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

Misc. Action No. 22-140

CONSOLIDATED RESPONSE IN OPPOSITION TO (i) THE REPUBLIC OF PANAMA'S MOTION TO INTERVENE, TO VACATE THE COURT'S MAY 19, 2022 ORDER, AND TO QUASH THE WSP USA SUBPOENA AND (ii) WSP USA'S MOTION TO QUASH THE SUBPOENA AND VACATE THE COURT'S MAY 19, 2022 ORDER

David Hille
WHITE & CASE
1221 Avenue of the Americas
New York, NY 10020
Phone: (212) 819-8200
Fax: (212) 354-8113

Carolyn B. Lamm
Hansel T. Pham
Matthew Drossos
WHITE & CASE
701 Thirteenth St. NW
Washington, DC 20005
Phone: (202) 626-3600

July 15, 2022

Counsel for Webuild S.p.A

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

PRELIMINARY STATEMENT 1

BACKGROUND 2

- A. The Parties and the Project 2
- B. GUPC's ICC Proceedings 3
- C. The ICSID Proceeding 4
- D. The § 1782 Proceedings 6

ARGUMENT 8

I. THE COURT PROPERLY GRANTED AND SHOULD NOT QUASH WEBUILD'S § 1782 APPLICATION AND REQUEST FOR SUBPOENA 8

- A. The Supreme Court's Decision in *ZF Automotive* Does Not Foreclose § 1782 Discovery in Aid of an ICSID Arbitration 8
  - 1. Under *ZF Automotive*, § 1782 discovery is available for proceedings before foreign or international tribunals "imbued with governmental authority" 8
  - 2. ICSID arbitral tribunals are "imbued with governmental authority" 12
- B. The Court Properly Exercised Its Discretion to Grant Webuild's Application and Should Not Vacate Its Order 25
  - 1. The nature and character of the ICSID proceeding and the likely receptivity of the ICSID tribunal to any discovery received weigh in favor of Webuild's Application 26
  - 2. Webuild's Application does not circumvent the applicable proof-gathering policies of the ICSID Tribunal 29
  - 3. Webuild's discovery requests are not unduly intrusive and burdensome 32
- C. Webuild's Discovery Requests Do Not Violate the Federal Rules of Civil Procedure 33

II. THE COURT SHOULD DENY PANAMA'S REQUEST TO INTERVENE 38

CONCLUSION 40

TABLE OF AUTHORITIES

CASES Page(s)

BG Group plc v. Republic of Argentina,
572 U.S. 25, 37 (2014) 24

Brandi-Dohrn v. IKB Deutsche Industriebank AG,
673 F.3d 76 (2d Cir. 2012)....25, 26, 27

Building and Realty Institute of Westchester and Putnam Counties, Inc. v. New York,
No. 19-cv-11285, 2020 WL 5667181 (S.D.N.Y. Sept. 23, 2020) 39

CBF Industria De Gusa S/A v. AMCI Holdings, Inc.,
850 F.3d 58 (2d Cir. 2017) 19, 20

Cont'l Cas. Co. v. Argentine Republic,
893 F. Supp. 2d 747 (E.D. Va. 2012) 22

Euromepa S.A. v. R. Esmerian, Inc.,
51 F.3d 1095 (2d Cir. 1995)....32

Infrared Envtl. Infrastructure GP Ltd. v. Kingdom of Spain,
No. 20-817 (JDB), 2021 WL 2665406 (D.D.C. Jun. 29, 2021)....24

Infrastructure Servs. Lux. S.A.R.L. v. Kingdom of Spain,
No. 18-1753 (EGS), 2019 WL 11320368 (D.D.C. Aug. 28, 2019) 23

In re Accent Delight Int'l Ltd.,
696 F. App'x 537 (2d Cir. 2017) 25

In re Application of Kreke Immobilien KG,
No. 13 Misc. 110(NRB), 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013) 35, 36

In re Application of Atvos Agroindustrial Investimentos S.A.,
481 F. Supp.3d 166 (S.D.N.Y. 2020)....26

In re Application of Banco Satander (BRASIL) S.A.,
No. 22-mc-00022 (ALC) (SN), 2022 WL 1546663 (S.D.N.Y. Apr. 6, 2022) 36

In re Application of Habib, No. 21-mc-522, 2022 WL 1173364
(S.D.N.Y. Apr. 20, 2022) 26

In re Application of Pidwell,
No. 1:21-MC-0166 (ALC)(KHP), 2022 WL 192987
(S.D.N.Y. Jan. 21, 2022) 33, 34, 35

In re Application of Roessner, No. 21-mc-513, 2021 WL 5042861
(S.D.N.Y. Oct. 29, 2021) 26, 27, 29

In re Application of the Children's Inv. Fund Found.,
363 F. Supp. 3d 361 (S.D.N.Y. 2019)....................34

In re Application of Warren,
No. 20-mc-208 (PGG), 2020 WL 6162214
(S.D.N.Y. Oct. 21, 2020) 31

In re Bank of N.Y. Derivative Litig.,
320 F.3d 291 (2d Cir. 2003) 39

In re Evenstar Master Fund SPC,
No. 20-mc-418 (S.D.N.Y. Nov. 23, 2021) 36

In re Ex Parte Eni S.P.A., No. 20-mc-334-MN,
2021 U.S. Dist. LEXIS 52304 (D. Del. Mar. 19, 2021) 9

In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP,
5 F. 4th 216 (2d Cir. 2021) 11

In re Hornbeam Corp.,
722 F. App'x 7 (2d Cir. 2018) 28

In re Metallgesellschaft AG,
121 F.3d 77 (2d Cir. 1997) 30

In re Republic of Kazakhstan,
110 F. Supp.3d 512 (S.D.N.Y. 2015) 29

In re Republic of Turkey, No. 19-20107 (ES) (SCM),
2020 WL 4035499 (D.N.J. July 17, 2020) 29

In re Subpoenas Served on Lloyds Banking Grp.,
21-MC-00376 (JGK)(SN), 2021 WL 3037388
(S.D.N.Y. July 19, 2021) 37

In re Top Matrix Holdings Ltd.,
No. 18-mc-465 (ER), 2020 WL 248716
(S.D.N.Y. Jan. 16, 2020) 34

Intel Corp. v. Advanced Micro Devices, Inc.,
542 U.S. 241 (2004).................... *passim*

Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP,
No. 18-103 (RMC), 2019 U.S. Dist. LEXIS 61780
(D.D.C. Apr. 10, 2019) 9

Karaha Bodas v. Negara,
500 F.3d 111 (2d Cir. 2007) 20

Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore LLP,
895 F.3d 238 (2d Cir. 2018) 31

Mees v. Buiter, 793 F.3d 291
(2d Cir. 2015) .... *passim*

Micula v. Gov't of Romania,
404 F. Supp. 3d 265 (D.D.C. 2019) 23

Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela,
863 F3d 96 (2d Cir. 2017)....................21, 22

NextEra Energy Global Holdings B.V. v. Kingdom of Spain,
No. 19-cv-01618 (TSC), 2020 WL 5816238 (D.D.C. Sept. 30, 2020)....................24

NBC v. Bear Stearns & Co.,
165 F.3d 184 (2d Cir. 1999) 9

OI European Grp. B.V. v. Bolivarian Republic of Venez.,
No. 16-1533 (ABJ), 2019 WL 2185040 (D.D.C. May 21, 2021) 23

"R" Best Produce, Inc. v. Shulman-Rabin Marketing Corp.,
467 F.3d 238 (2d Cir. 2006) 38

Republic of Kazakhstan v. Biedermann Int'l,
168 F. 3d 880 (5th Cir. 1999) 9

Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n,
356 F. Supp. 3d 287 (S.D.N.Y. 2018) 39

Sàrl v. Bolivarian Republic of Venez.,
514 F. Supp. 3d 20 (D.D.C. 2020)....................23

Seed Holdings, Inc. v. Jiffy Int'l,
5 F. Supp. 3d 565 (S.D.N.Y. 2014) 19

Servotronics, Inc. v. Rolls-Royce PLC,
975 F. 3d 689 (7th Cir. 2020) 9

Teco Guatemala Holdings, LLC v. Republic of Guatemala,
414 F. Supp. 3d 94 (D.D.C. 2019) 21, 22, 23

Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.,
922 F.2d 92 (2d Cir. 1990) 39

ZF Automotive US Inc. v. Luxshare Ltd.,
142 S. Ct. 2078 (2022).................... *passim*

STATUTES, RULES AND TREATIES

Arbitration Rules of the United Nations Commission on
International Trade Law ("UNCITRAL") 8, 9, 10

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(the "New York Convention"), June 10, 1958, 21 U.S.T. 2517 .... *passim*

Fed. R. Civ. P. 24(a)(2)....................38

Fed. R. Civ. P. 24(b)(2)....................38

International Bar Association Rules on the Taking of
Evidence in International Arbitration ("IBA Rules") 30, 31

9 U.S.C. § 207....................19

22 U.S.C. § 1650....................16

28 U.S.C. § 1782.................... *passim*

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J. Int'l Arb. 32, no. 6 (2015) 23

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Arbitration (Lew, Mistelis & Kroll eds. 2003) 18

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Webuild S.p.A ("Webuild" or "Applicant), formerly known as Salini Impregilo S.p.A., successor company to Impregilo, hereby submits this consolidated Opposition to the Republic of Panama's ("Panama") Motion to Intervene, to Vacate the Court's May 19, 2022 Order, and to Quash the WSP USA Subpoena (ECF No. 15, "Panama Mot."), and to WSP USA Inc.'s ("WSP") Motion to Quash Subpoena and to Vacate the Court's May 19, 2022 Order (ECF No. 23, "WSP Mot."). This Opposition is further supported by (i) the second declaration of Carolyn B. Lamm ("Second Lamm Decl."), who is lead counsel to Webuild in the underlying arbitration proceeding at issue (the "*Webuild* arbitration"), and (ii) the expert report of Christoph Schreuer ("Schreuer Report"), a leading authority in international investment law, and author of numerous works concerning arbitrations under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"), including the seminal treatise *The ICSID Convention: A Commentary*.

