UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Application of Webuild S.p.A. and Sacyr S.A., *Applicants*, To Obtain Discovery for Use in an International Proceeding	Case No. 1:22-mc-00140-LAK ***ORAL ARGUMENT REQUESTED***

THE REPUBLIC OF PANAMA'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE, TO VACATE THE COURT'S MAY 19, 2022 ORDER, AND TO QUASH THE WSP USA SUBPOENA

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INTRODUCTION

Panama seeks to intervene in this action to protect important interests implicated by Webuild's application for discovery under 28 U.S.C. § 1782.[1] As the sole respondent in the underlying arbitration, and the party against which the requested evidence would be deployed, Panama has an obvious and paramount interest in the outcome of this action, and it is uniquely positioned to oppose the application. Courts in this District routinely grant intervention in these circumstances. Webuild offers no reason for this Court to deviate from that established practice.

All agree that the key question is whether the Webuild Tribunal—an investor-State arbitral panel convened pursuant to the Panama-Italy bilateral investment treaty[2] and the ICSID Convention[3]—is a "foreign or international tribunal" for purposes of § 1782. The Supreme Court recently issued critical guidance on that question. In *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078 (2022),[4] it held that § 1782 extends only to bodies "imbued with" or "that exercise[]" governmental authority. Key here, the Court applied the standard it articulated to an *ad hoc* investor-State arbitral panel—one convened pursuant to the Russia-Lithuania bilateral investment treaty and administered under rules promulgated by the United Nations Commission on International Trade Law ("UNCITRAL Rules"). The Court determined that the panel was not "imbued with" and did not exercise governmental authority and thus fell beyond § 1782's scope.

ZF Automotive is at least highly instructive, if not dispositive, here. Webuild contends that

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[1] Sacyr S.A. has voluntarily dismissed its application. ECF No. 28. Panama requests that the Court vacate the May 19, 2022 Order and quash the subpoena with respect to Sacyr in view of that voluntary dismissal.

[2] Agreement between the Government of the Italian Republic and the Government of the Republic of Panama on the Promotion and Protection of Investments, 6 Feb. 2009, entered into force Oct. 12, 2010 ("Panama-Italy BIT").

[3] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 ("ICSID Convention").

[4] *ZF Automotive* was consolidated for argument and decision with *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-401. For convenience, we refer to these consolidated cases in the collective as *ZF Automotive*.

the Supreme Court left the door open for parties in ICSID arbitrations to gain access to federal discovery tools. But there is no daylight between this case and *ZF Automotive*; the Webuild Tribunal is identical in every material respect to the ad hoc investor-State panel in *ZF Automotive*. Webuild's attempt to drive a wedge between the two relies on gross distortions of the nature of ICSID arbitration and the dispute-resolution framework set forth in the ICSID Convention.

Regardless, the availability of § 1782 discovery rests in this Court's discretion. And even if the Webuild Tribunal were a "foreign or international tribunal" (it is not), this Court should exercise its discretion to deny discovery here. Webuild has sought third-party discovery in U.S. court, in flagrant disregard of the rules and procedures governing the exchange of evidence in the Webuild arbitration—rules to which the parties agreed. *See* Procedural Order No. 1, ¶ 15.2 (referring to IBA Rule 3.9), First Hodgson Decl., Ex. M, ECF No. 16-13. This Court should not endorse "attempts to circumvent [the] proof-gathering restrictions" applicable to the underlying arbitral proceedings. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

I. Panama May Intervene of Right

Webuild does not dispute that courts in this Circuit routinely permit a party to the underlying proceeding "against whom the requested information will be used" to intervene and oppose an application for discovery under § 1782. *In re Application of Sarrio, S.A.*, 119 F.3d 143, 148 (2d Cir. 1997); *accord In re Kuwait Ports Auth.*, No. 1:20-MC-00046-ALC, 2021 WL 5909999, at *5 (S.D.N.Y. Dec. 13, 2021) (describing *Sarrio* as a "well-established principle"). Indeed, Webuild fails to cite to a single § 1782 case to the contrary. Panama is the sole respondent in the underlying proceeding, and its intervention in this matter is amply warranted.

Webuild makes only two specific contentions against Panama's intervention, both of which are unavailing. First, Webuild argues (at 39) that Panama has no "unique interest" in this action because "an ICSID tribunal . . . cannot prescribe the process for obtaining discovery from non-

parties," and thus (according to Webuild) Panama is no better situated than WSP to oppose the § 1782 application. As an initial matter, the law in this Circuit does not require a "unique" interest to justify intervention, only that a proposed intervenor "show an interest in the action." *R Best Produce, Inc. v. Shulman-Rabin Mktg. Corp*., 467 F.3d 238, 240 (2d Cir. 2006). Webuild does not, and cannot, contend that Panama has no interest in this action.

In any event, unlike Panama, neither Webuild nor WSP are ICSID Member States. Panama—as a respondent in multiple ICSID arbitrations—has a unique interest in this proceeding: to ensure that the Supreme Court's decision in *ZF Automotive* is correctly applied to a tribunal operating under the ICSID Convention, to which both Panama and the United States are parties. Additionally, as the sole respondent in the Webuild Arbitration, Panama has a unique interest in protecting its bargained-for treaty rights and ensuring that the document production procedures that govern that proceeding are respected. WSP, a nonparty to the Webuild arbitration, does not share and is not positioned to represent these interests.

