ambassador, and (2) Claimants' counsel discussed that same topic of corruption, and the general issue of evidence, in a 9 March 2018 phone call with Arnold & Porter.

22. *Third*, Claimants' counsel never stated that the information that was the subject of their discussion with Mr. Lee was confidential, and Mr. Lee never understood it to be such.[64] Claimants' allegation that Mr. Lee must have assumed that the information discussed was

[57] *See* **First Lee Statement,** ¶¶ 5, 11-13, 21-25.
[58] *See* **First Lee Statement,** ¶¶ 16, 27.
[59] *See* **First Lee Statement,** ¶ 15.
[60] *See* **First Lee Statement,** ¶¶ 4-5, 10, 27-28.
[61] *See* **First Lee Statement,** ¶ 18.
[62] *See* **First Lee Statement,** ¶ 6.
[63] *See* **First Lee Statement,** ¶ 6-7, 19.
[64] *See* **First Lee Statement,** ¶¶ 20, 28.

confidential is circular and unsupported by any applicable legal or ethical standard. Under Panamanian law, the information would not have been confidential, and Claimants have failed to cite to any norm — from any country — that could establish that the contents of the discussion would have been confidential or must have been understood as such.

23. *Fourth*, Claimants' own behavior is consistent with the conclusion that the information provided on the call was not legally protected: As explained, it was not until *after* the call that Claimants invited Mr. Lee to conduct a conflicts check. Thus, Claimants' counsel oddly asks the Tribunal to believe that they purposely divulged confidential information during an initial contact with an unknown person, without having first conducted a conflicts check, in violation of (at least) best practices. It would have been reckless for Claimants' counsel to disclose protected information to a third party, without first ascertaining the norms on confidentiality and privilege in that third party's country, and before they had confirmed that the third party was free from conflicts.

24. *Fifth*, to the extent that there was, as Claimants contend, "[d]iscussion of the merits of the Claimants' claims," that fact alone has no bearing on whether the information that was shared was confidential, particularly given Claimants' aggressive strategy in attempting to denounce the Panamanian Supreme Court Decision. To this point, it is notable that by the date of the 7 February 2018 conversation, Claimants had already widely conveyed their views on the Panamanian Supreme Court in different proceedings and before different entities. Claimants had already: submitted a memorandum to, and participated in a hearing by, the United States Trade Representative regarding the Supreme Court Judgment; detailed their complaints on, *inter alia*, arbitrariness to United States Senators and Congressmen; submitted the Request for Arbitration and several other pleadings in this arbitration proceeding, which were published on the internet;

participated in a publicly webcast hearing where they openly described conversations with Claimants' counsel; and allegedly discussed corruption with the Panamanian Ambassador to the United States. Additionally, during at least one March 2018 telephone conference with Panama's counsel, Arnold & Porter, Claimants' counsel alleged to have public information about general corruption in Panama.

25. *Sixth*, Claimants' assertion that the discussion was confidential rests on three arguments, two of which are that (1) "information was provided to Mr. Lee that . . . was **obviously confidential**," and (2) "Mr. Lee provided information . . . that **was confidential**."[65] These arguments are circular. Accordingly, they do not withstand any amount of scrutiny, and in any event, are disputed by Mr. Lee.[66] The third argument is that "the conversation was confidential because . . . the discussion was expressly for the purpose of engaging Mr. Lee to advise and for the Claimants to obtain evidence in adversarial legal proceedings."[67] As noted, the possibility that the existence of the conversation might have been confidential does not mean necessarily that confidential information was disclosed. Further, Claimants' counsel confuse the concept of "private information" with legally "confidential information," treating these terms as synonyms.[68] Although they bear the burden of proving their allegations, Claimants provide no direct evidentiary support regarding their allegations of confidentiality.[69] In fact, the only

[65] **Application**, ¶ 10 (emphasis added).

[66] *See* **First Lee Statement**, ¶¶ 4, 5, 10, 20, 28.

[67] **Application**, ¶ 10.

[68] *See e.g.*, **First Hyman Statement**, ¶ 9 ("The evidence I indicated we had obtained was not public"), ¶ 10 ("None of the views expressed were public nor were they known to the Respondent"), ¶ 11 ("[I]nformation was provided to Mr. Lee that was not public and was obviously confidential").