PRELIMINARY STATEMENT

Webuild sought in good faith discovery from WSP pursuant to 28 U.S.C. § 1782 in aid of a proceeding against Panama before an international tribunal. As fully explained in Webuild's Application, the evidence sought from WSP is relevant and material to Webuild's claims in the underlying arbitration that Panama violated the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (the "BIT"), including the BIT's fair and equitable treatment provision and protections against unjust and discriminatory measures, as alleged in the arbitration. *See* Webuild App. 10–11, ECF No. 3, ("Webuild App."). Indeed, this Court already has determined that Webuild's Application meets both the statutory requirements and discretionary factors warranting discovery in this action. *See* ECF No. 11.

Panama now seeks to intervene in this action, and WSP has appeared, to vacate the Court's Order granting discovery, and to quash the subsequent subpoena issued to WSP. For the reasons discussed below, Panama and WSP's Motions should be denied.

First, Webuild's Application meets the statutory requirements for § 1782. The Supreme Court's decision in *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078 (2022), does not foreclose, and indeed supports, a holding that Webuild's investment arbitration, administered

under the auspices of ICSID, is a "proceeding in a foreign or international tribunal" within the meaning of § 1782. This is because, as described below, and in detail by Webuild's expert Christoph Schreuer, an arbitral tribunal constituted under the ICSID Convention is imbued with the governmental authority contemplated by the Supreme Court. *See Convention on the Settlement of Investment Disputes between States and Nationals of other States*, Mar. 18, 1965, 17 U.S.T. 1270 (the "ICSID Convention") (ECF 7-17).

Second, the Court properly exercised its discretion and found that Webuild's Application satisfied the applicable factors under *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), because (1) WSP is not a party to the foreign proceeding; (2) the ICSID tribunal may be receptive to (and there is no proof it would reject) the discovery; (3) there are no other proof-gathering measures available to obtain the evidence from WSP; and (4) Webuild's discovery requests are not unduly burdensome.

Finally, Panama has failed to establish that it may intervene of right. Specifically, it has failed to show that existing parties, namely WSP, cannot adequately represent the interests of Panama in this proceeding. Both seek the same result (and, indeed, WSP has largely duplicated Panama's motion), and as such, intervention is not warranted.

BACKGROUND

A. The Parties and the Project

Applicant Webuild is a global construction firm specialized in building large works and complex infrastructure projects. *See* Webuild App. 2. Together with three other companies, Webuild forms the consortium, GUPC S.A. ("GUPC"), which carried out the Panama Canal expansion project (the "Project") that was completed in 2016. *Id.* GUPC completed the Project by investing significant additional and uncompensated funds into the Project, while Panama repeatedly undermined the Project through a series of wrongful and unreasonable acts, including by misrepresenting and failing to disclose key information related to the Project, by shifting all of the commercial risk onto GUPC, and by outright refusing to accept responsibility for the additional costs GUPC was forced to incur during the Project. *Id.* at 8–9. The full extent of the underlying

Project is discussed in greater detail in Webuild's Application (ECF No. 3), at 4–9.

Panama is the sole respondent in Webuild's ICSID arbitration (*i.e.*, the *Webuild* arbitration). Through its organ and instrumentality the Panama Canal Authority ("ACP"), Panama has exclusive responsibility for the "operation, improvement, and modernization of the Canal, as well as supervising its management." *Id.* at 2.

WSP, from which discovery is sought in this proceeding, is a multinational company and the successor to Parsons Brinckerhoff, a primary consultant to Panama for the referendum approving the Project, and prior to and during the Project's construction. *Id.* at 2–4. According to WSP, "as program advisors" to ACP in connection with the Project, it "worked alongside the ACP to decide what the final project was going to look like." *Id.* at 3 (citing WSP, "Panama Canal: Expansion into the 21st Century," *available at* https://www.wsp.com/en-US/projects/panama-canal-expansion (last accessed May 15, 2022) (ECF 7-13)). WSP also "reviewed over a hundred studies and reports about what currently existed and what was possible, in order to build a plan that took all opportunities and restrictions into account." *Id.* WSP also "developed and integrated five models—capability, operation costs, market demand, hydrologic and financial—to determine how to maximize economic value of the Canal" that were "used to design an implementation strategy and ultimately to prepare and strategize the bid process." *Id.* WSP thus has information in its custody and control that bears directly on the *Webuild* arbitration and the information Panama disclosed or failed to disclose to Webuild and its partners.

B. GUPC's ICC Proceedings

As noted, over the course of the Project, GUPC (including Webuild) was forced to bear significant additional costs, including costs due to GUPC pursuant to the August 11, 2009 Contract Agreement between ACP and GUPC (the "Contract") and under Panamanian law, due to Panama's misconduct and failure to inform GUPC (including Webuild) of key information—related to, *inter alia*, the Project site and its conditions and the Project's costs—and due to Panama's failure to resolve ongoing contract claims promptly, fairly, and in good faith. *See* Webuild App. 4, 8. As

required by the Contract, GUPC submitted fully supported, detailed, and legitimate claims for entitlements to cover the additional costs caused by Panama's contractual breaches and misconduct. Despite being fully aware of its responsibility and the legitimacy of GUPC's claims, Panama (through ACP), outright rejected GUPC's claims, and protracted all resolution of claims through years of dispute procedures, including through ICC arbitrations, while failing to compensate Webuild and its partners for their engineering feat. *Id.*

C. The ICSID Proceeding

As discussed in Webuild's Application (ECF No. 3), Panama violated the international treaty protections assured to Webuild's investment under the BIT. These violations included Panama's failure to accord fair and equitable treatment to Webuild, including, among other things, by creating legitimate expectations that induced Webuild's investment and then, acting in contravention to those expectations; by making clandestine adjustments to the regulatory framework in bad faith; by unfairly exerting ruinous financial pressure on Webuild; by engaging in a smear campaign to disparage Webuild; and by unjustly enriching itself at Webuild's expense. Panama also impaired Webuild's investment through unjustified and discriminatory measures, including, *inter alia*, by making targeted changes to the legal framework solely applicable to the Project and treating Webuild and its partners less favorably than other similarly situated investors, and failed to provide full legal protection to Webuild's investment, including, among other things, by failing to provide regulatory conditions known to be necessary to the Project's success. *Id.* at 8. As a result, on March 11, 2020, Webuild submitted its international investment dispute with Panama to ICSID arbitration pursuant to the BIT. *See* Webuild Request for Arbitration, ECF No. 7-16. On April 1, 2020, the ICSID Secretary General provided formal notification of the registration of the Request for Arbitration to Webuild and Panama and assigned the action ICSID Case No. ARB/20/10. *See* Lamm Decl. ¶¶ 7–8; Letter, ECF No. 7-19. Webuild is the claimant in the ICSID arbitration proceeding. Panama (which includes ACP) is the sole respondent.

The Tribunal for the *Webuild* arbitration consists of Stanimir Alexandrov, Hélène Ruiz Fabri, and tribunal president Lucy Reed. ECF No. 7, ¶ 9; Second Lamm Decl., ¶ 5. Webuild

appointed as its party-appointed arbitrator Stanimir Alexandrov, a Bulgarian national designated by the ICSID Chairman of the Administrative Council to the ICSID Panel of Arbitrators. Second Lamm Decl., ¶ 5. Panama appointed Hélène Ruiz Fabri, a French national. Ultimately when the parties could not agree on a Tribunal president, the ICSID Secretary General provided a list of ten potential nominees, from whom Lucy Reed, a U.S. national who previously was on ICSID's Panel of Arbitrators and is an experienced ICSID arbitrator, was selected. *Id.*

Pursuant to Rules 31 and 32 of the ICSID Arbitration Rules—which are established by the ICSID Administrative Council (comprised of representatives of the ICSID Member States) to complement the procedural provisions of the ICSID Convention—and following the First Session, the Tribunal in the *Webuild* arbitration established the written and oral procedure for the arbitration and set a procedural calendar. *See* ECF No. 16-13 at 14. Under the written procedure, established by ICISD Arbitration Rule 31, Webuild is required to submit all of its factual evidence and legal arguments proving each substantive treaty breach that it claims. *See id*. Webuild has since filed its initial submission, and has only until April 21, 2023, to file its final reply submission on the merits. *See* Second Lamm Decl. ¶ 11, Ex. 3). That submission must include all other evidence Webuild intends to submit, which may include evidence currently held by WSP. *Id.* ¶ 6.

On May 5, 2022, Panama notified the Tribunal that it intended to object to the Tribunal's jurisdiction, and requested bifurcation of the proceeding. *Id.*, ¶ 8. Panama did so only three months before its first submission was due, after adamantly opposing bifurcation previously, and waiting until well after Webuild filed its first submission on the merits of Webuild's claims. *Id.*

While briefing on Panama's Notice was ongoing, Panama notified the Tribunal on May 26, 2022, of this § 1782 proceeding. *Id.*, ¶ 9. In particular, Panama argued that Webuild's Application was "an abusive circumvention of the Tribunal's discretion to control document production" in the *Webuild* arbitration. *Id.* Despite those erroneous assertions, the Tribunal—now nearly two months later—has not responded. *Id.*

On June 28, 2020, the Tribunal rejected Panama's request for bifurcation, and Panama subsequently requested an extension of time to submit its merits brief. *Id.*, ¶¶ 10–11. Thus, the

merits briefing with respect to Webuild's claims and Panama's anticipated jurisdictional objection will both be presented in Panama's Counter Memorial on the Merits (*i.e.*, first response brief) due on September 16, 2022, and Webuild's Reply on the Merits due on April 21, 2023. *Id.*, ¶ 11. Briefing is expected to conclude by January 19, 2024, with a hearing expected in early 2024. *Id.*

D. The § 1782 Proceedings

Webuild submitted its Application to obtain discovery from WSP for use in the ICSID arbitration on May 17, 2022. *See* ECF Nos. 1 & 3. Finding that Webuild met its burden under § 1782, the Court granted Webuild's Application on May 19, 2022, and authorized Webuild to obtain from the clerk "a subpoena for documents in substantially the same form as Exhibit 1 to the Declaration of Carolyn Lamm." ECF No. 11 at 1. Shortly thereafter, pursuant to the Court's Order, Webuild obtained the subpoena from the clerk of court, and served the court-approved subpoena on WSP on May 26, 2022, via its registered agent. ECF No. 12.

