

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Application of

Webuild S.p.A. and Sacyr S.A.,

Applicants,

To Obtain Discovery for Use in an International
Proceeding

Case No. 1:22-mc-00140-LAK

DECLARATION OF MÉLIDA N. HODGSON

I, Mélida N. Hodgson, declare as follows:

1. I am a member of the law firm Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”), counsel for the Republic of Panama (“Panama”) in the above-captioned matter.

2. Arnold & Porter is also counsel for Panama in *Webuild S.p.A. v. Republic of Panama*, ICSID Case No. ARB/20/10, filed March 11, 2020 (the “Webuild Arb.”), an arbitration initiated by Applicant Webuild, S.p.A. (“Webuild”) in March 2020 against Panama pursuant to the arbitration rules of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Rules”), as administered by its International Centre for Settlement of Investment Disputes (“ICSID”), and the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (entered into force on 4 October 2010) (the “Panama-Italy Treaty”).

3. Arnold & Porter is also co-counsel for Panama in *Sacyr S.A. v. Republic of Panama*, ICSID Case No. UNCT/18/6, filed August 3, 2018 (the “Sacyr Arb.”), an arbitration initiated by Applicant Sacyr, S.A. (“Sacyr”) in August 2018 against Panama pursuant to the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “UNCITRAL Rules”) and the Agreement on the Promotion and Reciprocal Protection of

Investments between the Kingdom of Spain and the Republic of Panama (entered into force on July 31, 1998) (the “Panama-Spain Treaty”).

4. As a preliminary matter, Applicants’ Memorandum of Law and supporting declarations all insist on referring to “Panama” as the counterpart in the contracts that underlie the dispute. But that is not accurate. The counterpart in the contract for the design and construction of the third set of locks is the Autoridad del Canal de Panamá (the “Panama Canal Authority” or “ACP”). *See, e.g.*, Lamm Decl., Ex. 4 Part 1, at 4 (ECF No. 7-4, at 5) (stating that “[t]he sole object of the corporation” formed by Applicants was “to develop, implement and carry out all works related to the Contract . . . signed by the joint venture or consortium [formed by Applicants] and the Panama Canal Authority”).

5. The facts are that the entity that invited parties to bid on the expansion of the Canal, that determined to whom to award the contract for the project, that executed the contract with Applicants’ Panamanian consortium, and that is litigating the same issues underlying the investment arbitrations in various contractual arbitrations administered by the International Chamber of Commerce’s International Court of Arbitration, is the ACP, and not Panama.

6. Contrary to Applicants’ assertions, Panama was not involved in the design and development of the project, the Master Plan, the bid process, the execution of the Contract, or the retention of experts to assist the ACP at any stage of the contracting process. *See, e.g.*, Zaffaroni Decl. Exs. 5-14 (attaching various documents from the ACP, not Panama). The ACP is also the counterpart to any relevant contractual relationship with Parsons Brinckerhoff or WSP USA (“WSP”). Panama has never engaged Parsons Brinckerhoff’s or WSP’s services in connection with the Panama Canal’s third set of locks expansion project. The third set of locks expansion project fell squarely under the ACP’s powers and prerogatives and therefore was managed and supervised by the ACP.

7. On August 3, 2018, Sacyr gave notice to Panama of its intent to initiate investor-State arbitration pursuant to the Panama-Spain Treaty. In its Notice of Arbitration, Sacyr invoked its right to initiate arbitration under the UNCITRAL Rules.

8. Sacyr and Panama subsequently agreed to ask the Sacyr Tribunal to bifurcate the proceedings and decide as a preliminary jurisdictional matter whether under customary international law principles of attribution the actions of the ACP could be attributed to Panama, such that Sacyr could proceed with its treaty claims. In addition, Panama raised objections to the Tribunal's jurisdiction on the basis of *res judicata* and *lis pendens* related to the ICC Arbitrations, among other objections. As part of that bifurcated jurisdictional phase, Sacyr requested the production of documents—largely documents only the ACP, a third party to that dispute, could possess.

9. After months of disputes between the parties regarding the scope and relevance of Sacyr's requests, the Sacyr Tribunal granted some requests, denied some, and stayed some to a possible merits phase. Consistent with arbitration practice, the Sacyr Tribunal determined what documents should be ordered produced based on its assessments of what documents would be relevant and material to its determination of the jurisdictional issues in dispute. There is no reason to assume that the same arbitral tribunal is not capable of doing the same in the merits phase.

