

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. 12

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

11 July 2019

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I. PROCEDURAL HISTORY

1. Pursuant to Section 20.1 of Procedural Order No. 1, a pre-hearing organizational call between the Parties and the President of the Tribunal was held by telephone conference on 8 July 2019 (the “**Pre-Hearing Call**”). Participating in the telephone conference were:

President of the Tribunal:

Lord Nicholas Phillips, President of the Tribunal

ICSID Secretariat:

Ms. Luisa Fernanda Torres, Secretary of the Tribunal

On behalf of the Claimants:

Ms. Karol Kepchar, Akin Gump Strauss Hauer & Feld

Mr. Justin Williams, Akin Gump Strauss Hauer & Feld

Ms. Katie Hyman, Akin Gump Strauss Hauer & Feld

On behalf of the Respondent:

Mr. E. Whitney Debevoise, Arnold & Porter Kaye Scholer LLP

Ms. Gaela Gehring Flores, Arnold & Porter Kaye Scholer LLP

Ms. Mallory Silberman, Arnold & Porter Kaye Scholer LLP

Ms. Katelyn Horne, Arnold & Porter Kaye Scholer LLP

Mr. Brian Vaca, Arnold & Porter Kaye Scholer LLP

Mr. Michael Rodriguez, Arnold & Porter Kaye Scholer LLP

Ms. Natalia Giraldo-Carrillo, Arnold & Porter Kaye Scholer LLP

Mr. Kelby Ballena, Arnold & Porter Kaye Scholer LLP

Ms. Gabriela Guillen, Arnold & Porter Kaye Scholer LLP

Ms. Dianne Lake, Arnold & Porter Kaye Scholer LLP

2. During the call, the Parties and the President of the Tribunal discussed the draft agenda for the Pre-Hearing Call circulated to the Parties on 21 June 2019, and the Parties joint statement of 5 July 2019 advising the Tribunal of any agreements reached on the agenda open items, as well as their respective positions where no agreement was reached. The 5 July 2019 submission also included the Respondent’s proposal concerning the Agenda for the Hearing. The Claimants’ proposal on the Agenda for the Hearing was submitted on 7 July 2019.
3. An audio recording of the Pre-Hearing Call was made and deposited in the archives of ICSID. The recording was made available to the Members of the Tribunal and the Parties on 8 July 2019.
4. Having considered the Parties’ positions, this Order sets out the Procedural Rules that the Parties have agreed upon and/or the Tribunal has determined will govern the conduct of the Hearing.

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II. ORDER

A. Date and Venue

5. The Hearing is scheduled to take place from 29 July to 2 August 2019, in person at the ICSID facilities in Washington, DC (the “**Principal Hearing**”). In addition, on 28 August 2019 a video conference session will be held to conduct the oral examination of one of the witnesses (“**VC Hearing**”).

B. Order of Proceedings

6. The general structure of the Hearing will be as indicated in **Annex A**.

C. Daily Schedule

7. The Parties have agreed that each day of the Principal Hearing will commence at 9:00 AM and it will conclude by 6:00 PM (EDT). There will be two coffee breaks of 15 minutes each (one in the morning and one in the afternoon), and a lunch break of one hour.
8. The VC Hearing on 28 August 2019 will begin at 10:00 AM (EDT) and will conclude by 1:00 PM (EDT).

D. Time Allocation

9. The Parties have agreed that, after excluding time needed for breaks, there will be a total of **37 working hours** available for both Parties’ presentations and examinations and the Tribunal’s questions (including the time available for use at the VC Hearing). Per agreement of the Parties, the total number of working hours have been calculated on the basis of 7 hours and 30 minutes of working time a day per five days, and assuming a total 30 minutes of “dead time”.
10. Per agreement of the Parties, the 37 working hours shall be allocated as follows: (i) 1 hour will be reserved for the United States of America’s oral presentation pursuant to Article 10.20(2) of the U.S.-Panama TPA (provided that should the United States of America use less than the allotted hour, any remaining time will be equally divided between the Parties); (ii) 8 hours will be reserved for the Tribunal; (iii) the remaining time shall be equally divided between the Parties, such that each Party shall have 14 hours.
11. Time shall be kept using the chess-clock method. Each Party may use the time available to it at each stage of the Hearing in the manner it desires, subject to the following:
- (a) *Tribunal Questions*. Time taken by the Tribunal for its own questions during the Parties’ presentations or witness or expert examination(s) and the answers to those questions shall not be counted against the Parties’ time. Time used for house-keeping matters shall also be counted against the Tribunal’s allotted time.