Despite Panama and WSP's attempt to conflate this action with other § 1782 actions previously brought by GUPC (not by Webuild), those prior actions are not relevant here. Each of those actions involved different parties and concerned different private commercial arbitrations at different procedural stages and subject to different legal standards. *See, e.g.*, ECF No. 18 at 2–3, 5–7 (objecting to statement of relatedness and noting that this action is unrelated to prior GUPC actions). Specifically, the applicant in those proceedings was GUPC (not Webuild), and those applications sought discovery to substantiate various claims based on breaches of contract—not treaty violations. *Id.* The discovery requests in those applications also were tailored to the specific issues in those arbitrations, which are different than the underlying facts, claims, and legal standards at issue in the *Webuild* arbitration. *Id.* at 5. Two of those § 1782 actions concluded long before Webuild filed the present Application. *See* Panama Mot. 10.

Moreover, the one prior action Panama and WSP claim is "particularly relevant" (Panama Mot. 11; WSP Mot. 3)—*i.e.*, a 2014 application by GUPC that was initially granted by Judge Gardephe—sat dormant for seven years, and as a result, has since been voluntarily dismissed by the applicant, as this Court has acknowledged. *See* Notice of Voluntary Dismissal, *Grupo Unidos*

Por El Canal, S.A., No. 1:14-mc-00405, ECF No. 61 (S.D.N.Y. June 13, 2022) (voluntarily dismissing GUPC's application without prejudice); *see also* Order, ECF No. 25 (denying Webuild's objection to statement of relatedness as moot because 2014 action had been dismissed). Thus, contrary to Panama and WSP's assertion that the 2014 action is "pending" (Panama Mot. 11; WSP Mot. 3), that action has no bearing on Webuild's present Application. Webuild's present Application is not an attempt to "side step" a proceeding that was never resolved, and there is no risk this Court will issue discovery orders for "largely duplicative materials from the same entity" as the prior action, given there will be no ruling in that action. Panama Mot. 11; WSP Mot. 3.

Critically, Panama (or its organ ACP) has never produced the requested evidence, despite repeated promises to do so and despite document production orders by a number of tribunals in the ICC arbitrations. *See* Second Lamm Decl. ¶¶ 13-15. As a result of that obstructionist conduct, GUPC sought discovery through third parties in the above-mentioned prior § 1782 proceedings. *Id.* In those proceedings, notably, Panama (through ACP) moved to intervene and sought to prevent production on the basis that "[m]any, if not all, of the documents [GUPC] seeks . . . are in ACP's custody and control." Letter from ACP 4, *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-405 (S.D.N.Y. June 24, 2016), ECF No. 40. Moreover, Panama (through ACP) asserted that such evidence would be part of the ICC arbitration's document production process and would be produced during the course of the relevant arbitration proceedings. *See* Transcript of Hearing on ACP's Motion to Compel Compliance With the Court's Order (excerpt), *GUPC*, No. 3:14-mc-80277 (N.D. Cal.), ECF No. 32 at 30:1-31:16 (Second Lamm Decl. Ex. 6); Letter from ACP 4, *In re GUPC.*, No. 14-mc-405 (S.D.N.Y. June 24, 2016), ECF No. 40; *see also* ACP Reply 13, *In re GUPC*, No. 14-mc-226 (D. Colo. Dec. 11, 2014), ECF No. 14; Motion to Intervene, *GUPC.*, No. 14-mc-80277 (N.D. Cal. Jan. 5, 2015), ECF No. 13.

Despite these representations, however, Panama (through ACP) consistently has failed to produce, or has produced only in heavily redacted form, the requested documents, despite the tribunals' orders to produce. Second Lamm Decl. ¶ 14; *see also* Excerpt of Claimants' First Post-Hearing Brief – Table (Second Lamm Decl. Ex. 4). If the WSP subpoena is not enforced, another

tribunal will be deprived once again of evidence fundamental to its ruling.

ARGUMENT

I. THE COURT PROPERLY GRANTED AND SHOULD NOT QUASH WEBUILD'S § 1782 APPLICATION AND REQUEST FOR SUBPOENA

A. The Supreme Court's Decision in *ZF Automotive* Does Not Foreclose § 1782 Discovery in Aid of an ICSID Arbitration

Panama and WSP assert that the Court should vacate its Order granting Applicant's Application for § 1782 discovery because, they claim, the U.S. Supreme Court's recent decision in *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078 (2022) foreclosed § 1782 discovery in aid of the investment treaty arbitration underlying this case. Panama Notice of Suppl. Authority 1–2 (ECF 19). Panama and WSP are wrong. While the Supreme Court held that § 1782 applications could not be made in aid of commercial arbitrations or ad hoc arbitrations under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), (*ZF Automotive*, 142 S. Ct. at 2089-91), it neither expressly nor implicitly foreclosed the use of § 1782 in aid of arbitrations brought under the ICSID Convention, like the arbitration at issue here. This is the case because, as described further below, ICSID arbitrations, unlike the two arbitrations at issue in *ZF Automotive*, are "imbued with governmental authority," as required within the meaning of § 1782. *Id.* at 2087. Indeed, Congress could have drafted § 1782 to foreclose discovery in aid of ICSID arbitrations, but it did not.

1. Under *ZF Automotive*, § 1782 discovery is available for proceedings before foreign or international tribunals "imbued with governmental authority"

Prior to *ZF Automotive*, the Supreme Court recognized in *Intel* that the language in § 1782 authorizing U.S. judicial assistance in aid of "foreign or international tribunals" allows parties to petition district courts for discovery "in connection with administrative and quasi-judicial

proceedings abroad." *Intel*, 542 U.S. 241, 257–58 (2004) (cleaned up). The broad holding in *Intel* left open the question of whether international arbitration qualified as a proceeding before a foreign or international tribunal for the purposes of § 1782, which led to several decisions by lower courts addressing the issue. A number of lower courts have since held that judicial assistance under § 1782 was not available in aid of private commercial arbitrations. *See, e.g.*, *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F. 3d 880, 883 (5th Cir. 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F. 3d 689, 696 (7th Cir. 2020). No lower courts, however, doubted that § 1782 was available in aid of ICSID arbitrations. *See, e.g.*, *Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP*, No. 18-103 (RMC), 2019 U.S. Dist. LEXIS 61780, at *19 (D.D.C. Apr. 10, 2019) ("[Counsel] has identified no split regarding ICSID cases."); *In re Ex Parte Eni S.P.A.*, No. 20-mc-334-MN, 2021 U.S. Dist. LEXIS 52304, at *9 (D. Del. Mar. 19, 2021) ("Respondents have not identified contrary authority that puts [applicant's] ICSID arbitration outside the scope of § 1782.").

ZF Automotive involved applications for § 1782 discovery in aid of two separate, unrelated arbitration proceedings, neither of which was an ICSID arbitration: first, a private commercial arbitration between two corporations before a private arbitral institution seated in Germany, and second, an ad hoc arbitration under the UNCITRAL Arbitration Rules between Lithuania and a Russian investor pursuant to the Russia-Lithuania bilateral investment treaty (the "Russia-Lithuania BIT"). *ZF Automotive*, 142 S. Ct. at 2084–86. The question at issue was whether either such arbitration proceeding constituted "a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). The Supreme Court began by explaining that while the term "tribunal" may broadly encompass any adjudicative body (*ZF Automotive*, 142 S. Ct. at 2084–86), the language and legislative history of § 1782 indicate that a "foreign" tribunal is best understood as an

adjudicative body that exercises governmental authority conferred by another nation, while an "international" tribunal is one that exercises governmental authority conferred by multiple nations. *Id.* at 2084–86. In short, the Supreme Court held that § 1782 discovery could be obtained only in aid of foreign and international tribunals "imbued with governmental authority," whether by one or multiple nations. *Id.* at 2087.

The Supreme Court then evaluated the arbitrations at issue in the two cases before it—neither of which, again, involved proceedings under the ICSID Convention. *Id.* at 2084–86. The Supreme Court readily determined that a purely private commercial arbitration did not involve an adjudicative body "imbued with governmental authority" and thus was excluded from § 1782. *Id.* at 2089. Specifically, the court emphasized that "[n]o government is involved in creating the [commercial arbitration] panel or prescribing its procedures." *Id*.

While the Supreme Court recognized that the ad hoc arbitration conducted under the UNCITRAL Arbitration Rules posed a "harder question" than the commercial arbitration, (*id.*), the court ultimately reasoned that the ad hoc tribunal also did not qualify as a foreign or international tribunal for purposes of § 1782 because it was not a "pre-existing body" that the sovereign states intended to imbue with governmental authority. *Id.* at 2089–91. Rather, the court noted, the ad hoc tribunal was formed solely as a result of the states' consent to arbitration in accordance with the UNCITRAL Arbitration Rules under the Russia-Lithuania BIT. *Id*. The Supreme Court explained that:

> [N]othing in the [Russia-Lithuania BIT] reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. For instance, the [BIT] does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum. In addition, the ad hoc panel 'functions independently' of and is not affiliated with either Lithuania or Russia. It consists of individuals chosen by the parties and lacking any 'official affiliation with Lithuania, Russia, or any other governmental or intergovernmental body.' *Id.* at 2090.

The Supreme Court further observed that the ad hoc tribunal lacked other "indicia of a governmental nature" that exist in other bodies widely recognized as international tribunals. *Id.* The court noted, for example, that the treaty establishing the United States-Germany Claims Commission—a tribunal "qualify[ing] as intergovernmental"—"specified where the commission would initially meet, the method of funding, and that the commissioners could appoint other officers to assist in the proceedings," which indicated governmental involvement in the formation of the Commission. *Id.* at 2091. In contrast, the Russia-Lithuania BIT did not specify that Russia and Lithuania would be "involved in the formation of the [ad hoc tribunal]." *Id.*

The court similarly distinguished ad hoc arbitrations from state-to-state arbitrations under the Russia-Lithuania BIT. *Id.* at 2090 n.4. According to the Supreme Court, state-to-state arbitrations "reflect a higher level of government involvement" because "each country is involved in forming that arbitral body and funds its operations," and because officials from the International Court of Justice, as opposed to the parties in the arbitration, could have a role in appointing the members of the tribunal. *Id.* The ad hoc arbitration, in turn, received "'zero governmental funding[,]'" was conducted by arbitrators "chosen by the parties," and was not "affiliated with either Lithuania or Russia." *Id.* at 2090 (quoting *In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, 5 F. 4th 216, 226 (2d Cir. 2021)).

