

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. 11

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

28 June 2019

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I. INTRODUCTION

1. The Tribunal has carefully considered the Claimants' application of 20 June 2019: (i) that the expert report of Mr Gabriel Fried be struck from the record, and (ii) that the expert report of Professor Jan Paulsson be struck from the record or be deemed to be the submission of co-counsel; and Panama's response to this application dated 25 June 2019. The following is the Tribunal's ruling in relation to this application.

II. ANALYSIS

A. The Report of Mr Fried

2. In their Reply at paras. 22 and 23 the Claimants submit that:

“22. [...] a damages approach that is a simplistic lost sales analysis is not rational under the circumstances, and a different approach is needed to appropriately measure loss.

23. The Claimants' damages expert has employed commonly accepted methodologies to measure the impairment to the value of the BRIDGESTONE and FIRESTONE marks. However, because the impact of a judicial decision on trademark value is to be assessed, impairment to the trademarks must be viewed from the perspective of persons who would find a judicial decision to be economically impactful – specifically, the perspective of a potential acquirer of or investor in the trademark rights. [...]”

3. Mr Fried's relatively short expert report joins issue with this proposition. The Tribunal considers that this report can properly be admitted pursuant to the provisions of ICSID Arbitration Rule 31. The Tribunal considers that the merits hearing will afford the Claimants a fair opportunity to address this report, with the assistance, if necessary, of Mr Daniel.
4. Accordingly, the Tribunal dismisses the application in respect of Mr Fried's report.

B. The Report of Professor Paulsson

5. In their Reply at para. 4 the Claimants quote from Professor Paulsson's book on *Denial of Justice* at p. 98:

“[...] the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it.”

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6. The Tribunal considers that it was properly open to Panama, pursuant to ICSID Arbitration Rule 31, to adduce a Report from Professor Paulsson commenting on this test. As Panama has demonstrated, it is commonplace for expert evidence to be adduced in investment treaty arbitrations in relation to rules of international law.
7. In the first part of his report Professor Paulsson deals at paras. 15 to 34 with the circumstances under which a “*denial of justice*” arises under customary international law, including, at para. 24, the passage cited by the Claimants in their Reply. In so far as these passages are controversial, and it is not clear to the Tribunal how much of them will be in issue, the Tribunal considers that the Claimants will be able fairly to deal with these at the merits hearing, and the contrary has not been suggested.
8. The challenge raised by the Claimants relates to a series of questions asking Professor Paulsson to assume, seriatim, that different allegations made by the Claimants are correct and to express an opinion as to whether these would amount to a “*denial of justice*” under Article 10.5 of the TPA. The Claimants submit that the question of whether the facts found by the Tribunal satisfy the appropriate tests of a denial of justice is essentially one for the Tribunal, and that in these circumstances Mr Paulsson’s views should be treated as submissions made by a co-counsel. On this basis, but not otherwise, the Claimants would not object to Professor Paulsson’s report being before the Tribunal.
9. The Tribunal agrees that, whether the facts found by the Tribunal satisfy the legal test of a “*denial of justice*” is a matter for the Tribunal. It would not, however, be right to treat Professor Paulsson as co-counsel, when neither he nor Panama agrees that he should have such role. The Claimants will, no doubt, attack the views that he has expressed, where they disagree with these, whether these are treated as his opinions or as his submissions. For its part, the Tribunal will make its own findings of fact and reach its own conclusions on whether or not these meet the legal test of “*denial of justice*”.
10. In these circumstances, the Tribunal has decided that Professor Paulsson’s report will remain on the record.

For and on behalf of the Tribunal,

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