Second, Webuild argues (at 39) that "WSP has made fundamentally the same objections" as Panama and therefore will adequately represent Panama's interests. Where a would-be intervenor shares the same ultimate objective as a party to the lawsuit, a presumption of adequacy of representation is rebutted by a showing of "collusion, nonfeasance, adversity of interest, or incompetence on the part of the named party that shares the same interest." *Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 178 F.R.D. 39, 42-43 (E.D.N.Y. 1998) (denying intervention because a party to the litigation was prepared to "vigorously defend" shared interests); *see also Butler, Fitzgerald & Potter v. Sequa Corp*., 250 F.3d 171, 180 (2d Cir. 2001) (emphasizing that this is "not an exhaustive list"). Courts within this Circuit recognize the question of competence as "relating to the ability, both legally and practically, of an existing party to represent an interest of

a proposed intervenor." *United States v. Int'l Bus. Machines Corp*., 62 F.R.D. 530, 538 n.20 (S.D.N.Y. 1974); *Sec. & Exch. Comm'n v. Ripple Labs, Inc*., No. 20 CIV. 10832 (AT), 2021 WL 4555352, at *4 (S.D.N.Y. Oct. 4, 2021).

Here, WSP's objections (which were filed over two weeks after Panama filed its motion and simply adopted Panama's positions) do not establish that WSP can competently represent Panama's interests. That is unsurprising. WSP readily admits that it lacks the requisite knowledge to do so. WSP Mem. 12 ("WSP, as a nonparty, is not privy to any independent information [with regard to the Webuild Arbitration] and therefore must rely on Panama's submissions addressing the proof-gathering restrictions and other procedures that … govern in the Arbitrations."). This alone forecloses WSP's practical ability to represent Panama's interests. For example, in this proceeding, Panama has submitted two affidavits addressing, among other things, Webuild's factually inaccurate assertions related to the Webuild tribunal;[5] WSP's motion is supported by no such affidavits, evidencing a disparity in Panama's and WSP's ability to address such inaccuracies. Furthermore, at its own expense, Panama has retained a legal expert, Barton Legum. Mr. Legum has prepared an opinion that addresses the nature of ICSID arbitration and responds to the "Legal Opinion" of Christoph Schreuer,[6] upon whom Webuild purports to rely in support of its

[5] *See, e.g.*, ECF No. 16 ¶ 4 ("First Hodgson Decl."); *see also* Second Hodgson Decl. ¶¶ 2, 3, 10-14.

[6] Some of Webuild's legal arguments do not appear to be the logical extension of Professor Schreuer's opinions. For example, Webuild argues (at 20), citing Professor Schreuer, that Member States "fully cede the governmental authority of their courts to annul awards to an ICSID body known as an Annulment Committee." Professor Schreuer's report does not support that characterization; it merely describes the annulment mechanism. Panama requested that Webuild voluntarily make Professor Schreuer available for deposition to probe the scope and nature of his opinions, but Webuild refused to do so. Second Hodgson Decl. ¶ 15.

At any rate, this Court should disregard the opinions in Professor Schreuer's "Legal Opinion" because they constitute impermissible legal opinion. Professor Schreuer, at page 22 of his Legal Opinion, purports to offer opinions about the ultimate legal question here: whether the Webuild Tribunal is "imbued with governmental authority for purposes of § 1782." "It is a well-established rule in this Circuit that experts are not permitted to present testimony in the form of legal conclusions." *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined No. of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994); *see also, e.g.*, *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (experts "may not give testimony stating ultimate legal conclusions based on" the facts of the case); *Music Sales Corp. v. Morris*, 73 F. Supp. 2d 364, 381 (S.D.N.Y. 1999) ("testimony

Consolidated Opposition; it is understood that WSP will submit no expert opinion. In forming his opinions, Mr. Legum relied upon documents from the Webuild arbitration that are available only to the parties to the arbitration. Legum Decl. ¶ 18. WSP, as a nonparty to the proceeding, lacks access to these documents and thus lacks the information needed to adequately represent Panama's interests. Because WSP lacks the practical ability to "vigorously defend" Panama's interests in this case, the Court should grant Panama's request to intervene as of right under Rule 24(a)(2).[7] *Great Atl. & Pac. Tea Co.*, 178 F.R.D. at 45.

II. The Court Should Vacate Its § 1782 Order and Quash the WSP Subpoena

Section 1782 permits district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). The key question is whether the Webuild Tribunal—an investor-State arbitral panel convened pursuant to the Panama-Italy bilateral investment treaty ("BIT") and the ICSID Convention, qualifies as a "foreign or international tribunal" for purposes of the statute. It does not.

In its recent decision in *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078, the Supreme Court made clear that the only tribunals that fall within § 1782's ambit are those that "exercise[] governmental authority." *Id.* at 2086, 2089. The Webuild Tribunal does not meet that description. Like the ad hoc investor-State panel in *ZF Automotive*, the Webuild Tribunal is "not a pre-existing body," but rather an arbitral panel convened for the purpose of adjudicating a particular dispute. *Id.* at 2090. Nothing in either the Panama-Italy BIT or the ICSID Convention

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of an expert on matters of domestic law is inadmissable for any purpose," including when "submitted with motions for the benefit of the judge"); *Roundout Valley Cent. Sch. Dist. v. Coneco Corp*., 321 F. Supp. 2d 469, 480 (N.D.N.Y. 2004) ("it is axiomatic that an expert is not permitted to provide legal opinions, legal conclusions, or interpret legal terms; those roles fall solely within the province of the court").

[7] In the alternative, this Court may exercise its discretion to grant Panama permissive intervention under Rule 24(b). The main consideration under that rule is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). Panama's intervention at this early stage does not delay or prejudice the adjudication of Webuild's or WSP's rights.

indicates "[Panama] and [Italy's] intent that [the Webuild Tribunal] exercise governmental authority." *Id.* The Webuild Tribunal bears each of the characteristics that the Supreme Court in *ZF Automotive* viewed as evidence that the ad hoc panel in that case was not imbued with governmental authority. And while Webuild claims that ICSID tribunals have other attributes—not considered in *ZF Automotive*—that demonstrate that they are vested with governmental authority, Webuild's arguments in this regard distort the purposes and nature of ICSID arbitration.