Notably, the *ZF Automotive* decision does not mention the ICSID Convention at all, nor did the Supreme Court have a full procedural or evidentiary record before it addressing the applicability of § 1782 to ICSID arbitrations. Indeed, the Supreme Court restricted its decision to the facts and cases before it and expressly did "not attempt to prescribe" a rule to govern all governmental and intergovernmental bodies, acknowledging that tribunals "may take many forms." *Id.* at 2091. Significantly, the Supreme Court refused to adopt the broad test advocated

by the United States in its amicus curiae brief, which proposed that *any* arbitration before a non-governmental adjudicator to which the parties consented, whether in a contract or a treaty, should not be deemed a foreign or international proceeding within the meaning of § 1782. *See* Brief of the United States as Amicus Curiae 23–32, *ZF Automotive*, No. 21-401 (U.S. Jan. 31, 2022). Instead, as outlined above, the Supreme Court adopted a narrower approach calling for the consideration of multiple factors in considering whether a tribunal is imbued with governmental authority by one or multiple nations.

2. ICSID arbitral tribunals are "imbued with governmental authority"

The unique history and structure of ICSID and the ICSID Convention demonstrate that arbitral tribunals constituted under the ICSID Convention are intended to function as international tribunals imbued with governmental authority—within the meaning set out by the Supreme Court—and that ICSID arbitrations thus are materially different from commercial and ad hoc arbitrations for the purposes of § 1782.[1] That ICSID tribunals were intended to exercise governmental authority conferred by multiple nations is evident from (i) the origin and nature of ICSID arbitration pursuant to a multilateral treaty, the ICSID Convention; (ii) the role of sovereign States in the creation, administration, and governance of ICSID, as well as the financing of ICSID by the States Parties to the ICSID Convention (the "Member States"); (iii) the composition of ICSID tribunals, over which Member States exercise significant influence; (iv) the limited jurisdiction of ICSID tribunals, which requires both consent of the parties and ICSID Convention membership; and (v) the unique annulment and enforcement mechanisms of ICSID awards,

[1] Even Supreme Court petitioner AlixPartners, LLP, who argued in *ZF Automotive* that the ad hoc tribunal underlying the case was not an international tribunal, acknowledged that the same reasoning did *not* apply to ICSID arbitrations conducted under the ICSID Rules. Reply of Petr's AlixPartners, LLP, et al. 14 n.3, *ZF Automotive*, No. 21-401 (U.S. May 11, 2022) (arguing that case law involving ICSID arbitrations conducted under the ICSID Rules of Arbitration was "dissimilar").

including in particular that each Member State is obligated to recognize an ICSID award as binding and to enforce its pecuniary obligations within its territory as if it were a final judgment of a court in that State.

First, the ICSID Convention, a multilateral treaty, was drafted under the auspices of the World Bank and entered into force on October 1966. *See* Schreuer Report 4. Today, the ICSID Convention has been signed and ratified by 157 States ("Member States" or "Contracting States"), including by Panama and Italy. *See* Database of ICSID Member States, *available at* https://icsid.worldbank.org/about/member-states/database-of-member-states. As reflected in its Preamble, the ICSID Convention was designed to "promote economic development through the creation of a safe and favourable investment climate," and it "provides a procedural framework for arbitration and conciliation in investment disputes between States and foreign investors." Schreuer Report 4–5; ICSID Convention, Preamble.

Addressing the initial proposal for the ICSID Convention, the then-General Counsel of the World Bank who oversaw the drafting of the Convention expressed the desire to create an "international arbitration and/or conciliation machinery" through "inter-governmental action." Note by A. Broches, General Counsel, to the Executive Directors of the World Bank, Aug. 28, 1961, *reprinted in* History of the ICSID Convention, vol. II-1, at 1–2, *available at* https://icsid.worldbank.org/resources/publications ("History of the ICSID Convention"). The purpose of the Convention was not simply to resolve particular disputes, but rather to develop a permanent institutional scheme to address and "remove some of the uncertainties and obstacles that faced investors in any foreign country and in particular in many of the States that had only recently attained independence and self-government[.]" *Travaux Préparatoires* (1970), History of the ICSID Convention, vol. I, at 2; *see also* Schreuer Report 4–5. The initial draft of the ICSID

Convention was extensively discussed and revised, article by article, by several committees of legal experts and government representatives appointed by over 60 countries, including Italy and Panama, such that "all member countries [had] an opportunity to participate directly in the final process of formulating the text of the treaty." Antonio Parra, The History of ICSID 59 (2d ed. 2017); *see also* Schreuer Report 4. Following deliberations, the drafts were approved by the World Bank Executive Directors, who represented the World Bank member governments. Schreuer Report 4. The drafting history makes clear that the Member States intended ICSID tribunals to possess sufficient stature to judge the conduct of sovereign states against the standards of conduct established in international law. *See, e.g.*, Consultative Meeting of Legal Experts held in Addis Ababa, December 16-20, 1963, *in* History of the ICSID Convention, vol. II-1, at 267, 268.

Second, the central role of sovereign states in the creation, administration, and governance of ICSID are further indicia of governmental authority. The *travaux préparatoires* (*i.e.*, the drafting history) of the ICSID Convention demonstrates the central role of sovereign states in the establishment of ICSID as a "permanent intergovernmental institution" dedicated to the resolution of international investment disputes—a feature that is absent from commercial and ad hoc arbitration. ICSID is comprised of two main organs: the ICSID Secretariat, led by the Secretary-General, and the ICSID Administrative Council, which is the governing body of ICSID. *See* ICSID Convention, arts. 4–8, 9–11; *see also* Schreuer Report 5–6. Each Member State—including Panama and Italy—has one seat, and one vote, on ICSID's Administrative Council. ICSID Convention, art. 4; Schreuer Report 5–6. The Chairman of the Administrative Council is the President of the World Bank, who is elected by the member states of the World Bank through appointed representatives. ICSID Convention, art. 5; International Bank for Reconstruction and Development Articles of Agreement (2012), art. V §§ 2(a), 4(b), 5(a), *available at*

https://www.worldbank.org/en/about/articles-of-agreement. The Administrative Council meets annually and adopts the rules and regulations governing ICSID's institutional framework and operations, including the adoption of the annual budget of revenues and expenditures of the Centre, and the adoption and amendment of the ICSID arbitration, conciliation, and fact-finding rules. ICSID Convention, art. 6. The Administrative Council, composed of Member States, also is responsible for the election of the Secretary-General, who is the legal representative and principal administrative officer of the Centre. *Id.* art. 11. The Secretary-General must act in accordance with the provisions of the Convention and the rules adopted by the Administrative Council. *Id.*

In addition to their governance role through the Administrative Council, the Member States also are responsible for bearing the excess cost where ICSID's expenditures exceed its receipts, and thus have a direct role in funding the Centre. *Id.* art. 17. Moreover, under an Administrative Agreement between ICSID and the World Bank, the latter bears the cost of ICSID's staff as well as its administrative costs. Schreuer Report 7. Thus, ICSID itself is "a publicly financed institution subject to the oversight of the Member States through the Administrative Council, which adopts the rules governing ICSID's operations." *Id.* This feature of ICSID contrasts directly with the Supreme Court's observation that ad hoc tribunals lack governmental authority, because they "function[] independently of" sovereign states and are "not affiliated with" them in any way, such as by receiving governmental funding for their operations. *ZF Automotive*, 142 S. Ct. at 2090.

ICSID's status under international law provides further indicia of governmental authority. In structuring ICSID, the drafters of the ICSID Convention imbued ICSID with full international legal personality in order to ensure "the proper functioning of proceedings under the auspices of the Centre[.]" *See* Preliminary Draft of the ICSID Convention (Working Paper for Consultative Meetings of Legal Experts Designated by Governments), Oct. 15, 1963, *reprinted in* History of

the ICSID Convention, vol. II-1, at 200; *see also* Schreuer Report at 7–8 n. 27. The Centre, its property, and assets, as well as persons acting under it, including ICSID arbitrators, are granted broad privileges and immunities from legal process. ICSID Convention, arts. 18–20; *see also* Schreuer Report 7–8. These immunity provisions resemble those of established international tribunals, such as the International Court of Justice and the International Criminal Court. *See* Schreuer Report 8, n.28 (citing Gary Born, Chapter 13: Rights and Duties of International Arbitrators, *in* International Commercial Arbitration 2177 n.442 (3d ed. 2021)). Notably, arbitrators in commercial and ad hoc arbitrations, such as the ones at issue in *ZF Automotive*, do not possess such privileges and immunities.

Third, the ICSID Convention establishes a central role for Member States in the composition of ICSID tribunals, further vesting them with governmental authority. *See* Schreuer Report 9–10 (citing ICSID Convention, arts. 13–15, 52(3)). In particular, ICSID maintains an official Panel of Arbitrators which is comprised of persons designated by the Member States and by the Chairman of the ICSID Administrative Council (the President of the World Bank) to serve for a renewable period of six years. ICSID Convention, arts. 12, 13. Each Member State may designate four persons to the Panel, and the Chairman may designate ten. *Id.* In the United States, designations to the ICSID Panel of Arbitrators are made by presidential appointment. 22 U.S.C. § 1650. The ICSID Convention requires that the persons designated to the Panels "shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement." ICSID Convention, art. 14.

Once a request for arbitration is filed, the ICSID Convention provides that, unless the parties agree on another method, they shall each appoint one arbitrator, and then appoint the president of the tribunal by agreement. *Id.* art. 37. If the parties are unable to agree on a tribunal

president, the Chairman of the ICSID Administrative Council *must* appoint the president from the Panel of Arbitrators designated by the Member States and Chairman. *Id.* art. 38. While the parties in each dispute are not obligated to select their arbitrators from the Panel of Arbitrators, they often do so. *See* Schreuer Report 10. Moreover, as will be explained below, the arbitrators adjudicating an ICSID annulment proceeding—the *only* available form of challenge against an ICSID award—must be appointed by the Chairman from the designated Panel of Arbitrators. ICSID Convention, art. 52; *see also* Schreuer Report 10. As such, "Member States, through designations of persons to the Panel of Arbitrators and through the[ir] appointment of arbitrators [as parties] in particular cases, enjoy a strong influence on the composition of ICSID arbitral tribunals and annulment committees." Schreuer Report 11.