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- (b) *Opening Statement.* Each Party shall be free to decide how much time to allocate to its opening statement, having regard to the principle that time used shall be deducted from that Party's allotted time.
 - (c) *Closing Statements.* Each Party may use up to 1 hour for an oral Closing Statement at the end of the Principal Hearing, to summarize its conclusions and answer any questions by the Tribunal. Should there be a significant number of questions from the Tribunal to be addressed during the Closing Statement, the time required to answer those questions will be deducted from the Tribunal's time.
 - (d) *Direct Examinations and Expert Presentations.* The duration of direct examination(s) of witnesses and presentations by experts is governed per Section 19.8.3 of Procedural Order No. 1, per which "[a]bsent leave from the Tribunal, direct examination of a witness shall not exceed 15 minutes and direct examination of an expert shall not exceed 30 minutes."
12. The Secretary of the Tribunal shall keep the time, under the direction of the Tribunal.

E. Documents for Use at the Hearing

1. Electronic Core Bundle

13. As agreed by the Parties, there shall be a single Electronic Core Bundle in USB form (PC and Mac compatible), to be prepared by the Respondent in consultation with the Claimants. Per agreement of the Parties, the costs relating to the preparation of this Electronic Core Bundle shall be evenly split between the Parties.
14. The Electronic Core Bundle shall contain all pleadings, witness statements, exhibits and legal authorities on file to date, with a unified hyperlinked index. It shall not contain any document not previously filed. The hyperlinked index shall identify with **RED** material that has been designated as "protected information." (*See*, U.S.-Panama TPA, Articles 10.21(2), 10.21(4) and 10.29.)
15. The Respondent will endeavor to distribute the Electronic Core Bundle USB as soon as possible (if feasible, on or around 15 July 2019) to: (i) counsel for the Claimants (1 copy); (ii) each Member of the Tribunal (3 copies); (iii) the Secretary of the Tribunal (2 copies); and (iv) additional copies shall be available at the Principal Hearing for the English court reporter (1 copy), the Spanish court reporter (1 copy) and the interpreters (1 copy).
16. As discussed during the Pre-Hearing Call, there shall be no hard copy Core Bundle.

2. Examination Bundles

17. A Party may if it so wishes prepare hard copies of examination bundles ("the **Examination Bundles**") for any witness(es) and expert(s) to be examined in person.

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18. The Examination Bundles shall contain a copy of the relevant witness statement(s) or expert report(s) and shall only contain documents already on the record. Each document shall be separated with a tab., and the bundle shall be accompanied with an index that cross-references to the corresponding Exhibit (C- or R-) or Legal Authority number (CLA- or RLA-). During the Hearing, the Parties shall refer to the documents in the Examination Bundles by their corresponding Exhibit (C- or R-) or Legal Authority number (CLA- or RLA-).
19. The Index of an Examination Bundle shall identify with **RED** material that has been designated as “protected information.” (*See*, U.S.-Panama TPA, Articles, 10.21(2), 10.21(4) and 10.29.) In addition, any documents that contain “protected information” shall be printed on **LIGHT RED** paper.
20. The Examination Bundles shall be distributed at the beginning of the relevant examination.
21. The Party using Examination Bundles shall have 7 copies available for distribution to: each Member of the Tribunal (3 copies); the Secretary of the Tribunal (1 copy); opposing counsel (1 copy); witness(es) or expert(s) being examined in person (1 copy); and the court reporter (1 copy). For any witness(es) or expert(s) that will testify in Spanish, the Party using the Examination Bundle shall produce 2 additional copies: interpreters (1 copy) and Spanish court reporter (1 copy), for a total of 9 copies.
22. Absent any different agreement by the Parties, for any examination by video conference, a copy of the full Electronic Core Bundle will be provided to the witness or expert in advance of the examination, *in lieu* of a hard copy Examination Bundle. The full Electronic Core Bundle for the witness or expert shall be delivered in a manner to be arranged between the Parties. Should the Parties reach a different agreement in connection with this matter, they shall inform the Tribunal no later than at the end of the Principal Hearing on **2 August 2019**.