Webuild's request thus fails at the threshold. But even if the Webuild Tribunal were a "foreign or international tribunal" for purposes of § 1782, this Court should exercise its discretion to deny discovery. Webuild's application is no more than an attempt to short-circuit the proof-gathering procedures that apply in the Webuild arbitration—procedures to which Webuild agreed. Under those procedures, a party that wishes to obtain third-party evidence must first submit a request to the tribunal detailing (among other things) the evidence sought and its relevance or materiality to the case; the tribunal may authorize the requesting party to take steps to obtain the documents, or it may take steps to obtain the documents itself. It is undisputed that Webuild has not followed those procedures, and those tactics have deprived the Webuild Tribunal of the opportunity to render its views on whether discovery from WSP is warranted. As a matter of comity and respect for whatever governmental authority the Webuild Tribunal wields, this Court should vacate its § 1782 order and quash the subpoena.

A. Only bodies that exercise governmental authority conferred by one nation or multiple nations constitute "foreign or international tribunals" under § 1782

In *ZF Automotive*, the Supreme Court issued important guidance on the application of § 1782. The question presented was whether certain "private adjudicatory bodies"—there, a private commercial arbitration panel and an ad hoc investor-State arbitral panel—"count as 'foreign or international tribunals'" for purposes of the statute. 142 S. Ct. at 2083.

To answer the question, the Court examined the relevant text and surrounding context, which make clear that the term "foreign or international tribunal" as used in § 1782 "reache[s] only bodies exercising governmental authority." *Id.* at 2088. That is, a "foreign tribunal" is "a tribunal imbued with governmental authority by one nation," and an "international tribunal" is "a tribunal imbued with governmental authority by multiple nations." *Id.* at 2087.

The statutory history and a comparison to the Federal Arbitration Act (FAA), which principally governs domestic arbitration, further confirmed this interpretation. The Court noted that "[f]rom the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create." *Id.* at 2088. The "animating purpose of § 1782 is comity." *Id.* As the Court observed, extending the resources of federal courts to "purely private bodies adjudicating purely private disputes abroad" did not serve those purposes. Furthermore, a broad reading of § 1782 to encompass private bodies would also create tension with the FAA, which does not afford parties in domestic arbitrations the expansive discovery that is available under § 1782. "Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration," and the Court could conceive of no rationale justifying such an anomalous result. *Id.* at 2088-89.

The Court then considered whether the two entities before it were governmental or intergovernmental bodies. The first entity was a private commercial arbitral panel, which plainly did not "qualify as a governmental body." *Id.* at 2089. The second was an ad hoc arbitration panel, convened pursuant to the Russia-Lithuania BIT and in accordance with the UNCITRAL Rules to adjudicate a dispute between a Russian investor and Lithuania concerning Lithuanian government acts. *Id.* The Court viewed this panel as presenting a "harder question," at least at first glance, since "[a] sovereign is on one side of the dispute, and the option to arbitrate is contained in an

international treaty rather than a private contract." *Id.* But neither of those factors was dispositive; instead, "[w]hat matters is the substance of the agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?" *Id.*

The Court answered that question in the negative. First, the Court noted that the panel was "not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes." *Id.* at 2090. And the treaty itself gave no indication that an ad hoc panel convened pursuant to its arbitration provision would exercise governmental authority. As the Court explained:

> [T]he treaty 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 entity.'

Id. at 2090. The panel also "lack[ed] other possible indicia of a governmental nature." *Id.* The panel received no government funding, proceedings were confidential, and the award could be made public only with both parties' consent. *Id.* The ad hoc panel's authority to decide the dispute derived from the parties' consent, not from any governmental authority. *Id.* For all these reasons, the ad hoc investor-State arbitration panel was not a foreign or international tribunal under § 1782.

To be sure, the Supreme Court did not specifically address whether investor-State panels convened pursuant to the ICSID Convention, as opposed to ad hoc investor-State panels, exercise governmental authority such that they qualify as "foreign or international tribunals" for purposes of § 1782. *See* Opp. 11. But as explained in the next section, the Supreme Court's logic and the close similarities between the Webuild Tribunal and the ad hoc panel at issue in *ZF Automotive* compel the same conclusion here: The Webuild Tribunal does not "exercise governmental authority" and therefore does not qualify as a "foreign or international tribunal." 142 S. Ct. at 2089.

B. The Webuild Tribunal is not a "foreign or international tribunal" under § 1782

Webuild argues (at 12) that "[t]he 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." Webuild's arguments conflate, on the one hand, ICSID itself—*i.e.*, the International Centre for Settlement of Investment Disputes ("the Centre") created by the ICSID Convention—and, on the other, panels that are convened, by the consent of the parties to the case, to decide individual investor-State disputes. An accurate understanding of the nature of ICSID arbitration and the respective roles of the Centre and ICSID arbitral panels makes clear that panels like the Webuild Tribunal are materially indistinguishable from the ad hoc panel at issue in *ZF Automotive*. They are not imbued with and do not exercise governmental authority.

1. Relevant background on ICSID arbitration

The ICSID Convention is "a multilateral treaty aimed at encouraging and facilitating private and foreign investment in developing countries." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 100 (2d Cir. 2017). It creates a framework for arbitral proceedings and establishes the Centre to facilitate the resolution of disputes between Contracting States (or "Member States") and investors of other Contracting States. Convention pmbl.; *id.* art. 1(2). The Centre provides administrative support to tribunals for arbitrations conducted pursuant to rules it promulgates. *Id.* art. 6(1)(c).[8] The Convention also provides for the binding nature and enforceability of ICSID awards and creates a framework for internal review of awards that are disputed by one or more parties to the proceeding (known as "annulment"). *Id.* arts. 52-55.

[8] The 2022 ICSID Arbitration Rules came into effect on July 1, 2022. ICSID Arbitration Rules (2022), https://bit.ly/3dejsIx. The Webuild arbitration is governed by the 2006 Rules. Procedural Order No. 1, art. 1.1; ICSID Rules of Procedure for Arbitration Proceedings (2006), https://bit.ly/3SJPhcv ("2006 ICSID Arb. Rules").