As the Supreme Court stated in *ZF Automotive*, where a tribunal consists of individuals with some "official affiliation" to sovereign states or "any other governmental or intergovernmental entity[,]" this indicates that sovereign states intended to imbue that tribunal with governmental authority. *ZF Automotive*, 142 S. Ct. at 2090. Here, the role of the Member States and the Chairman (the President of the World Bank) in designating individuals to the ICSID Panel of Arbitrators (including the Chairman's designation of Stanimir Alexandrov, Webuild's appointed arbitrator, and the Chairman's prior designation of Lucy Reed, the president of the Tribunal in this case, *see* Second Lamm Decl. ¶ 5, Ex. 2)—and the Chairman's mandatory selection from the Panel of Arbitrators of the tribunal president (where the parties do not agree) and the annulment committee members—indicates governmental involvement in the formation of ICSID tribunals. The Supreme Court made a similar observation with respect to state-to-state tribunals, which it found *do* fall within the meaning of § 1782—stating that the fact that "under some circumstances" the countries could "invite officials of the International Court of Justice to appoint

the body's members" reflected a "higher level of government involvement" indicative of an international tribunal, which did not exist in ad hoc arbitrations. *ZF Automotive*, at 2090 n.4.

Fourth, unlike commercial or ad hoc tribunals, an ICSID tribunal does not have jurisdiction solely through the consent of the parties under a BIT or an investment agreement. To fall within the jurisdiction of the Centre, both the host state of the investment and the investor's home state must have consented to ICSID arbitration as Contracting States to the ICSID Convention. ICSID Convention, art. 25(1) (providing that the jurisdiction of the Centre only extends to legal disputes arising from an investment between a Contracting State and a national of another Contracting State); *see also* Schreuer Report 11–12. Any sovereign state that wishes to have its investment disputes resolved through an ICSID arbitration is thus required not only to offer its consent to ICSID arbitration through a BIT or other legal instrument, *but also* must participate in the governance and operations of ICSID as a Contracting State to the ICSID Convention. *See* Chapter 28: Arbitration of Investment Disputes, *in* Comparative International Commercial Arbitration 777 (Lew, Mistelis & Kroll eds. 2003) (describing the double layer of consent required to initiate an ICSID arbitration).

In this respect, then, ICSID tribunals "derive [their] authority" and jurisdiction from the consent of the Member States, through ratification of the ICSID Convention—and not solely from "the parties' consent to arbitrate" a particular dispute, as is the case with commercial and ad hoc tribunals. *ZF Automotive*, 142 S. Ct. at 2090. In addition, because the jurisdiction of ICSID tribunals is limited to the adjudication of disputes arising directly out of an investment between a Contracting State and a national of another Contracting State (ICSID Convention, art. 25), the claims involved in ICSID arbitrations most often arise from state acts, rather than from commercial acts or acts of private entities. Schreuer Report 13.

Further, Article 36(3) of the ICSID Convention requires the ICSID Secretary-General—who is elected by Member States through the ICSID Administrative Council—to conduct a review of any requests for arbitration in order to determine if the dispute is manifestly outside the jurisdiction of the Centre and, if so, to refuse registration of the request. ICSID Convention, art. 36(3); Schreuer Report 11. In this way, the institution of ICSID arbitration proceedings is subject to a screening process by the Secretary-General, an officer elected by a body composed of Member State representatives. Schreuer Report 11.

Fifth, and critically, the intent of the ICSID Member States to imbue ICSID with governmental authority is evident in the unique mechanisms for annulling and enforcing ICSID awards, which differ in crucial respects from the mechanisms for annulling and enforcing awards rendered by commercial or ad hoc tribunals. *See* Schreuer Report 15–21.

To enforce arbitral awards rendered by commercial or ad hoc tribunals, the prevailing party must petition a national court for an order confirming and enforcing the award under a convention or treaty governing the recognition and enforcement of such awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), June 10, 1958, 21 U.S.T. 2517; *see also, e.g.*, *Seed Holdings, Inc. v. Jiffy Int'l*, 5 F. Supp. 3d 565, 579 (S.D.N.Y. 2014) ("Where, as here, 'an arbitral award falling under the [New York] Convention is made,' any party to the arbitration may apply to any court with jurisdiction for an order confirming the award.") (quoting 9 U.S.C. § 207). Other parties can oppose judicial enforcement under one of the several grounds provided in the applicable convention, such as those listed in Article V of the New York Convention. *See* New York Convention, art. V (incorporated into the U.S. Federal Arbitration Act through 9 U.S.C. § 207); *CBF Industria De Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 71 (2d Cir. 2017) ("'[C]ourts in countries of *secondary* jurisdiction [(*i.e.* where award

enforcement proceedings may occur)] may refuse enforcement only on the limited grounds specified in Article V' of the New York Convention.") (quoting *Karaha Bodas v. Negara*, 500 F.3d 111; 115 n.1 (2d Cir. 2007)).

In parallel, the party opposing enforcement may also petition the national courts of the state where the tribunal was seated (i.e., the "primary" jurisdiction) to annul or "set aside" the award pursuant to the grounds provided in the domestic arbitration law of the arbitration seat. The parties to a commercial or ad hoc arbitration are free to petition the courts of *any* signatory state for enforcement, but the parties define which national courts will have the authority to annul an award by agreeing on the seat of the arbitration. Under this framework, the sovereign states thus retain the authority of their national courts to determine the validity of commercial and ad hoc arbitral awards. *See, e.g.*, *CBF Industria De Gusa S/A*, 850 F.3d at 71, 75 ("The New York Convention specifically contemplates that the state in which, or under the law of which [an] award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief .'").

In contrast, under the ICSID Convention, Member States fully cede the governmental authority of their courts to annul awards to an ICSID body known as an Annulment Committee. *See* ICSID Convention, art. 52; *see also* Schreuer Report 15. Each Annulment Committee, which is established when one or both parties to a concluded ICSID arbitration submits an application for annulment, is imbued with the *sole* authority to annul ICSID awards, and which may be granted only on the extremely limited grounds specified in the ICSID Convention. *See* ICSID Convention, art. 52(1). As Christoph Schreuer explains in his expert report, one of the "distinguishing features" of ICSID arbitration is that:

> ICSID awards are not subject to setting aside or to any other form of scrutiny by domestic courts. Under the ICSID Convention, a domestic court or authority,

> before which recognition and enforcement are sought, is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. An ICSID award is *res judicata* both as regards the decision on jurisdiction and the decision on the merits.

Schreuer Report 16; *see also* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 Duke L.J. 739, 750–51 (1989) (observing that one of the driving forces of ICSID was to replace national courts' role in enforcing awards with an impartial control mechanism). As the Second Circuit has recognized, "Member states' courts are thus not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award; under the [ICSID] Convention's terms, they may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F3d 96, 102 (2d Cir. 2017); *see also Teco Guatemala Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 100–101 (D.D.C. 2019) (describing ICSID's "internal" annulment process, and the "exceptionally limited" role of national courts in enforcing ICSID awards).

Significantly, the parties to a particular dispute have no choice in the composition of the Annulment Committee that will decide an application for annulment of the rendered award. As noted above, all members of an Annulment Committee are selected by the Chairman of the ICSID Administrative Council (the President of the World Bank) from the Panel of Arbitrators—all of whom were designated either by the Member States or by the Chairman. ICSID Convention, art. 52(3). Because the Annulment Committee is the only body that can annul an ICSID award, it follows that the ultimate oversight over ICSID awards is exclusively in the hands of individuals officially designated by the Member States or by the Chairman. *See* Schreuer Report 10.

Once an ICSID award is rendered—and an Annulment Committee refuses to annul it, if

annulment is sought—the Member States are obligated under the ICSID Convention to recognize the award as binding and to enforce its pecuniary obligations "as if it were a final judgment of a court in that State." ICSID Convention, art. 54(1); *see also* Schreuer Report 18–21. Unlike commercial or ad hoc arbitral awards, ICSID awards thus are equivalent to final judgments of national courts, further underscoring the governmental authority conveyed to ICSID tribunals by Member States under the ICSID Convention.

In the United States, for example, the legislation implementing the ICSID Convention provides that ICSID awards "create a right arising under a treaty of the United States" and that "the pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a) (further providing that the Federal Arbitration Act shall not apply to the enforcement of awards rendered pursuant to the ICSID Convention).

Awards rendered by ICSID tribunals are therefore equivalent to final judgments of domestic courts—lacking any substantive review by national courts of the kind that exists in commercial and ad hoc arbitrations. In enforcing ICSID awards in the United States, for example, U.S. district courts must "look to established procedures for enforcing *state court judgments* in federal court." *Mobil Cerro Negro*, 863 F3d at 121–22 (emphasis added); *Teco Guatemala Holdings*, 414 F. Supp. 3d at 101 (same); *see also Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 753–54 (E.D. Va. 2012) ("Congress mandated that the proper method of enforcement of an ICSID arbitral award is the same as the enforcement of a state court judgment, which is a suit on the judgment as a debt.").

And indeed, numerous U.S. courts have recognized this distinctive feature of ICSID awards. In *Mobil Cerro*, the Second Circuit observed that the ICSID Convention's command for

Member States to "treat the award as if it were a final judgment of [their] courts" reflects "an expectation that the courts of a member nation will treat the award as final," and that they will do "no more than examine the judgment's authenticity and enforce the obligations imposed by the awards." 863 F.3d 96, 101–102, 120–21 (citing Christoph Schreuer, et al., *The ICSID Convention: A Commentary* 1139–41 (2d ed. 2009)). In *Teco Guatemala Holdings*, the D.C. district court similarly noted that the Member States' choice to shield ICSID awards from external review and to treat their enforcement "in the same manner as a state court judgement" was "no accident[,]" but instead reflected a deliberate choice to grant ICSID awards a higher degree of finality than commercial or ad hoc awards subject to the FAA. 414 F. Supp. 3d at 100–101, 103 (enforcing ICSID award against Guatemala and refusing to "revisit issues decided by the ICSID tribunal and ad hoc committee"); *see also, e.g.*, *OI European Grp. B.V. v. Bolivarian Republic of Venez.*, No. 16-1533 (ABJ), 2019 WL 2185040, at *2 (D.D.C. May 21, 2021) (recognizing the expectation that ICSID awards will be treated as final domestic judgments); *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265, 275–76 (D.D.C. 2019) (same); *Infrastructure Servs. Lux. S.A.R.L. v. Kingdom of Spain*, No. 18-1753 (EGS), 2019 WL 11320368, at *2 (D.D.C. Aug. 28, 2019) (same).