10. On February 3, 2022, the Sacyr Tribunal decided, on the basis of Article 4 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts that the structure of the ACP within the Panamanian government was such that its conduct could be attributed to Panama. In essence, the Sacyr Tribunal determined that it had jurisdiction to hear Sacyr's claims that the measures taken by the ACP could constitute treaty violations.

11. Subsequently, the Sacyr Tribunal requested that the parties agree on a procedural calendar that will govern the merits phase of the arbitration. Sacyr and Panama reached agreement on that procedural calendar in relevant part on May 18, 2022, pursuant to which there is a specific two-month document production phase.

12. The procedures reflect the nature of document production in UNCITRAL investment arbitration, which is strictly controlled by an investment tribunal's discretion. According to that calendar, the document production phase begins in May 2023 and concludes in July 2023, a typical arbitration timeframe that reflects the limited scope of document production in arbitration.

13. Notably, the document production phase falls between the first and second round of pleadings, enabling Sacyr to request documents after it has seen Panama's substantive pleadings. This procedure allows Panama to object to the production of documents and upon such objection, allows the Sacyr Tribunal to determine in its discretion whether Sacyr's requests are relevant and material to the determination of the dispute. Under this procedural structure, the Sacyr Tribunal has not yet been presented with an opportunity to decide whether the documents Sacyr seeks from this Court are or could be material and relevant to its determination of the issues in dispute, or whether it needs this Court's assistance in obtaining such documents.

14. Webuild, after having noticed a dispute on July 16, 2015 (as predecessor company Salini Impregilo S.p.A.), filed a Request for Arbitration on March 11, 2020 pursuant to the ICSID Rules and the Panama-Italy Treaty.

15. In the Webuild Arb., the parties agreed to a procedural calendar on May 21, 2021 (later modified on October 26, 2021) that was approved by the Webuild Tribunal in Procedural Orders No. 3 and 4 and includes a document production phase that would take place

between August 2022 and November 2022, unless the Webuild Tribunal decides to determine as a preliminary matter whether it has jurisdiction over Webuild's claims.

16. On May 5, 2022, Panama submitted a jurisdictional objection and requested that the Webuild Tribunal first determine whether to bifurcate the proceedings and decide whether Panama consented to arbitrate under the Panama-Italy Treaty. In short, Panama contends that the ICSID Tribunal lacks jurisdiction over Webuild's claims because the Panama-Italy Treaty, which provides Panama's consent to arbitration, excludes claims when the investor (Webuild) has an investment agreement with an entity of Panama (the ACP), and requires the investor (Webuild) to pursue its claims via the dispute settlement procedures in the agreement (ICC arbitration). Panama requested that the Webuild Tribunal resolve its jurisdictional objection as a preliminary matter, prior to reaching the merits of Webuild's claims. Pleadings are completed, with Webuild submitting a Reply on May 27, 2022. If Panama ultimately prevails on this point, there would be no Webuild arb. in which the documents sought here could be used.

17. The Webuild Tribunal has not yet reached the issue of whether, under international law, the conduct of the ACP may be attributed to Panama. It is not bound by the Sacyr Tribunal's determination.

18. Similar to the UNCITRAL Rules, the ICSID Rules provide for document exchange under the strict control of the arbitral tribunal.

19. The standard for document production in international arbitration ("document exchange") is strict, given the nature of a practice that combines procedural practices and evidentiary principles of at least two legal systems (civil and common law) with differing, sometimes opposing, views on the ability of a party to compel the production of documents not yet deemed material to the resolution of the dispute by the trier of fact, or that may never be produced as evidence in the dispute.

20. Neither of the Tribunals in the investment arbitrations was presented with advance (i) notice of Applicants' § 1782 request, (ii) opportunity to determine whether the documents that each Applicant seeks here are material and relevant or (iii) opportunity to direct the parties in any way with respect to Applicants' § 1782 request.

21. As additional context regarding Applicants' behavior in connection to document production, during the jurisdictional phase in the Sacyr arbitration, Panama sought the assistance of the ACP in order to comply with the Tribunal's instruction to produce documents requested by Sacyr. Panama subsequently produced documents obtained from the ACP to Sacyr. Upon information and belief, Sacyr subsequently attempted to use two of those documents in the Lock Gates ICC Arbitration—to which Panama is not a party—against the ACP.