Arbitration under the Convention and access to the Centre's facilities and services are available only for "legal dispute[s] arising directly out of an investment, between a Contracting State … and a national of another Contracting State," which the parties have consented to resolve through ICSID arbitration. *Id.* art. 25. As the Convention makes clear, a State's adherence to the Convention on its own does not constitute consent to ICSID arbitration. *See id.* pmbl.; Legum Decl. ¶¶ 23, 62-63. Instead, such consent is contained in a separate instrument—frequently a BIT or multilateral agreement. Legum Decl. ¶ 63. An investor's consent to ICSID arbitration, in turn, is expressed by its decision to invoke that mode of dispute resolution. *Id*.

Importantly, the Centre itself does not arbitrate disputes. Legum Decl. ¶ 36. Instead, each case is heard by an independent arbitral tribunal, convened for the purpose of deciding that individual case. *See* Convention art. 37. There is no pre-existing or standing decision-making body that presides over disputes. The ICSID arbitral system thus differs significantly from other international adjudicatory bodies, such as the International Court of Justice, the International Criminal Court, the WTO Appellate Body, or the Iran-U.S. Claims Tribunal, which are standing bodies composed of individuals appointed to serve for specific periods of time. Legum Decl. ¶ 34.

Moreover—and again in contrast to many other international adjudicatory bodies—in the overwhelming majority of cases, the members of an ICSID tribunal are selected by the parties to that specific dispute. Convention art. 37; Legum Decl. ¶¶ 34, 48-50. Only on rare occasions may the Centre have any role in appointing arbitrators. *See* Convention art. 38. Further, the proceedings—including the payment of arbitrators' fees—are funded entirely by the parties. ICSID Admin. & Fin. Reg. 14.

The Centre's role is thus solely administrative: the Centre acts as a registrar (such as by receiving, reviewing, and registering requests for arbitration), assists in the constitution of

tribunals, assists parties with procedural matters, organizes hearings, and administers the finances of each case. ICSID, *About ICSID, Secretariat – Overview*, https://bit.ly/3PYL4QC. The administrative, rather than adjudicatory, nature of the Centre was clear from the Convention's inception. As Aron Broches, the principal drafter of the Convention, explained:

> There would never be a question of arbitration or conciliation *by* the Center, but rather *under the auspices* of the Center. "Under the auspices here" meant the provision of housekeeping facilities, and services in connection with the designation of conciliators and arbitrators. [Broches] thought that that was quite clear from the text. … Judicial functions would only be performed by an arbitral tribunal whose members had been chosen by the parties, or by the President of the Administrative Council, if the parties so desired … . That fact could not give a judicial colour to the functions of the Center itself which were purely administrative.

II-1 Int'l Centre for the Settlement of Investment Disputes, *History of the ICSID Convention* 104-05 (1968); *see also id.* at 107 ("the functions of the Centre [are] not judicial or quasijudicial, but administrative").

That the Centre's purpose is purely administrative is widely accepted. Even Webuild's expert Christoph Schreuer agrees: in his treatise on the Convention, he observes that "[d]uring the Convention's drafting, it was repeatedly emphasized that the Centre's purpose would be to facilitate conciliation and arbitration but that it would not undertake these activities itself. In other words, the Centre's task would be administrative rather than judicial." Christoph Schreuer et al., *The ICSID Convention: A Commentary* 10 (2d ed. 2009). Indeed, as Professor Schreuer notes, during the drafting of the Convention, some stakeholders expressed concern about the close links between the Centre and the World Bank, including "a perceived conflict of interest between judicial activities and the Bank's lending activities." *Id.* at 13. But "[t]hese misgivings were countered by reference to the Centre's purely administrative functions." *Id.*

Thus, Webuild's extensive discussion (at 13-16) of the structure, administration, and governance of the Centre is beside the point. The relevant adjudicatory body is the Webuild

Tribunal, not the Centre, and the question for this Court is whether the Webuild Tribunal itself exercises governmental authority. The answer to that question is no.

2. The Webuild Tribunal is materially indistinguishable from the ad hoc arbitral panel in *ZF Automotive*, which the Supreme Court held did not exercise governmental authority

The Webuild Tribunal possesses each of the six characteristics that the Supreme Court in *ZF Automotive* highlighted as evidence that Lithuania and Russia did not "imbue" the ad hoc panel with government authority. 142 S. Ct. at 2090; *see* p. 7, *supra*.

First, like the ad hoc panel in *ZF Automotive*, the Webuild Tribunal is "not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes." *Id.* As explained above, p. 10, *supra*, there is no standing or pre-existing ICSID arbitral tribunal. *See also* Legum Decl. ¶ 34. Instead, in accordance with its procedural rules, the Centre "convenes arbitral tribunals in response to requests made by either a member state or a national of a member state. *Mobil Cerro Negro*, 863 F.3d at 101 (citing Convention arts. 36-37). That is precisely what happened in this case: the constitution of the Webuild Tribunal occurred upon the registration of Webuild's request for arbitration. *See* First Lamm Decl. ¶¶ 7-9, ECF No. 7.

Second, like the Lithuania-Russia BIT in *ZF Automotive*, neither the Panama-Italy BIT, nor the ICSID Convention, "itself create[s] the [Webuild Tribunal]." 142 S. Ct. at 2090. Legum Decl. ¶ 35. The Panama-Italy BIT "simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum." *Id.* Those rules are the Convention and the ICSID Rules. *See* Convention art. 6(1); 2006 ICSID Arb. Rules.

Third, like the ad hoc panel in *ZF Automotive*, the Webuild Tribunal "'functions independently' of and is not affiliated with either" Panama or Italy. 142 S. Ct. at 2090. "It consists of individuals chosen by the parties and lacking any 'official affiliation with [Panama], [Italy], or any other governmental or intergovernmental entity.'" *Id.* None of the arbitrators is affiliated with

(or even a national of) Panama or Italy: indeed, the Convention requires that "[t]he majority of the arbitrators … be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute," unless "each individual member of the Tribunal is appointed by agreement of the parties." Convention art. 39; *accord* 2006 ICSID Arb. Rule 1(3).