3. Demonstrative Exhibits

23. Section 17.8 of Procedural Order No. 1 concerning Demonstrative Exhibits applies. In principle, Demonstrative Exhibits are to be distributed to opposing counsel 30 minutes before they are presented to the Tribunal but at a natural break. If practical difficulties to comply with this advance notice arise, the Parties will bring the difficulty to the Tribunal’s attention at an appropriate time during the Hearing and the Tribunal shall provide guidance then.
24. The Parties understand that Demonstrative Exhibits are not an opportunity to submit, nor should they resemble supplementary briefs. Demonstrative Exhibits shall indicate the source of the information contained therein through references to the record.
25. Each Party shall have at least 8 hard copies of any Demonstrative Exhibit available for distribution to: each Member of the Tribunal (3 copies), the Secretary of the Tribunal (1 copy), opposing counsel (1 copy), the court reporter(s) (2 copies), and the interpreters (1 copy, if interpretation is being used the day the Demonstrative Exhibit is distributed).

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26. In addition, promptly after the conclusion of the Hearing day in which the corresponding Demonstrative Exhibit is used, the Parties shall upload each Demonstrative Exhibit to the case folder in the electronic file sharing system (“BOX”), with the required CD-__ or RD-__ number.

F. Witness and Experts Examinations

27. The Parties have provided the notices of witnesses and experts to be examined in accordance with the Procedural Calendar – Amendment No. 5. One of those witnesses (Ambassador Emanuel Gonzalez-Revilla) will be examined via video conference to be conducted on 28 August 2019. The Tribunal does not wish to examine any witness or expert not called by the Parties.
28. The rules and procedure concerning the conduct of examinations and sequestration rules are established in Procedural Order No. 1, Section 19, with the following amendment with respect to direct examination of experts:

Section 19.8.2 of Procedural Order No. 1, which provides for a brief direct examination limited to the scope of prior testimony, shall apply to the examination of witnesses. However, the Parties’ experts may provide a brief presentation on the subject of their expert testimony *in lieu* of direct examination, provided that to the extent any evidence has been submitted after an expert’s last report, then that expert may address such evidence. The expert may not produce or rely on evidence not previously discussed or submitted in the written submissions. Consistent with Section 19.8.3 of Procedural Order No. 1, each expert’s presentation may not exceed 30 minutes.

G. Interpretation

29. In accordance with Section 11.7 of Procedural Order No. 1, the Parties have notified the Tribunal that the following experts require interpretation (Spanish-English): Mr. Adán Arnulfo Arjona, Mr. Edwin Molino Garcia, Mr. Jorge Lee and Ms. Marissa Lasso de la Vega Ferrari.
30. The Parties have agreed that simultaneous interpretation (English-Spanish-English) shall be available during Days 1 (for opening statement), 2 and 3 of the Principal Hearing. The Respondent shall notify by **15 July 2019** whether interpretation will be required for the other days of the Principal Hearing.
31. The VC Hearing on 28 August 2019 will be conducted in English only, with no interpretation required. (*See*, the Claimants’ email of 14 June 2019 and the Respondent’s email of 25 June 2019).

H. Audio Recording and Transcripts

32. The provisions of Procedural Order No. 1, Section 22.1 concerning audio recording apply.

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33. The provisions of Procedural Order No. 1, Sections 22.2 and 22.3 concerning transcripts apply, with the following clarifications:
- There shall be real-time English court reporting during all days of the Principal Hearing, and Spanish real-time court reporting only during those days in which there are experts testifying in Spanish (namely, Day 2 and Day 3 of the Principal Hearing).
 - There shall not be real-time court reporting during the VC Hearing of 28 August 2019. An English transcript for the VC Hearing on 28 August 2019 shall be prepared based on the audio recording.
 - The Parties will confer and agree to the method for reviewing, correcting, and redacting the transcripts immediately following the Hearing. As agreed, the Parties shall submit to the Tribunal their joint corrections and redactions of the transcript for the Principal Hearing by **30 August 2019**.
 - The Parties shall agree to a date for the correction and redaction of the transcript of the VC Hearing of 28 August 2019 upon receipt of the transcript from the court reporter.