[69] *See e.g.*, **RLA-0071**, *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (Award, 31 January 2006), ¶¶ 70–71 (Guillaume, Cremades, Sinclair) ("It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim – "Actori incumbat probatio". . . . This principle has been recognized in international law more than one century ago by arbitral tribunals.").

support Claimants provide is a witness statement by Ms. Hyman, Claimants' counsel. Instead of providing factual support, Ms. Hyman simply argues that some of the information exchanged in the 7 February Conversation was confidential **(1)** even though she might not have mentioned that it was confidential,[70] **(2)** because it was obviously confidential,[71] and **(3)** because Mr. Lee should have known that it was confidential.[72] Claimants incorrectly assume that some of the information discussed must have been confidential because they now say so. Such faulty logic cannot be the basis of the disqualification of a party's expert.[73]

26. In summary, Claimants raise unsupported and contradictory allegations regarding the supposed confidentiality of the information they exchanged with Mr. Lee during one perfunctory telephone conversation that occurred prior to any conflict check. In contrast, Mr. Lee has clearly refuted Claimants' charges in detail and provided supporting documentary evidence. Simply, Mr. Lee and Claimants' counsel never exchanged confidential information.

B. Claimants Misrepresent their Cited Standards on Conflicts of Interest

27. Claimants also direct the Tribunal to Article 706(5) of the Panamanian Judicial Code, arguing that the principles of this article necessitate Mr. Lee's exclusion, because he "expressed his opinion on the merits of the case to the Claimants during the telephone conversation on 7 February 2018" and that "Mr. Lee is also conflicted under the domestic

[70] *See* **First Hyman Statement**, ¶ 11("I do not remember whether I expressly stated that the conversation and the information provided was confidential").

[71] *See* **First Hyman Statement**, ¶ 11 ("[I]nformation was provided to Mr. Lee that was not public and was obviously confidential").

[72] *See* **First Hyman Statement**, ¶ 9 (that the information provided was confidential "would have been abundantly clear to Mr. Lee, a very experienced lawyer and judge").

[73] It is also worth noting that Claimants' narrative on Jorge Lee's supposed conflict of interest has shifted over time. Initially, in their letter to Arnold & Porter, Claimants' counsel alleged that all of the "discussions" that they had with Mr. Lee, from 3 November 2017 to 6 March 2018, were privileged, because they had provided Mr. Lee with confidential information. *See* **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 1. In contrast, Claimants' counsel now assert that confidential information was exchanged by ***both*** parties, but ***only*** during ***one part*** of the 7 February Conversation. *See* **Application**, ¶¶ 9.2-9.3.

Panamanian law standard."[74] By its terms, Article 706(5) applies when a **judge**, or certain family members have "***made determinations by writing*** regarding the facts that gave standing to the process."[75] As Mr. Lee is not a judge, Claimants apparently find it apt to apply Panamanian law by analogy to an independent expert.[76] Even if this were a germane exercise — which it is not — Claimants, cannot point to any written opinion — apart from the expert report that Panama submitted with its Counter-Memorial — by Mr. Lee. In fact, they do not even attempt to argue that such an opinion exists; their claim is that "Mr. Lee did express his opinion on the merits of the case ***during the telephone call on 7 February 2018***."[77]

28. Claimants next rely on the *Flughafen* case, because "the facts are very similar to those in the present case."[78] As a threshold matter, even if the facts in *Flughafen* were very similar to those in the present case, the *Flughafen* tribunal rejected the challenge, and did ***not*** exclude the expert, because (1) it found that the information transmitted to the expert was not confidential, and (2) it found that the expert's affirmation sufficed to establish that he did not have effective knowledge of the alleged confidential information.[79] Even more so than the facts in the *Flughafen* case, the facts in the present case militate against expert exclusion.

29. The *Flughafen* tribunal refused to remove the challenged expert for the following reasons:

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[74] **Application**, ¶¶ 32-33.

[75] **Ex. C-0264**, Article 760 of the Panamanian Judicial Code.

[76] *See* **Application**, ¶ 15.

[77] **Application**, ¶ 15 (emphasis added).

[78] **Application**, ¶ 29.

[79] *See* **CLA-0133**, *Flughafen Zürich A.G. and Gestión Ingeniería IDC S.A. v. Republic of Venezuela*, ICSID Case No. ARB/10/19, (Decision concerning the disqualification of Mr. Ricover as an expert in this proceeding, concerning the exclusion of the Ricover-Winograd Report and concerning the Document Request, 29 August 2012), ¶¶ 37-38 (Fernandez-Armesto, Alvarez, Vinuesa) ("***Flughafen***").