Consistent with ICSID Rules, upon the registration of Webuild's request for arbitration, the parties selected the arbitrators to serve on the tribunal. By agreement of the parties, the tribunal consists of three arbitrators. Second Hodgson Decl. ¶ 5. Webuild appointed Stanimir Alexandrov, a Bulgarian arbitrator/practitioner. Panama—in its capacity as a party to the dispute, not as an ICSID Member State—appointed Hélène Ruiz Fabri, a French professor/practitioner. *Id.* ¶¶ 6, 7. The parties initially could not agree on the individual who would serve as tribunal president. Therefore, "the parties proposed, and the Secretary-General followed, a mutually developed and agreed-upon process that resulted in the parties selecting Ms. Lucy Reed, a U.S. national, to serve as President of the Webuild Tribunal." *Id.* ¶¶ 8, 9; *id.* Exs. A-C. None of these arbitrators on the Webuild Tribunal is affiliated with Panama or Italy, and Webuild cites no evidence indicating that either nation has conferred any governmental authority upon any of them.

Nor does any of the arbitrators exercise authority conferred by the Centre or any other government body. Webuild contends (at 17) that "the role of the Member States and the Chairman (the President of the World Bank) in designating individuals to the ICSID Panel of Arbitrators … 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—indicate governmental involvement in the formation of ICSID tribunals." Webuild's argument rests on a misconception of the nature and purpose of the Panel of Arbitrators.

The Convention does provide for the maintenance of a Panel of Arbitrators. Convention

arts. 12-16. However, the Panel is not a standing body; it is a roster of approximately 440 individuals designated by Contracting States and ten designated by the Chairman of the Administrative Council who are available for selection to ICSID tribunals. *See* Members of the Panels of Conciliators and of Arbitrators (May 3, 2022), ICSID/10, https://bit.ly/3BDksjJ; Legum Decl. ¶ 51. The drafting history confirms the Panel's "limited significance." II-1 *History of the ICSID Convention* 29-30. Mr. Broches noted that the Panel consists only of "pieces of paper, lists of names." *Id.* at 107. He explained that, even when arbitrators were selected from the Panel, they "would be paid by the parties, and could not be regarded in any sense as part of the Center. They would function under the auspices of the Center but would not be officials of the Center." *Id*.

Additionally, an individual's inclusion on the roster of Panel members indicates that a Member State or the Chairman considers that individual to be "of high moral character and recognized competence in the fields of law, commerce, industry, or finance, who may be relied upon to exercise *independent* judgment." Convention art. 14(1) (emphasis added). It is not an indication that any Member State or the Centre intends to vest that individual (much less the tribunal for which that individual was selected) with governmental authority to decide investment disputes. Indeed, many of the individuals on the roster are "persons with no arbitration experience who have little chance of ever being appointed by anyone," and the vast majority never serve on *any* ICSID tribunal. Legum Decl. ¶ 51-52.

At any rate, these issues are not relevant to the question presented here, which is whether the Webuild Tribunal is imbued with government authority. As Webuild readily acknowledges (at 17), "the parties in each dispute are not obligated to select their arbitrators from the Panel of Arbitrators." Here, one of the arbitrators on the Webuild Tribunal, Mr. Alexandrov, is currently on the Panel. *See* Second Hodgson Decl. ¶ 6. Webuild voluntarily selected him to serve on the

Tribunal; he was not appointed by the Chairman. That Mr. Alexandrov is on the Panel is thus pure coincidence. *See* Legum Decl. ¶ 52. Webuild highlights (at 17) "the Chairman's prior designation [to the Panel] of Lucy Reed, the President of the Tribunal in this case." But Ms. Reed was not on the Panel when she was appointed; regardless, she was appointed by the parties' agreement, not by the Chairman under a default procedure. Second Hodgson Decl. ¶¶ 8, 9. Ms. Reed's past membership of the Panel is thus doubly irrelevant to whether the Webuild Tribunal exercises governmental authority.

Fourth, like the ad hoc panel in *ZF Automotive*, the Webuild Tribunal does not receive any "government funding." The Webuild Tribunal is funded jointly by the parties to the dispute, *i.e.*, Webuild and Panama. *See* Procedural Order No. 1, art. 9.1 ("The parties shall cover the direct costs of the proceeding in equal parts."). While Panama contributes its share of the costs of the proceedings, it does so in its capacity as a party to the arbitration, not as an ICSID Member State. *See* Legum Decl. ¶ 40.

Webuild argues (at 15) that "Member States … have a direct role in funding the Centre," as they are responsible for bearing the Centre's operational costs, to the extent the Centre's expenditures exceed its receipts. *See* Convention art. 17. That is irrelevant to the nature of the Webuild Tribunal. Again, the Centre, which has purely administrative functions with respect to individual cases, is distinct from the tribunal convened to decide an individual dispute, and the costs of such individual arbitration proceedings are borne entirely by the parties, not by the Centre or the Member States. Legum Decl. ¶ 40; ICSID Admin. & Fin. Reg. 14; *see* Convention art. 61(2). The Centre handles the disbursement of payments to arbitrators and other personnel (such as interpreters, translators, reporters, or secretaries), but those amounts are funded by the parties' advances on arbitrator fees and expenses. ICSID Admin. & Fin. Reg. 14; Legum Decl. ¶ 40.