I. Pre-Hearing Skeleton

34. The Parties have agreed that there shall not be Pre-Hearing Skeletons.

J. Post-Hearing Briefs

35. The Parties have agreed to submit Post-Hearing Briefs by **25 September 2019** (*i.e.* 4 weeks after the VC Hearing).
36. Post-Hearing Briefs shall be limited to 50 letter-sized pages (double-spaced, 12pt Times New Roman font) and footnotes shall be limited to references only.

K. Statement on Costs

37. The Parties have agreed that each Party shall submit a Statement of Costs by **16 October 2019**. The Statements of Costs shall be limited to 15 letter-sized pages (double-spaced, 12pt Times New Roman font). The Tribunal will provide guidance as to the approach and level of detail required for the Statement of Costs at the end of the Principal Hearing.

L. Attendance of the “non-disputing Party”

38. As agreed by the Parties, representatives of the United States of America (the “non-disputing Party” under the U.S.-Panama TPA) are allowed in the Hearing room. The United States of America has confirmed its intent to make an oral submission pursuant to Article 10.20(2) of the U.S.-Panama TPA. The Tribunal will inform the United States of America that its oral submission is scheduled to take place on Day 1 of the Principal Hearing.

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M. Transparency

39. In accordance with Article 10.21(2) of the U.S.-Panama TPA, and Section 21.6 of Procedural Order No. 1, the Principal Hearing and the VC Hearing shall be public.
40. As agreed by the Parties, the Principal Hearing will be made public via *real-time* streaming in the English language on the ICSID Website. An announcement to this effect shall be published on the ICSID Website.
41. In turn, it is agreed that the VC Hearing will be recorded and the recording will be streamed in the English language on the ICSID Website on the following day (29 August 2019), such that the recording will not be permanently uploaded on the ICSID Website. An announcement to this effect shall be published on the ICSID Website.
42. The index of the Electronic Core Bundle and the index of any Examination Bundle shall identify with **RED** material that has been designated as “protected information” as indicated *supra*, ¶¶ 14 and 19.
43. The Parties have agreed on a protocol to prevent public disclosure of “protected information”, included as **Annex B**.

N. Other Matters

44. During the Pre-Hearing Call, the Respondent objected to counsel for the Claimants located in London to join the VC Hearing from the same site as the President of the Tribunal in the absence of counsel from the Respondent. In light of that objection, the President of the Tribunal shall join the VC Hearing on his own. Counsel for the Claimants located in London shall join from their own VC facilities.

O. Logistical Details

45. The logistical details (*e.g.*, confirmation of Hearing room and break-out room, list of Hearing participants, set up details, court reporting arrangements, internet access, audio-visual equipment and catering orders) will be handled through correspondence directly by the ICSID Hearing Organization Team.

For and on behalf of the Tribunal,

—[Signed]_____

Lord Nicholas Phillips Baron of Worth Matravers
President of the Tribunal

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**ANNEX A
AGENDA FOR THE PRINCIPAL HEARING¹**

Date	Procedural Step
Monday, 29 July 2019	U.S. Oral Submission
Monday, 29 July 2019	Claimants' Opening
Monday, 29 July 2019	Respondent's Opening
Monday, 29 July 2019 to Tuesday, 30 July 2019	Mr. Thomas R. Kingsbury
Tuesday, 30 July 2019	Mr. Adán Arnulfo Arjona (<i>Spanish</i>)
Tuesday, 30 July 2019 to Wednesday, 31 July 2019	Mr. Jorge Federico Lee (<i>Spanish</i>)
Wednesday, 31 July 2019	Mr. Edwin Molino Garcia (<i>Spanish</i>)
Wednesday, 31 July 2019	Ms. Marissa Lasso de la Vega Ferrari (<i>Spanish</i>)
Thursday, 1 August 2019	Ms. Roberta Jacobs-Meadway
Thursday, 1 August 2019	Ms. Nadine H. Jacobson
Thursday, 1 August 2019	Mr. Brian M. Daniel
Friday, 2 August 2019	Mr. Gabriel Fried
Friday, 2 August 2019	Mr. Matthew Shopp
Friday, 2 August 2019	Claimants' Closing
Friday, 2 August 2019	Respondent's Closing

¹ This agenda serves as a general guide only, in the understanding that the estimated days for a given step may vary having regard to the fact that the Hearing will operate under a chess clock system and according to the principles set forth in *supra*, ¶ 11.