- The claimants acknowledged that the information sent to the expert "was not marked as 'confidential'";[80]

- Neither prior to nor during the transmission did the claimants make any reservations about **(1)** "the confidentiality of the information sent", **(2)** "the imposition of exclusivity on the possible expert", or **(3)** the prohibition of the expert "from acting in judicial or arbitral proceedings concerning the facts contained in the information provided";[81]

- The expert affirmed that he did not open the transmitted files or obtain access to them, had no knowledge of the information they contained, and could therefore not take advantage of that information in preparing the expert report;[82] and

- The expert affirmed that he did not provide the files to any third party.[83]

30. Here, Mr. Lee affirms that he was never informed that the 7 February Conversation was confidential. Claimants corroborate Mr. Lee's testimony with the admission that Counsel for Bridgestone "may not have expressly stated that the conversation was confidential."[84] And, as already noted above, none of the emails were marked confidential.[85]

[80] **CLA-0133**, *Flughafen*,¶ 36(i).

[81] **CLA-0133**, *Flughafen*, ¶ 36(ii)

[82] *See* **CLA-0133**, *Flughafen*, ¶ 36(iii)

[83] *See* **CLA-0133**, *Flughafen*, ¶ 36(iv).

[84] **Application**, ¶10; *see also* **First Hyman Statement**, ¶ 11("I do not remember whether I expressly stated that the conversation and the information provided was confidential").

[85] Claimants current position that supposedly confidential information was provided to Mr. Lee only during the 7 February call contrasts with what Claimants originally alleged — that the "discussions" from 3 November 2017 to 6 March 2018 "involved the provision to Mr. Lee of confidential information." *See* **Ex. C-262**, Letter from Akin Gump to Arnold & Porter, 9 October 2018, p. 1.

31. Further, as in *Flughafen*, Claimants' counsel here do not make (nor do they claim to have made) any reservations on the confidentiality of the sent information, the imposition of exclusivity, or a prohibition on Mr. Lee from acting in the proceedings.

32. In *Flughafen*, there was no dispute that the claimants had sent, via email, a contract, a business plan, damages calculations, a Power Point presentation, and their request for arbitration.[86] Here, Claimants provide only vague allegations about the information discussed in the 7 February 2018 Conversation. Further, there is no suggestion that Claimants provided Mr. Lee with substantial and substantive information of the type indisputably sent in *Flughafen*.

33. Mr. Lee, further explains that there was no discussion of the strategy or merits of the case,[87] no discussion of corruption allegations specific to the Panamanian tort case,[88] and that Claimants' counsel only described the facts of the underlying Panamanian proceedings to provide him with a basic understanding of the Bridgestone Arbitration.[89]

34. Finally, because no confidential information was exchanged, axiomatically, Mr. Lee could not have had knowledge of confidential information or transmitted it to a third party.

35. In sum, Mr. Lee does not suffer from a conflict under any of the standards cited by Claimants.

[86] *See* **CLA-0133**, *Flughafen*, ¶ 9.
[87] *See* **First Lee Statement,** ¶¶ 6-7, 19.
[88] *See* **First Lee Statement,** ¶ 18.
[89] *See* **First Lee Statement,** ¶¶ 16, 27.

IV. Mr. Lee Does Not Have a Duty to Disclose His Initial Contact with Claimants' Counsel

A. Mr. Lee Does Not Have a Duty to Disclose a Non-Existent Relationship

36. Claimants request that the Tribunal take into account Mr. Lee's alleged failure to disclose his relationship with Claimants' counsel as required by Article 5(2)(a) of the IBA Rules.[90] In truth, Mr. Lee never had a relationship with Claimants' counsel, and thus no corresponding duty to disclose his initial contact.

37. Mr. Lee engaged in one telephone conversation with Claimants' counsel, after which Claimants provided Mr. Lee with information to help him run a conflicts check.[91] Mr. Lee then declined to assist Claimants.[92] No agreement, of any type, was ever sent to, let alone signed by, Mr. Lee.

38. That no relationship was established between Mr. Lee and Claimants' counsel is also supported by the IBA Guidelines, on which Claimants rely. The Guidelines extensively describe various types of relationships.[93] But these relationships are distinguished from Mr. Lee's and Counsel for Bridgestone's "initial contact," under the Green List.[94] Under any reading, Mr. Lee had no relationship with Claimants' counsel and no duty to disclose the 7 February Conversation under Article 5(2)(a) of the IBA Rules.

39. Claimants attempt to cast aspersions by citing to the fact that Mr. Lee did not disclose in his expert report the interactions between him and Claimants' counsel. Here,

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[90] *See* **Application**, ¶¶ 16-17.

[91] *See* **First Lee Statement,** ¶¶ 14-21.

[92] *See* **First Lee Statement,** ¶ 24.