Fifth, like the proceedings before the ad hoc panel in *ZF Automotive*, proceedings before the Webuild Tribunal "maintain confidentiality," and "the award may be made public only with the consent of both parties." 142 S. Ct. at 2090. The parties to an ICSID arbitration may tailor the level of confidentiality or transparency of the proceedings, ICSID, *Confidentiality and Transparency - ICSID Convention Arbitration*, https://bit.ly/3vzow0J (last visited Aug. 10, 2022), but in all events arbitrators must "keep confidential all information coming to [their] knowledge as a result of [their] participation in this proceeding, as well as the contents of any award made by the Tribunal." 2006 ICSID Arb. Rule 6(2). Hearings are closed to the public absent the parties' agreement. Procedural Order No. 1, art. 20.6 ("Consistent with Arbitration Rule 32(2), hearings shall be closed to the public unless the Parties agree otherwise."). And under the Convention, "[t]he Centre shall not publish the award without the consent of the parties." Convention art. 48(5).

Finally, the Webuild Tribunal, like the ad hoc panel in *ZF Automotive*, is a creature of Webuild's and Panama's consent. 142 S. Ct. at 2090-91.[9] Just as "Russia and Lithuania each agreed in the [Russia-Lithuania BIT] to submit to ad hoc arbitration if an investor chose it," *id.* at 2090, Panama and Italy each agreed to submit to ICSID arbitration if an investor of the other State, such as Webuild, selected that mode of dispute resolution. Panama-Italy BIT art. IX(3)(c). And like the Fund in *ZF Automotive*, *id.*, Webuild has asserted that it took Panama up on that offer by initiating ICSID arbitration proceedings. Request for Arbitration, First Lamm Decl. ¶¶ 7-8, *id.* Ex. 10 ¶ 3.

Notably, ICSID arbitration is only one of several options for resolving disputes under the Panama-Italy BIT; the BIT also permits recourse to a court of competent jurisdiction of the Contracting Party or ad hoc arbitration pursuant to the UNCITRAL Rules. As in the case of the

[9] Whether Panama has consented to the Webuild Tribunal's jurisdiction over Webuild's claims is a contested issue in the arbitration. Among other things, Panama disputes that it consented to jurisdiction over claims arising from the acts of the Panama Canal Authority. *See* Second Hodgson Decl. ¶ 4. The Webuild Tribunal has the authority to determine its own jurisdiction and will resolve such issues in conjunction with its assessment of the merits. *See id.*

Russia-Lithuania BIT in *ZF Automotive*, "[t]he inclusion of courts on the list reflects [Panama] and [Italy's] intent to give investors the choice of bringing their disputes before a pre-existing governmental body." 142 S. Ct. at 2090. The other options, in contrast, are non-governmental modes of dispute resolution. *See id.*[10] And like the Russia-Lithuania BIT, the Panama-Italy BIT also provides for the resolution of state-to-state disputes regarding the interpretation of the treaty by an arbitral tribunal funded by the two contracting parties, and presided over, if necessary, by persons appointed by the International Court of Justice. "This reflects a higher level of government involvement and highlights the absence of such details" with regard to ICSID arbitration. *ZF Automotive*, 142 S. Ct. at 2090 n.4.

Webuild argues (at 18) that because "any sovereign state that wishes to have its investment disputes resolved through an ICSID arbitration … *also* must participate in the governance and operations of ICSID as a Contracting State to the ICSID Convention," ICSID tribunals are imbued with government authority. But the existence of additional conditions on access to ICSID arbitration is a distinction without a difference. The ICSID tribunal derives its authority from the consent of the parties, here expressed in Panama's offer to submit to ICSID arbitration in the Panama-Italy BIT and Webuild's alleged acceptance of that offer. Legum Decl. ¶ 66. Contrary to Webuild's suggestion (at 18), a State's ratification of the ICSID Convention does not constitute consent to any particular arbitration, nor does it vest the Centre or any tribunal with the authority to decide any dispute involving the ratifying state. Legum Decl. ¶ 23; Convention pmbl.

[10] That the Panama-Italy BIT offers both ICSID and UNCITRAL arbitration demonstrates that Panama and Italy did not intend for ICSID tribunals to be clothed with governmental authority in a way that ad hoc tribunals are not. Parties to BITs often include both UNCITRAL and ICSID arbitration as modes of dispute resolution because of limitations on the scope of ICSID arbitration. Legum Decl. ¶ 67. For instance, ICSID arbitration excludes jurisdiction over claims of dual nationals. The UNCITRAL Rules contain no such limitation. States may include both options to permit dual nationals to bring arbitration claims. *Id*.

3. The Webuild Tribunal lacks any other indicia of governmental authority

The Webuild Tribunal is, for all relevant purposes, indistinguishable from the ad hoc arbitral panel at issue in *ZF Automotive*; it has every feature that the Supreme Court cited as evidence that the ad hoc panel was not imbued with governmental authority. Webuild identifies various other aspects of the Centre and the Convention that purportedly show that "multiple nations" intended for ICSID tribunals "to function as international tribunals imbued with governmental authority." Opp. 12. None of Webuild's arguments withstands scrutiny.

a. The drafting of the ICSID Convention under the auspices of the World Bank

Webuild highlights (at 13-14) that the ICSID Convention "was drafted under the auspices of the World Bank," was discussed and revised by government representatives, and has "been signed and ratified by 157 States." But as *ZF Automotive* made clear, "the treaty's existence" is not "dispositive": "[w]hat matters is the substance of the[] agreement" and whether the relevant governments "intend[ed] to confer governmental authority" on the body at issue. 142 S. Ct. at 2089; *see id.* at 2091 (similar). Webuild points to nothing in the text or negotiating history of the Convention that indicates that the Contracting States intended for individual arbitral panels to exercise governmental authority.

The mere fact that the rules and procedures governing an arbitration proceeding were drafted and adopted by an intergovernmental organization does not mean that the tribunal is imbued with governmental authority. Indeed, the UNCITRAL Rules, which governed the *Fund v. Lithuania* proceeding at issue in *ZF Automotive*, were likewise adopted by an intergovernmental organization: they were drafted by the U.N. Commission on International Trade Law and adopted by the U.N. General Assembly. *See* Legum Decl. ¶¶ 25-26. In short, although the Supreme Court did not expressly consider this aspect of the ad hoc tribunal in *ZF Automotive*, the nature and

history of the rules governing ICSID investor-State arbitration and the UNCITRAL Rules governing ad-hoc investor-State arbitration are for all material purposes the same.