22. In an effort to discuss Panama's requested intervention in this matter and its objections to the discovery sought, counsel for Panama communicated with counsel for Applicants via electronic mail and during a telephonic conference conducted on June 8, 2022. Applicants, among other things, refused to consent to Panama's intervention in this action, disagreed that their instant § 1782 request violates Panama's proof-gathering and document production rules in the Underlying Proceedings, and rejected Panama's position that any discovery of WSP stemming from Applicants' subpoena, which was served pursuant to § 1782, should be delayed pending the Supreme Court's forthcoming guidance in *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, 142 S. Ct. 638 (2021).

23. During the June 8, 2022 call, David Hille, a member of White & Case, represented that White & Case represents both Webuild and Sacyr in this § 1782 proceeding.

24. Attached as **Exhibit A** is a true and correct copy of an English translation of Law No. 19 of 1997 (the Organic Law of the Panama Canal Authority).

25. Attached as **Exhibit B** is a true and correct copy of the “Assignment and Acceptance Agreement between GUPC Consortium, GUPCSA and ACP” dated May 31, 2010.

26. Attached as **Exhibit C** is a true and correct copy of excerpts of the “Conditions of Contract” for the Design and Construction of the Third Set of Locks.

27. Attached as **Exhibit D** is a true and correct copy of the Declaration of Nicholas Henchie dated August 3, 2021 and filed in *Grupo Unidos Por El Canal, S.A. v. Autoridad del Canal de Panamá*, No. 1:20-cv-24867 (S.D. Fla. Aug. 6, 2021) (ECF No. 57-1).

28. Attached as **Exhibit E** is a true and correct copy of the July 20, 2017 Final Award in the Cofferdam Arbitration, ICC Arbitration No. 19962/ASM/JPA.

29. Attached as **Exhibit F** is a true and correct copy of the February 17, 2021 Final Award in the Concrete Arbitration, ICC Arbitration No. 20910/ASM/JPA (C-20911/ASM).

30. Attached as **Exhibit G** is a true and correct copy of the December 10, 2018 Final Award in the Advance Payments Arbitration, ICC Arbitration No. 22588/ASM/JPA.

31. Attached as **Exhibit H** is a true and correct copy of UNCITRAL Rules Article 24.

32. Attached as **Exhibit I** is a true and correct copy of ICSID Arbitration Rules – Rule 34 Evidence: General Principles.

33. Attached as **Exhibit J** is a true and correct copy of Procedural Order No. 3 in *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Republic of Panama*, ICSID Case No. ARB/20/10.

34. Attached as **Exhibit K** is a true and correct copy of Procedural Order No. 4 in *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Republic of Panama*, ICSID Case No. ARB/20/10.

35. Attached as **Exhibit L** is a true and correct copy of Procedural Order 1 in *Sacyr S.A. v. Republic of Panama*, ICSID Case No. UNCT/18/6.

36. Attached as **Exhibit M** is a true and correct copy of Procedural Order 1 in *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Republic of Panama*, ICSID Case No. ARB/20/10.

37. Attached as **Exhibit N** is a true and correct copy of excerpts of the official Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

38. Attached as **Exhibit O** is a true and correct copy of the subpoena White & Case (as counsel for GUPCSA) sought to serve on Parsons Brinckerhoff in *In re Grupo Unidos por el Canal, S.A.*, No. 1:14-mc-00405 (S.D.N.Y. Dec. 5, 2014) (ECF No. 3-2).

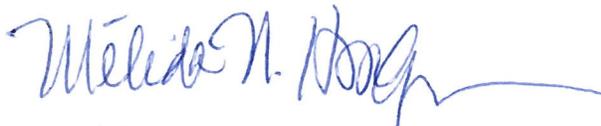
39. Attached as **Exhibit P** is a chart comparing the key similarities between the 2014 Parsons Brinckerhoff subpoena and the 2022 WSP USA subpoena.

40. Attached as **Exhibit Q** is a true and correct copy of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

41. Attached as **Exhibit R** is a true and correct copy of the Brief for the United States as Amicus Curiae Supporting Petitioners filed with the U.S. Supreme Court in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401, and *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States*, No. 21-518.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of June 2022 in New York, New York.



Mélida N. Hodgson