[93] *See e.g.*, **CLA-0134**, IBA GUIDELINES, General Standard 6; *see also id.*, Practical Application of the General Standards, ¶¶ 2.1, 2.2.3, 2.3, 3.1.1, 3.3, 3.4.

[94] *See* **CLA-0134**, IBA GUIDELINES, Green List, ¶ 4.4.1.

Claimants assert that "[i]t must be assumed that the Respondents' legal counsel drew the [IBA] Article 5(2)(a) disclosure requirement to Mr. Lee's attention," and invite the Tribunal to draw the conclusion that Mr. Lee intentionally chose to hide from the Tribunal something that he and Panama knew should be disclosed. Claimants' objection that Mr. Lee's certification does not track the exact language of Article 5(2)(a) of the IBA Rules is pedantic and disingenuous. Claimants seek Mr. Lee's disqualification in part on the basis of this technicality when they previously dismissed Panama's objection to their witness, which Claimants incorrectly interpreted as an objection based on the same technicality. But there is no basis for assuming bad faith. The reality is that Mr. Lee, who drafted his own expert report, inserted the disclosure that he normally includes in Panamanian proceedings. When reviewing his report, which was 64 pages — and one of four reports submitted — Panama's counsel did not notice that the disclosure did not mention relationships with counsel.[95] If Claimants were concerned by the non-disclosure, they could have invited Mr. Lee to disclose his relationships with counsel, instead of seeking the nuclear option of trying to disqualify him.

B. Mr. Lee Does Not Have a Duty to Disclose a Non-Existent Conflict of Interest

40. Claimants also cite to General Standard 3 of the IBA Guidelines to suggest that the 7 February Conversation would lead a reasonable and independent observer to conclude that

[95] Panama is surprised that Claimants would insist that the non-observance of such a formality could be grounds for imputation of intentional bad faith and disqualification of an expert, particularly given that Claimants attempted to put forward their own lawyer as an independent expert, and called the problem a "formality" when Panama drew it to their attention. *See* **Expedited Objections Hearing Transcript** (Day 2) 166:09-172:20. In fact, Claimants' counsel had no issue presenting Ms. Williams as an expert even though her relationship with the Bridgestone Licensing and Bridgestone Japan constitutes a conflict of interest pursuant to paragraph 2.1.1. of the Red List. *See* **CLA-0134**, IBA GUIDELINES, Waivable Red List, ¶ 2.2.1 ("The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties").

there might exist a conflict of interest requiring disclosure.[96] However, the IBA Guidelines focus on conflicts of interests regarding arbitrators, and Claimants again summarily state that they apply to experts by analogy.[97] But even if the IBA Guidelines applied to experts, they would actually establish that Mr. Lee was not conflicted and had no duty to disclose the 7 February Conversation.

41. *First*, the IBA Guidelines "provide specific guidance . . . as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed . . . the [IBA] Guidelines categorise situations that may occur in . . . Application Lists."[98] These Application Lists are labelled the Non-Waivable Red List, the Waivable Red List, the Orange List, and the Green List.[99]

42. The Green List details "specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List."[100] For this reason, the IBA Guidelines state that situations "such as those set out in the Green List, could never lead to disqualification under the objective test . . . [and] need not be disclosed."[101]

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[96] *See* **Application**, ¶¶ 18-19. Contrary to Claimants' assertion, the objective standard as to whether a conflict of interest exists is detailed in General Standard 2. *See* **CLA-0134**, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (23 Oct 2014), General Standard 2 ("**IBA GUIDELINES**"). Instead, General Standard 3 establishes a subjective test, under which disclosure is still subject to the objective standard. *See* **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 7 ("As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.").

[97] *See* **Application**, ¶18.

[98] **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 1.

[99] *See* **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶¶ 2, 3, 7.

[100] **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 7 (emphasis added).

[101] **CLA-0134**, IBA GUIDELINES, Explanation to General Standard 3(a) (emphasis added).

43. Claimants mischaracterize the IBA Guidelines by omitting any reference to paragraph 4.4.1 of the Green List, which plainly encompasses the 7 February Conversation:

> The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.[102]

Mr. Lee was given a general factual explanation of the underlying Panamanian disputes to provide him with a basic understanding of the Bridgestone Arbitration, and there was no discussion of confidential information.[103] There was no discussion of evidence specific to the Bridgestone Arbitration[104] or of its merits.

44. Thus, if the IBA Guidelines applied to experts, the 7 February Conversation would be encompassed explicitly by the Green List, meaning that there would be "no appearance or actual conflict . . . from an objective point of view," and thus, Mr. Lee would have had no duty to disclose.[105]

45. *Second*, Claimants also cite to cases that are inapposite, because they involve factually distinguishable situations considered by the Orange List,[106] which details "specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to

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[102] **CLA-0134**, IBA GUIDELINES, Green List, ¶ 4.4.1.