Conversely, an award that has been annulled by an ICSID Annulment Committee *may not* be enforced by Member States. "The decision of the [ad hoc annulment] committee is not subject to appeal, and in the event of annulment, *the only redress* is to resubmit the dispute to another tribunal." Bondar, *Annulment of ICSID and Non-ICSID Investment Awards*, J. Int'l Arb. 32, no. 6 (2015), at 628 (emphasis added); *see also Sàrl v. Bolivarian Republic of Venez.*, 514 F. Supp. 3d 20, 45 (D.D.C. 2020) ("American courts cannot give an annulled ICSID award full faith and credit."); *Teco Guatemala Holdings*, 414 F. Supp. 3d at 106–07 (noting that parts of an ICSID award annulled by an ICSID Annulment Committee could not be enforced and were instead

"subject to further arbitral proceedings"). In that vein, U.S. courts, for example, routinely stay ICSID enforcement cases while annulment proceedings are pending. *See, e.g.*, *Infrared Envtl. Infrastructure GP Ltd. v. Kingdom of Spain*, No. 20-817 (JDB), 2021 WL 2665406, at *6–7 (D.D.C. Jun. 29, 2021); *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, No. 19-cv-01618 (TSC), 2020 WL 5816238, at *2–3 (D.D.C. Sept. 30, 2020).

Therefore, unlike in commercial or ad hoc arbitrations, for which national courts have considerable enforcement and set-aside authority under treaties such as the New York Convention, the roles of Member States' courts in review and enforcement of ICSID awards is highly circumscribed. Simply put, awards issued by commercial and ad hoc tribunals do not create the same right to "full faith and credit" granted to ICSID awards. This feature, above all, underscores an intention by Member States to imbue ICSID tribunals with the governmental authority reserved for national courts. *See* Schreuer Report 18-21.

In the *Webuild* case in particular, Italy and Panama—both by agreeing to the BIT *and* by ratifying the ICSID Convention—have agreed to be bound by the award of the ICSID Tribunal *and* to enforce the pecuniary obligations in the award as if that award had been rendered by a court in that State. *Cf. ZF Automotive*, slip op. at 13 ("What matters is the substance of their agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?" (citing *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 37 (2014) ("As a general matter, a treaty is a contract, though between nations," and "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent"))). Thus, Italy and Panama, like all the Member States, have ceded the authority to review and set aside the award and have conferred governmental authority to the ICSID Tribunal to issue a binding award whose pecuniary obligations will be enforced by Italy and Panama (and by all Member States) as if it

were a final judgment of their national courts.

* * *

Given the history and structure of ICSID, including the mechanisms for review and enforcement of ICSID awards—all of which differ materially from commercial and ad hoc arbitrations—Panama and WSP's contention that *ZF Automotive* forecloses Webuild's Application for discovery under § 1782 is meritless. As such, Webuild's Application for discovery in aid of the *Webuild* arbitration meets the statutory requirements for § 1782 discovery.

B. The Court Properly Exercised Its Discretion to Grant Webuild's Application and Should Not Vacate Its Order

Where, as here, the statutory requirements of § 1782 are met, the court "may order" the requested discovery at its discretion. 28 U.S.C. § 1782(a). In *Intel*, the Supreme Court enumerated several discretionary factors that "bear consideration in ruling on a § 1782(a) request":

(1) whether the persons from whom the discovery is being sought are participants in the foreign proceeding;

(2) the nature and character of the foreign proceeding and the receptivity of the foreign tribunal to U.S. federal court judicial assistance;

(3) whether the request is an attempt to circumvent foreign proof-gathering limitations; and

(4) whether the discovery sought is unduly burdensome.

Intel, 542 U.S. at 264–65; *see also In re Accent Delight*, 696 F. App'x 537, 538–39 (2d Cir. 2017) (citing *Intel* factors); *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80–81 (2d Cir. 2012) (same). Here, as the Court recognized (ECF No. 11), all the discretionary factors weigh in favor of granting Webuild's Application, and thus, the Court properly exercised its discretion.

Panama and WSP concede that the first *Intel* factor—whether WSP is a party to the foreign proceeding—is met. Panama Mot. 21 (asserting that second, third, and fourth *Intel* factors weigh against discovery); WSP Mot. 10 (same). As discussed in Webuild's Application, WSP is not, and

can never be made, a party to Webuild's ICSID arbitration. Webuild App. 16–17. Because WSP is not a party to that proceeding, the Tribunal does not have jurisdiction to order WSP to produce information. Thus, this factor weighs in favor of granting Webuild's Application and denying Panama and WSP's motions to vacate. *See Intel*, 542 U.S. at 264 ("[N]onparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.").

Panama and WSP contend, however, that the second, third, and fourth factors do not weigh in favor of Webuild's Application. These contentions are unavailing.

1. The nature and character of the ICSID proceeding and the likely receptivity of the ICSID tribunal to any discovery received weigh in favor of Webuild's Application

The second *Intel* factor considers both the nature and character of the foreign proceeding *and* whether the foreign tribunal would be receptive to the discovery. 542 U.S. at 264. As the Second Circuit has held, this factor primarily considers "whether the 'nature, attitude and procedures of that jurisdiction,' indicate that it is receptive to assistance under § 1782[.]" *Mees v. Buiter*, 793 F.3d 291, 303 n.20 (2d Cir. 2015) (quoting *Brandi-Dohrn*, 673 F.3d at 80–81). As such, courts in this district routinely have analyzed this factor in view of whether the foreign tribunal would be receptive to the evidence. *See In re Application of Atvos Agroindustrial Investimentos S.A.*, 481 F. Supp.3d 166, 176–177 (S.D.N.Y. 2020) (analyzing second *Intel* factor in view of whether Brazilian court would be receptive to § 1782 discovery); *In re Application of Roessner*, No. 21-mc-513, 2021 WL 5042861, at *3 (S.D.N.Y. Oct. 29, 2021) (finding second *Intel* factor met where there was "no 'authoritative proof' that the German court would reject Section 1782 assistance"); *In re Application of Habib*, No. 21-mc-522, 2022 WL 1173364, at *3 (S.D.N.Y. Apr. 20, 2022) (finding second *Intel* factor weighed against granting motion to quash because the respondent failed to produce evidence that foreign tribunal would reject evidence sought).

As Webuild explained in its Application, the ICSID Arbitration Rules generally provide for discovery in ICSID arbitrations and require parties to cooperate with the tribunal in the production of documents. Webuild App. 17 (citing ICSID Arbitration Rules, Rule 34). Moreover, in the past, ICSID tribunals have been receptive to discovery obtained through § 1782 applications. *Id.* Thus, there is no reason to suggest that this factor weighs against Webuild's Application.

WSP nevertheless contends that this factor weighs against Webuild's Application because Webuild supposedly has not shown that the ICSID Tribunal would be receptive to the evidence sought. WSP Mot. 10. This turns the requirement on its head. Webuild is not required to prove the Tribunal would accept the evidence, nor must it notify the Tribunal or first seek discovery in the arbitration. *See Brandi-Dohrn*, 673 F.3d at 82 (holding that § 1782 does not require the evidence sought be admissible in the foreign proceeding); *Mees*, 793 F.3d at 303 (holding that § 1782 does not require first seeking evidence in the foreign proceeding). Instead, for this factor to weigh against Webuild's Application, WSP (or Panama) must provide this Court with "authoritative proof" the Tribunal would *reject* the evidence to warrant quashing the subpoena and vacating the Court's Order. *See In re Application of Roessner*, 2021 WL 5042861, at *3 (finding second discretionary factor weighs in favor of discovery where there was no "authoritative proof" that the foreign tribunal would reject the evidence); *see also Mees*, 793 F.3d at 303 n.20 (same).

Here, neither Panama nor WSP has alleged, let alone proved, that the Tribunal would reject the discovery sought. Indeed, tellingly, Panama has not even asserted this argument. *See generally* Panama Mot. 22. Under ICSID Rule 34(1), the tribunal alone determines whether evidence is admissible and its probative value. ICSID Arbitration Rules, Rule 34(1) (ECF No. 7-17). Thus, there are no rules of evidence that would preclude admission of the evidence sought here.

Panama and WSP also contend that, because Panama intends to assert objections to the

jurisdiction of the Tribunal in the *Webuild* arbitration, this somehow affects the character of the ICSID proceedings. Panama Mot. 22; WSP Mot. 10–11. Panama and WSP are wrong. There is no requirement that the information sought under § 1782 be necessary at a particular stage of the foreign proceeding. *See Mees*, 793 F.3d at 298, 303–04 ("[D]iscovery sought pursuant to § 1782 need not be necessary for the party to prevail in the foreign proceeding[.]"). Indeed, a court may grant an applicant's § 1782 application even *before* the foreign proceeding has been initiated. *See In re Hornbeam Corp.*, 722 F. App'x 7, 9–10 (2d Cir. 2018) (granting discovery for use in anticipated foreign proceeding); *Intel*, 542 U.S. at 259 (finding that § 1782 merely requires the foreign proceeding to be "within reasonable contemplation"). Further, obtaining the evidence at this stage of the proceeding is critical because the parties generally are not permitted to submit any new evidence in the arbitration hearing that was not first introduced into the record. *See* Tribunal's Procedural Order No. 1 ¶¶ 16.4.1, 16.4.3 (ECF 16-13) ("Procedural Order No. 1").

Moreover, Panama and WSP are incorrect to suggest that the discovery Webuild seeks would be of no use with respect to jurisdictional issues. Indeed, the Tribunal has now twice confirmed its view that "the factual analysis and legal issues involved in deciding [jurisdiction] are potentially intertwined with other issues on the merits." Second Lamm Decl. ¶ 10; *see also id.* ¶ 6. Thus, Panama's assertion of a jurisdictional objection in the arbitration is no basis to undermine Webuild's request for discovery.

Finally, Panama and WSP argue that the Court should "at a minimum . . . stay Webuild's subpoena until the ICSID Tribunal has ruled on this pressing jurisdictional question." Panama Mot. 22; WSP Mot. 11. This argument is moot. When Panama made its request for a stay, the Tribunal had not yet ruled on Panama's request to the bifurcate proceedings so that Panama's jurisdictional objections could be addressed first. The Tribunal has since denied Panama's

bifurcation request, Second Lamm Decl. ¶¶ 6–10, meaning that the merits of Webuild's claim will be considered with Panama's jurisdictional objections, and the urgency for Webuild to obtain the requested discovery from WSP continues. Webuild's next submission on the merits of its claim is due on April 21, 2023—well before the Tribunal is expected to rule on Panama's jurisdictional objection. *Id.* ¶ 11. A stay of the subpoena until the Tribunal has ruled on its jurisdiction would entirely defeat the purpose of Webuild's § 1782 request and, accordingly, should be denied.