Webuild vaguely contends (at 14) that "[t]he 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."[11] But "stature" is not the same as governmental authority. The ad hoc panel in *ZF Automotive* likewise "possess[ed] sufficient stature" to judge the conduct of sovereign states: that panel was convened with Lithuania's consent, pursuant to the Russia-Lithuania BIT that specifically authorized that mode of dispute resolution to adjudicate alleged treaty violations on the part of the host state. Yet Lithuania's consent in that case to submit such disputes to an ad hoc panel did not vest that panel with governmental authority. Nor is that the case here.

b. The role of sovereign states in the creation, administration, and governance of ICSID

Webuild relies (at 14) on "the central role of sovereign states in the creation, administration, and governance of ICSID." Again, Webuild fails to distinguish between the Centre and the individual tribunals, including the one hearing Webuild's claims against Panama. For instance, Webuild notes (at 14-15) that the ICSID Administrative Council is "composed of Member States," and "meets annually and adopts the rules and regulations governing ICSID's institutional framework and operations." But the Council is the Centre's governing body; as the Centre itself makes clear in its public materials, "the Administrative Council plays **no role in the administration of individual cases**." ICSID, *About ICSID, Administrative Council* (emphasis

[11] As support for this statement, Webuild cites (at 14) notes from a meeting of consultative experts regarding the draft Convention. II-1 *History of the ICSID Convention* 267-68. The cited discussion concerned the nature of claims that would be brought before arbitral tribunals and affirmed that tribunals would decide questions of international law. No one expressed the view that the tribunals would exercise governmental authority.

added), https://bit.ly/3QbXEvq (last visited Aug. 27, 2022); *accord* Convention arts. 4, 6.[12]

Likewise, Webuild argues (at 15) that the Centre is publicly financed and "subject to the oversight of the Member States through the Administrative Council, which adopts the rules governing ICSID's operations." This, too, is irrelevant to whether the Webuild Tribunal exercises governmental authority: as already explained, *see* pp. 16-17, *supra*, ICSID tribunals, including the Webuild Tribunal, are independent, are formed only with the consent of the parties to the dispute, and are funded by the parties to the dispute, not by the Member States or the Centre.

c. Privileges and immunities

Webuild points (at 15) to the Centre's "status under international law" as an institution with "full international personality," claiming that such status "provides further indicia of governmental authority." Again, the status of the Centre (which does not adjudicate disputes) is not pertinent; the question is whether *the Webuild Tribunal* is imbued with and exercises governmental authority.

Webuild also contends (at 16) that "ICSID arbitrators[] are granted broad privileges and immunities from legal process," that "resemble" those of other entities that Webuild believes plainly qualify as "international tribunals, such as the International Court of Justice and the International Criminal Court." But such immunity does not indicate that the ICSID Member States, or Panama and Italy for that matter, intended for arbitrators to exercise governmental authority. Instead, the Convention's drafting history makes clear that immunity was intended to protect the integrity of the adjudicative process: it was "a guarantee against pressure and hence an additional safeguard that arbitrators … would act with independence." II-1 *History of the ICSID Convention*

[12] In this regard, the ICSID Administrative Council is comparable to the Administrative Council of the Permanent Court of Arbitration. According to press reports, the Permanent Court of Arbitration was the administering institution for the ad hoc arbitration at issue in *ZF Automotive*. *See* Legum Decl. ¶ 30.

389; *see also id.* at 490 (describing arbitral immunity from legal process as a form of "protection").

Many arbitral rules likewise provide for immunity or limitations on liability—including for arbitrators presiding over private commercial disputes. *See* Legum Decl. ¶ 44 & n.35. Thus, contrary to Webuild's contention, the protections afforded by the Convention are not unique to arbitrators on ICSID tribunals. *See* Opp. 16 (asserting that "arbitrators in commercial and ad hoc arbitrations … do not possess such privileges and immunities").

Indeed, U.S. courts have long recognized that "arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process." *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990); *see id.* (citing cases). Such immunity serves to safeguard the adjudicator's independence. *Cf., e.g.*, *Butz v. Economou*, 438 U.S. 478, 515 (1978) (recognizing immunity to "preserv[e] the independent judgment" of certain quasi-judicial agency officials). Given this background understanding of the purposes of arbitral immunity, it is unsurprising that whether the arbitrators on the ad hoc panel in *ZF Automotive* enjoyed immunity did not factor into the Supreme Court's analysis of whether that panel was imbued with or exercised governmental authority.

d. The nature of the claims heard by ICSID tribunals

Webuild notes (at 18) that "the claims involved in ICSID arbitrations most often arise from state acts, rather than from commercial acts or acts of private entities." Panama disputes (and the Webuild Tribunal has not decided) whether the acts at issue here are state acts, as opposed to commercial acts of the Panama Canal Authority. Second Hodgson Decl. ¶ 4. Regardless, the substance of claims that a party has consented to submit to a tribunal does not have a bearing on whether the tribunal exercises governmental authority in reviewing those claims. The ad hoc panel in *ZF Automotive* considered claims arising from state acts, *see* 142 S. Ct. at 2084, yet the Supreme Court concluded that the ad hoc panel did not exercise governmental authority.

e. The Secretary-General's screening of requests for arbitration

Webuild observes (at 19) that the Secretary-General screens requests for arbitration "to determine if the dispute is manifestly outside the jurisdiction of the Centre." But this role does not suggest that Member States intended for ICSID tribunals to exercise government authority. As noted above, the Centre's jurisdiction is predicated upon the parties' consent to ICSID arbitration. The Secretary-General's "limited power to 'screen' requests" prevents the needless expenditure of the respondent's and the Centre's resources on administering a case that is obviously ineligible for ICSID arbitration. II-2 *History of the ICSID Convention* 955; *see* Legum Decl. ¶ 57-58. It is not an indication that the Secretary-General may override the parties' consent to ICSID arbitration.