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**ANNEX B
PROTOCOL FOR PROTECTION OF “PROTECTED INFORMATION”**

1. Objectives

1. These protocols are established to ensure:
 - (a) The maximum transparency of the Hearing, under the transparency regime established by Article 10.21 of the U.S.-Panama TPA.
 - (b) The confidentiality of “protected information” (as defined in Article 10.29 of the U.S.-Panama TPA) excluded from disclosure under the regime established in Article 10.21 of the U.S.-Panama TPA.
 - (c) An efficient, smooth and minimally disrupted Hearing.

2. General Rules

2. As agreed by the Parties, the Hearing will be broadcasted in *real-time* through the ICSID Website.
3. “Protected information” shall be protected from disclosure by holding relevant parts of the Hearing “in private”, instead of publicly.
4. The privacy of the Hearing shall be achieved, when necessary, through the moderation of the video feed, and the redaction of relevant parts of the transcripts before publication.
5. The term “moderation” means that the video feed will be muted and the screen will be showing a sign indicating that the Hearing is temporarily held “in private”.
6. The Parties shall follow the protocols established below to alert the Tribunal of the use of “protected information” during the Hearing and request the “moderation” of the video feed.

3. Protocols

7. A Party may request at any time during the Hearing that part of the Hearing be held “in private” and that the broadcast be moderated temporarily to prevent disclosure of “protected information”.
8. The Parties shall request moderation of the video feed **before** the “protected information” is discussed, addressed or shown at the Hearing (whether by the counsel or by witnesses or experts).
9. Requests for moderation of a real-time video feed **cannot** be accommodated after alleged “protected information” has been discussed, addressed or shown at the Hearing by the other Party or by the witness or expert.

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10. To avoid delayed requests for moderation, which may result in a breach of confidentiality, the Parties are responsible to identify, **before** discussing, addressing or showing (whether through counsel submissions or through witnesses or experts examination) documents or information, whether these are “protected information” or could raise confidentiality issues.
11. To minimize the number of interruptions, the Parties are invited to organize the topics addressed during their oral statements and witness/expert examinations so that those which involve “protected information” are grouped together, wherever possible.
12. Each Party shall designate one member of its legal team who shall be responsible for bringing moderation requests to the Tribunal’s attention.
13. The Parties shall request moderation of the video feed both orally and by using the **RED** sign provided by the Secretary of the Tribunal before the start of the Hearing.
14. The Parties shall request the resumption of the video feed both orally and using the **GREEN** sign provided by the Secretary of the Tribunal before the start of the Hearing.
15. When the Parties request the moderation or resumption of the video feed, the Secretary of the Tribunal shall inform the technician in charge of the video feed, using audiovisual alert device located in the technical booth. A **RED** light will be shown in the Hearing room to signal to participants when the video feed is closed to the public.
16. If a Party has an objection to the moderation or resumption of the video feed requested by the other Party, it shall immediately alert the Tribunal, which shall hear the Parties and decide on the matter. The discussion between the Parties and the Tribunal shall be held “in private” and the transcript shall be marked “confidential”.
17. If the Tribunal decides that documents and information about to be discussed, addressed or shown warrant the Hearing to be temporarily held “in private”, the video feed shall be moderated per the Tribunal’s instructions.
18. Resumption of the video feed shall be requested by the Party which requested and obtained moderation (subject to any objection to resumption under protocol 16 above) or proposed by the Tribunal. Resumption may also be requested by the other Party if it deems it necessary. The Tribunal shall rule on any dispute between the Parties in that respect.

4. Additional Issues

19. If either Party intends to refer during the Hearing to any document that has been classified as “Restricted Information,” that Party shall notify the Tribunal immediately **before** advertent to such document in the manner described above. In addition to the moderation procedure described above, the Hearing shall then be suspended temporarily to enable withdrawal from the Hearing room of any persons in attendance who are not permitted to view the documents or hear discussions about their contents. At present, only the following individuals are so permitted: official representatives of the Republic of Panama, counsel for Claimants, counsel

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for Panama, Mr. Kingsbury, Mr. Arjona, Mr. Lee, and Mr. Paulsson. It is understood also that the Members of the Tribunal, the Secretary of the Tribunal, court reporter(s), interpreters, and AV technicians are also authorized to remain in the Hearing room.

20. With respect to demonstrative exhibits and examination bundles, in order to avoid confusion and improve efficiency, any document containing “protected information” will be printed on **LIGHT RED** colored paper.