2. Webuild's Application does not circumvent the applicable proof-gathering policies of the ICSID Tribunal

The third *Intel* factor considers whether the application is "an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel*, 542 U.S. at 264–65. Courts in this district have construed this factor to mean that an application for § 1782 discovery may not circumvent the proof-gathering policies of the institution *governing the foreign proceeding at issue*. *See, e.g.*, *In re Republic of Kazakhstan*, 110 F. Supp.3d 512, 517 (S.D.N.Y. 2015) (examining whether applicant sought to circumvent proof-gathering policies of Swedish tribunal at issue in § 1782 application); *In re Application of Roessner*, 2021 WL 5042861, at *3 (finding applicant was not seeking to circumvent proof-gathering restrictions of German law, the governing law in the German court proceeding). Accordingly, here, the applicable proof-gathering policies are those of the *Webuild* ICSID arbitration, *i.e.*, the ICSID Arbitration Rules.

As discussed in Webuild's Application, the ICSID Tribunal does not have any compulsory powers over third parties who are not before it. Webuild App. 17. And, indeed, the fact that past ICSID tribunals have been receptive to such discovery demonstrates that § 1782 discovery is not prohibited by the ICSID Arbitration Rules. *See In re Republic of Turkey*, No. 19-20107 (ES) (SCM), 2020 WL 4035499, at *5–6 (D.N.J. July 17, 2020). Therefore, Webuild seeks in good faith the discovery of information from a U.S. entity that is not a party to the arbitration but likely

possesses information that will not be available for evidence-gathering within the procedures of the arbitration. Webuild App. 17. This discovery fully complies with the ICSID Rules.

Panama misconstrues this third *Intel* factor by lamenting that Webuild's Application circumvents "Panama's document exchange and proof-gathering policies." Panama Mot. 22–25. To the extent this argument refers to the proof-gathering laws of the Republic of Panama, those laws are irrelevant here. Such laws are not applicable to the international ICSID proceeding.

Panama contends that the pertinent proof-gathering policies also include "additional agreements" with Webuild in the underlying proceeding, agreements which purportedly "inherently lack the broad discovery of civil litigation." *Id.* at 23. But, as the Second Circuit has explained, this *Intel* factor does "not 'authorize denial of discovery pursuant to § 1782 solely because such discovery is unavailable *in the foreign court*, but simply . . . allow[s] consideration of foreign discoverability (along with many other factors) when it might otherwise be relevant to the § 1782 application[.]'" *Mees*, 793 F.3d at 303 (emphasis added) (quoting *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997)). Thus, to the extent that any "additional agreements" with Webuild fail to provide for third-party discovery, this too is not a reason to quash the WSP subpoena.

Panama and WSP further contend that Webuild is attempting to circumvent the ICSID Tribunal's proof-gathering policies because the International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") are applicable to the *Webuild* arbitration. Panama Mot. 23–25; WSP Mot. 12–14. Panama and WSP premise this argument on Article 3.9 of the IBA Rules, which prescribes certain processes for obtaining discovery from non-parties. Panama Mot. 23–25; WSP Mot. 12–14. Panama conveniently omits (and WSP overlooks), however, that the IBA Rules are explicitly non-binding on the parties in the *Webuild* arbitration.

Specifically, Procedural Order No. 1 in the *Webuild* arbitration clearly states that "the Tribunal and the Parties may be guided – *but are not bound by* – the IBA Rules on the Taking of Evidence in International Arbitration (2010)[.]" Procedural Order No. 1 (ECF No. 16-13), ¶ 15.2. Webuild plainly cannot circumvent these guidelines if it is not bound by them.[2]

Moreover, courts in this district have recognized that even where the IBA Rules apply to the foreign proceeding (and here they do not), a party's failure to seek permission from the tribunal to obtain non-party discovery is not dispositive of a § 1782 application. *See In re Application of Warren*, No. 20-mc-208 (PGG), 2020 WL 6162214, at *8 (S.D.N.Y. Oct. 21, 2020). Specifically, the court in *Warren* held that "to the extent that IBA Article 3.9 requires a party seeking third-party discovery to request assistance from the Tribunal—or leave to pursue the documents on its own—that rule is best understood as one that 'fail[]s to facilitate' discovery from third parties, rather than as a proof-gathering restriction." *Id.* Thus, even where the *Warren* court found that the applicant had not complied with Article 3.9 of the IBA Rules, "the significance of that non-compliance is tempered by the practical reality that the Arbitral Tribunal has no power to compel [the discovery target] to produce documents, and there is no reason to believe that [the discovery target] would voluntarily comply with any request made or authorized by the Arbitral Tribunal to produce the requested documents." *Id*. As such, the court found that the applicant had not circumvented any proof-gathering policies, because there were none. *Id.*

The same is true here. Despite Panama's attempts to inject its own proof-gathering policies into the ICSID arbitration, the only applicable policies here are those of the ICSID Arbitration Rules, which do not prohibit (and indeed do not govern) seeking discovery from third-parties.

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[2] Because the IBA Rules are explicitly non-binding on Webuild, Panama's reliance on *Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 243 (2d Cir. 2018) is inapposite. Panama Mot. 25. There, unlike here, the discovery policies at issue were binding on the parties.

Notably, Panama has even written to the Tribunal to complain about Webuild's § 1782 application, and the Tribunal has taken no action—nor even made any comment—in response. Second Lamm Decl. ¶ 9. Thus, this third factor weighs in favor of Webuild's Application.

3. Webuild's discovery requests are not unduly intrusive and burdensome

The fourth *Intel* factor considers whether the application (or requests) are unduly burdensome. *Intel*, 542 U.S. at 265. If a court finds that the requests are unduly burdensome, "it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Mees*, 793 F.3d at 302 (quoting *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995)).

Panama and WSP misleadingly assert that Webuild's Application is unduly burdensome because it attempts to "side step" another proceeding in this district and "expend valuable judicial resources to have a second judge in the Southern District of New York address these issues." Panama Mot. 26; WSP Mot. 17. Panama further seeks to impugn Webuild as "lacking candor" for failing to address this other proceeding. Panama Mot. 26. But, it is Panama that lacks candor. What Panama fails to inform the Court of is that the purportedly related action to which Panama refers had been sitting dormant for *seven years* without any indication it would ever be resolved.

In any event, there is now no risk of burdensome duplicative discovery orders, because the purportedly related proceeding was voluntarily dismissed by the applicant, GUPC, before WSP even filed its Motion. Notice of Voluntary Dismissal, *Grupo Unidos Por El Canal S.A.*, No. 1:14-mc-00405 (S.D.N.Y. Jun. 13, 2022), ECF No. 61.

Further, it must be emphasized that the instant proceeding was never an attempt to "side-step" the prior § 1782 application—or the discovery procedures of the arbitration. Rather,

Webuild merely seeks in good faith to obtain discovery from WSP—a third party not before the Tribunal—for use in its ICSID arbitration. Webuild may indeed seek similar information from Panama through the discovery proceedings of the arbitration, but Panama's organ ACP already repeatedly has refused to produce this information, despite orders from the prior arbitration tribunals and representations that it would do so. Second Lamm Decl. ¶¶ 13–14; Email from Cofferdam ICC Tribunal, dated April 5, 2016 (Second Lamm Decl. Ex. 5); Transcript of Hearing on ACP's Motion to Compel Compliance (excerpt) at 30:1-31:16, *Grupo Unidos Por El Canal, S.A.*, No. 3:14-mc-80277 (N.D. Cal. Mar. 31, 2015), ECF No. 32 (Second Lamm Decl., Ex. 6). It cannot be unduly intrusive or burdensome for Webuild to seek to obtain the discovery from WSP when Panama has effectively claimed it does not possess the information Webuild requests.

C. Webuild's Discovery Requests Do Not Violate the Federal Rules of Civil Procedure

Beyond its arguments that largely overlap with Panama's, WSP also seeks to quash the subpoena on the ground that Webuild has propounded supposedly "overly-broad and unduly burdensome requests" on a non-party to the arbitration, in violation of the Federal Rules of Civil Procedure. WSP Mot. 17–18. In particular, WSP again erroneously contends that the requests are burdensome because "most, if not all of the documents sought" supposedly "would be in the possession of parties to the Arbitrations[.]" *Id.* at 18. WSP further impugns Webuild, its partners, and GUPC, asserting that they have "abuse[d]" § 1782 and "the United States judicial process" by continuing their pursuit of the critical documents Panama and its organ have steadfastly refused to produce. *Id.* at 17. These arguments are incorrect and provide no basis to quash the subpoena.

First, "[t]he law is . . . clear that a party seeking discovery pursuant to Section 1782 need not first seek discovery from the foreign tribunal[,]" even if a party to the foreign proceeding has the same documents requested from the non-party. *In re Application of Pidwell*, No. 1:21-MC-

0166 (ALC)(KHP), 2022 WL 192987, at *5 (S.D.N.Y. Jan. 21, 2022). Thus, Webuild has no obligation under § 1782 (or under the Federal Rules) to seek discovery from Panama in the foreign proceeding first, on the off chance that Panama may hold the same documents as WSP. In *Pidwell*, the court explained that the fact that a non-party may have some of the same documents as the respondent in the foreign proceeding "does not weigh against granting the requested discovery[,]" because the "critical issue" was that the target of the discovery request was, as here, "not a party to that [foreign] litigation[.]" *Id.*; *see also In re Top Matrix Holdings Ltd.*, No. 18-mc-465 (ER), 2020 WL 248716, at *5 (S.D.N.Y. Jan. 16, 2020) (holding that first discretionary factor did not weigh against discovery even where party to foreign proceeding possessed the same documents). The same is the case here.

In any event, it is unclear that WSP and Panama hold identical documents responsive to Webuild's discovery requests. WSP does not "describe with any particularity the documents that are allegedly both in [their] possession and the possession of a party to one of the Foreign Proceedings," as it must. *In re Application of the Children's Inv. Fund Found.*, 363 F. Supp. 3d 361, 375 (S.D.N.Y. 2019) (holding that conclusory and speculative statements cannot form the basis of a Rule 26 objection). Instead, WSP vaguely asserts that the information Webuild requests, "to the extent it exists, would *likely* be in the possession of Panama." WSP Mot. 15 (emphasis added). WSP appears to suggest that by virtue of the fact that the discovery pertains to Parsons's relationship with Panama, Panama must possess the exact same information. *Id.* But such a leap is unsupported, particularly given the passage of time and the potential for differing document retention policies between a government bureaucracy and its former corporate consultant.