[103] *See* **First Lee Statement, ¶¶** 4-5, 10, 16, 27.

[104] *See* **First Lee Statement, ¶¶** 6-7, 19.

[105] *See* **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 7.

[106] *See* **CLA-0135**, *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), ¶ 4 (Williams, Paulsson, Brower) ("***Hrvatska***") (noting that Claimants alleged disclosure in light of paragraph 3.3.2 of the Orange List); *see also* **CLA-0136**, *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 (19 April 2018) ("***Halliburton***"), ¶ 88 ("[T]he present case may be said to fall within the IBA Guideline Orange List 3.1.5").

doubts as to the arbitrator's impartiality or independence."[107] As opposed to the Green List, which considers situations that objectively "need not be disclosed,"[108] the Orange List "reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations."[109]

46. The *Hrvatska* case involved a change to the composition of respondent's legal team (ten days before the merits hearing) which resulted in the inclusion of a barrister who was part of the same Chambers as the President of the tribunal.[110] Not only are these facts completely distinct from those before this Tribunal, they are also considered by paragraph 3.3.2 of the Orange List.[111]

47. In *Halliburton*, the English Court of Appeals ***dismissed*** a challenge against an arbitrator who had accepted multiple appointments by the same party in various arbitrations.[112] Again, the facts are in no way comparable to Mr. Lee's initial contact and are considered by paragraph 3.1.5 of the Orange List.[113]

48. In sum, assuming the IBA Guidelines applied to Mr. Lee, his initial contact with Claimants' counsel is included in the Green List, meaning that there would have been "***no appearance and no actual conflict of interest***" or duty to disclose.[114]

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[107] **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 3.

[108] **CLA-0134**, IBA GUIDELINES, Explanation to General Standard 3(a).

[109] **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 3.

[110] *See* **CLA-0135**, *Hrvatska*, ¶ 3.

[111] *See* **CLA-0135**, *Hrvatska*, ¶ 4; *see also* **CLA-0134**, IBA GUIDELINES, Orange List, ¶ 3.3.2 ("The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers").

[112] *See* **CLA-0136**, *Halliburton*, ¶¶ 11-15.

[113] *See* **CLA-0136**, *Halliburton*, ¶ 88; *see also* **CLA-0134**, IBA GUIDELINES, Orange List, ¶ 3.1.5 ("The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties").

[114] **CLA-0134**, IBA GUIDELINES, Practical Application of the General Standards, ¶ 7 (emphasis added).

49. Under any objective analysis of the facts, Mr. Lee does not suffer from a conflict of interest and has had no prior relationship with Claimants' counsel. As a result, he had no duty to disclose his initial contact with counsel for Bridgestone.

V. Conclusion

50. Claimants' counsel and Mr. Lee never exchanged confidential information. Mr. Lee does not suffer from a conflict of interest. Mr. Lee has never had a relationship with Claimants' counsel. Mr. Lee had no duty to disclose his initial contact with Claimants' counsel.

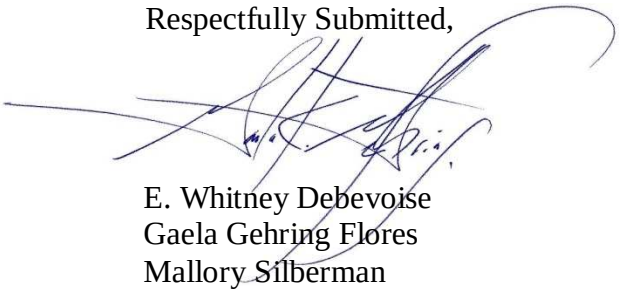
51. To undermine Mr. Lee and Panama's credibility, Claimants rely on unsupported and inconsistent allegations that are contradicted by Mr. Lee and the evidence. Claimants' strategy is not new. As Panama explained in its Counter-Memorial, when Claimants lack evidence to support their claims, they attempt to poison the well against those with whose opinions they disagree.[115] They continue this unwarranted strategy here. To protect the integrity of these proceedings, it should not be permitted by the Tribunal.

VI. Relief Requested

52. For all the reasons set forth above, Panama requests that the Tribunal (1) dismiss Claimants' Application in its entirety and (2) award full costs and attorney's fees to Panama for the time and resources it expended in defending against Claimants' allegations since the receipt of Claimants' 9 October 2018 letter.

[115] **Counter-Memorial**, ¶ 293.

Respectfully Submitted,



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