Further, contrary to WSP's accusation, Webuild has not "resort[ed] to burdening WSP in the first instance[,]" where "most, if not all of the documents sought, would be in the possession

of the parties to the Arbitrations[.]" *Id.* at 18. For nearly a decade, Webuild and its partners have sought similar discovery from Panama, through its organ ACP, in private commercial arbitrations, and Panama consistently has defied tribunals' orders concerning those similar discovery requests. Second Lamm Decl. ¶¶ 12–14. Indeed, one of those tribunals even lamented in an email to the parties that despite the need for the discovery in the arbitration, and despite the tribunal's order for Panama to turn over such requested information, the tribunal's "hands [were] tied," because it did not have the authority to compel Panama to actually produce any documents. *Id.* ¶ 13; Email from Cofferdam ICC Tribunal, dated April 5, 2016 (Second Lamm Decl. Ex. 5). Panama's intervention in this action—and its attempt to quash the subpoena—is merely a transparent attempt to protect its ability to defy later discovery orders by the ICSID Tribunal, which also lacks authority to compel Panama to produce documents. Webuild thus has no reason to believe that Panama would comply with any discovery orders from the ICSID Tribunal (should it even possess documents identical to WSP, as WSP claims), and indeed Webuild was not required to first engage in the discovery process in the ICSID proceeding. *In re Pidwell*, 2022 WL 192987, at *5. The fact that Webuild has not yet engaged in the likely futile attempt to obtain the documents from Panama via the procedures of the specific ICSID arbitration at issue is no basis to quash the subpoena.

Second, contrary to WSP's suggestion that the document requests themselves are overbroad, Webuild's requests do not "demand that WSP search for, collect and review essentially all records related to Parsons Brinckerhoff's services for a multi-billion dollar Project[.]" WSP Mot. 18. In arguing that § 1782 relief "is routinely rejected where the proposed discovery . . . is 'unduly intrusive or burdensome[,]'" *id.*, WSP mischaracterizes the court's holding in *In re Application of Kreke Immobilien KG,* No. 13 Misc. 110(NRB), 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013). There, the court denied the petitioner's application because the parties, the

underlying dispute, and all the physical documents were located outside of the United States. 2013 WL 5966916, at *4. The court reasoned that "the connection to the United Stated is slight at best" and therefore it would be inappropriate to order turnover of documents located outside of the United States. *Id.*. "For the sake of completeness," only after denying the application, the *Kreke* court then went on to discuss the breadth of the requests. *Id.* at *4, 7. To the extent the court there found the requests overly burdensome, the court relied on "recent" cases from 2004, 2006, and 2009, for the proposition that "courts should be more inclined to grant applications that seek either a single document or only those documents relating to a particular event." *Id.* at *7. This is certainly no longer the case. *More recent* cases suggest that courts in this district are equally permitted to grant discovery broader than merely "a single document" or "single event." *See In re Application of Banco Satander (BRASIL) S.A.*, No. 22-mc-00022 (ALC) (SN), 2022 WL 1546663, at *2 (S.D.N.Y. Apr. 6, 2022) (finding applicant's discovery requests, which sought "all" bank records for an specified period of time from 33 individuals was not overly burdensome (citing to Subpoena, No. 22-mc-00022 (Jan. 24, 2022), ECF No. 1-1)); *see also* Order 9–11, *In re Evenstar Master Fund SPC*, No. 20-mc-418 (S.D.N.Y. Nov. 23, 2021), ECF No. 61 (finding subpoenas in similar format to Webuild's were not overly broad or unduly burdensome (referring to Proposed Subpoenas, No. 20-mc-418 (S.D.N.Y. Nov. 18, 2020), ECF Nos. 4-2, 4-3, 4-4, 4-5, 4-6)).

Webuild's requests comply with this recent trend. The subpoena specifies a timeframe that appropriately encompasses WSP's involvement in the Project and lists with specificity key contracts and search terms for documents Webuild seeks. ECF No. 7-1. WSP erroneously attempts to characterize the requests as "going back almost 20 years." WSP Mot. 18. But, though dating back to 1999, the bulk of the requests focus on the reasonable nine-year time period between 2004 and 2013, leading up to the commencement of the Project for which WSP acted as a critical

advisor to Panama. ECF No. 7-1. Though broader than a single document request, the requests in their current form are necessary to obtain the evidence Webuild seeks, and the requests do not seek more than that permitted by § 1782 or the Federal Rules of Civil Procedure.

To the extent WSP requests that it should receive costs related to any production, WSP Mot. 19 n.7, such request should be denied. Webuild's requests are reasonable, limited, and well within the scope of typical § 1782 discovery, and likely would involve little more than the search of electronic files. In any event, should this Court determine the requests are overly broad (even after it previously approved the form of the subpoena), the appropriate remedy is to revise the requests, not deny the Application. *Mees*, 793 F.3d at 302. Should the Court determine the requests are overly broad, Webuild would be open to meet-and-confer discussions with WSP to review the scope of the subpoena and further target the requests should the Court so order.

WSP's contention that the documents Webuild seeks are subject to "confidentiality and non-disclosure agreements" is also unavailing. WSP Mot. 18. WSP has not identified which documents, if any, are subject to such agreements, and the harm it would incur, as it must. "When a party moves to quash a subpoena on privacy grounds a court must weigh the probative value of the documents sought against the privacy interests asserted." *In re Subpoenas Served on Lloyds Banking Grp.*, No. 21-MC-00376 (JGK)(SN), 2021 WL 3037388, at *4 (S.D.N.Y. July 19, 2021). For confidentiality concerns, "the key question is if 'a party [can] show[] that disclosure will result in a clearly defined, specific and serious injury.'" *Id.*

Here, WSP has merely alleged without specificity that "many" of the requested documents, "*to the extent they still exist*," are covered by confidentiality and non-disclosure agreements. WSP Mot. 18 (emphasis added). Such hypothetical concerns do not "clearly define[]" a "specific and serious injury." *See Lloyds*, 2021 WL 3037388, at *4–5 (finding Ukraine's purported harm,

"jeopardizing sensitive information about Ukraine's sovereign activities and activities of third parties with pivotal roles in the nation's economy, including energy, infrastructure, banking, transportation, and defense[,]" did not clearly define a specific and serious injury that warranted quashing the subpoena). This hypothetical, vague harm does not and cannot outweigh the probative value of the documents Webuild seeks from WSP, particularly given that WSP could seek—but has not yet sought—a protective order limiting disclosure of confidential materials beyond their confidential use in the arbitration.

Webuild's document requests are essential to Webuild's claims that Panama intentionally misled and failed to disclose critical information concerning the Project, including the expected costs of the Project, upon which Webuild and its partners based its tender. The requests are also critical to Webuild's claims that Panama engaged in a consistent pattern of misbehavior and forced Webuild and its partners to invest additional funds in the Project for which Panama is responsible. The critical nature of the evidence WSP holds cannot be outweighed by the hypothetical, unspecified harm that WSP could incur from purported unspecified confidentiality agreements.

II. THE COURT SHOULD DENY PANAMA'S REQUEST TO INTERVENE

Intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is appropriate where the party seeking intervention "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. Proc. 24(a)(2); *see also "R" Best Produce, Inc. v. Shulman-Rabin Marketing Corp.*, 467 F.3d 238, 240 (2d Cir. 2006) (quoting same). Courts consider substantially similar requirements when determining whether a party is entitled to "permissive" intervention under Rule 24(b)(2). "'Failure to satisfy *any one* of these [four] requirements is a sufficient ground to deny the application.'" *"R" Best Produce*, 467 F.3d at 240 (emphasis in original) (alteration in

original) (quoting *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003)). Panama cannot satisfy either standard for intervention, as it fails to demonstrate that its purported interests cannot be represented by existing parties, namely, WSP.

While the burden of demonstrating adequate representation is typically minimal, "a higher burden applies when the movant seeks the same relief as one of the parties to the action." *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 356 F. Supp. 3d 287, 297 (S.D.N.Y. 2018) (citing *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990)). Panama half-heartedly contends that only Panama, and not WSP, can "demonstrate how Applicant['s] *ex parte* application undermines agreed-upon document production schedules in the [arbitration] and represents an attempt by Applicant[] to abuse the § 1782 process." Panama Mot. 13. But, as discussed above, this argument is entirely baseless, because an ICSID tribunal does not and cannot prescribe the process for obtaining discovery from non-parties over which it has no jurisdiction. An argument so seriously lacking in foundation cannot be the reason for Panama's purportedly unique interest in this action.

Beyond that argument, WSP has made fundamentally the same objections (and indeed more objections) to the subpoena and to the Court's Order as did Panama. *Cf.* WSP Mot. §§ I-II, *with* Panama Mot. 2-9, § II; *see also Building and Realty Institute of Westchester and Putnam Counties, Inc. v. New York*, No. 19-cv-11285, 2020 WL 5667181, at *5 (S.D.N.Y. Sept. 23, 2020) (holding that intervening party was adequately represented even where "the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy"). Panama thus has failed to show that WSP cannot adequately represent its purported interests in this proceeding, and Panama thus is not permitted to intervene as of right. For the same reason, Panama should be denied permissive intervention, as well.

CONCLUSION

For the foregoing reasons, Webuild respectfully requests that the Court deny (i) Panama's Motion to Intervene, to Vacate the Court's May 19, 2022 Order, and to Quash the WSP USA Subpoena (ECF No. 15) and (ii) WSP's Motion to Quash Subpoena and to Vacate the Court's May 19, 2022 Order (ECF No. 23).

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Respectfully submitted,

s/ David Hille

David Hille
WHITE & CASE
1221 Avenue of the Americas
New York, NY 10020
Phone: (212) 819-8200
Fax: (212) 354-8113
dhille@whitecase.com

Carolyn B. Lamm
Hansel T. Pham
Matthew Drossos
WHITE & CASE
701 Thirteenth St. NW
Washington, DC 20005
Phone: (202) 626-3600
clamm@whitecase.com
hpham@whitecase.com
mdrossos@whitecase.com

Counsel for Applicant Webuild S.p.A.