The rules of many arbitral institutions include similar screening mechanisms to ensure that requests for arbitration meet prima facie jurisdictional requirements, so as not to "burden a respondent with the initial steps in an arbitration where it is plain on the face of the request that the parties granted the institution no authority to administer the proceedings." Legum Decl. ¶¶ 57-58. In no way do such procedures obviate the consensual nature of arbitration.

f. Annulment and enforcement mechanisms

Webuild argues (at 19) that the "unique mechanisms for annulling and enforcing ICSID awards" show that ICSID Member States intended "to imbue ICSID with governmental authority." As an initial matter, there is no correlation or logical relationship between the reviewability or enforceability of a decision and whether the body that rendered it was clothed with governmental authority. Legum Decl. ¶¶ 76-86. The Court in *ZF Automotive* did not consider the review mechanisms governing the ad hoc panel in that case—which are not materially different from the mechanisms available under the ICSID Convention, *see* Legum Decl. ¶¶ 88-96—as a factor bearing on whether that panel exercised governmental authority. *See ZF Automotive*, 142 S. Ct. at 2089-91. Regardless, nothing about the Convention's post-award mechanisms indicates that the

Webuild Tribunal is imbued with or exercises governmental authority.

Turning first to annulment, the Convention establishes a self-contained system: it provides that awards issued by ICSID tribunals are subject only to "annulment" on narrow grounds. Legum Decl. ¶ 92. Those grounds are "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." Convention art. 52(1). An annulment application is heard by an "*ad hoc* Committee" appointed by the Chairman of the Administrative Council for that purpose, composed of individuals from the Panel of Arbitrators. Convention art. 52(3). If annulment is granted, the award is deemed invalid (in whole or in part) and another tribunal must be constituted to consider the dispute anew. Convention art. 52(6). An award that has not been annulled is subject to enforcement in national courts, where it must be treated "as if it were a final judgment of a court in that State," Convention art. 54(1), and enforced consistent with national law, *id.* arts. 54(3), 55.

The relevant tribunal here is the Webuild Tribunal, not any ad hoc Committee. Webuild made its § 1782 application only in connection with the Webuild arbitration, not any annulment proceeding. Indeed, whether an ad hoc Committee will ever be convened in connection with Webuild's claims against Panama is pure conjecture: For an ad hoc Committee to be formed, one of the parties would have to object to the eventual award of the Webuild Tribunal, and would need to identify one of the limited grounds to do so.

Webuild contends that, by means of these post-award mechanisms, "Member States fully cede the governmental authority of their courts to annul awards to an ICSID body known as an Annulment Committee," Opp. 20, which has "ultimate oversight over ICSID awards," Opp. 21.

Webuild is incorrect on multiple levels.

First, contrary to what Webuild's arguments may imply, there is no standing "ICSID body" known as the "Annulment Committee." The entity that presides over an annulment application is an "*ad hoc* committee," convened for the sole purpose of evaluating that application.

Second, while the Chairman of the Administrative Council appoints ad hoc committees from among the individuals on the Panel of Arbitrators, Opp. 21, this mechanism is not a delegation of governmental authority to any ad hoc committee (much less a sign that the original tribunal was imbued with governmental authority).[13] Instead, the Convention's principal drafter observed, it "assure[s] the effective implementation of the remedy of annulment." Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev. 321, 332-33 (1991). Absent such safeguards, once an award has been rendered, a prevailing party might refuse to participate in an annulment proceeding, or fail to cooperate with its adversary in the selection of individuals to serve on the committee. Placing the duty to convene an ad hoc committee and to administer annulment proceedings in the hands of the Centre counteracts misaligned incentives and protects against bad faith conduct. The absence of party-appointed arbitrators also "gives a higher probability of complete objectivity of every single member and a better basis for rational cooperation among members" of the ad hoc committee. Schreuer, *Commentary*, at 1029.

Third, ad hoc committees do not "oversee" the merits of ICSID tribunals' decision-making; annulment is an extraordinary remedy designed only to guard against "violation of fundamental principles of law governing the Tribunal's proceedings." II-1 *History of the ICSID Convention*

[13] In practice, "before the *ad hoc* Committee members are appointed, ICSID informs the parties of the proposed appointees and circulates their *curricula vitae*. This gives the parties an opportunity to submit comments indicating that there might be a manifest lack of qualities required for serving as a Committee member; for example, that there is a conflict of interest which the Centre or the candidate was unaware of. In exceptional circumstances, a proposed candidate is withdrawn and replaced by another person." Background Paper on Annulment, ICSID (April 2016), ¶ 41, https://bit.ly/3P6rUXN (footnotes omitted).

218-19. The annulment mechanism was an effort to "reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice." Broches, *Observations on Finality*, at 324-25; *see also* Schreuer, *Commentary*, at 903.

As for enforcement, Webuild emphasizes (at 22) that "[a]wards rendered by ICSID tribunals are … 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." Webuild's description is incorrect as a factual matter. A party that wishes to execute on an ICSID award must first file an action in court for recognition and enforcement of the award; only after the court has issued a domestic judgment may the award holder execute against the debtor's assets. *See, e.g.*, *Mobil Cerro Negro*, 863 F.3d at 116-18. And the Convention makes clear that defenses based on sovereign immunity remain available. Convention art. 55.

Parties are always free to structure alternative dispute resolution mechanisms as they see fit and to bind themselves to the ultimate results of those processes—including by agreeing, *ex ante*, not to seek further review of those outcomes in court. The Convention's post-award mechanisms—including the preclusion of review or challenges of ICSID awards in national courts—thus simply reflect the Member States' decision to accord such awards a high degree of finality. *See* Opp. 23; II-1 *History of the ICSID Convention* 161.

As Mr. Broches explained, "one of the purposes of the Convention was to give a greater sense of confidence not only to investors but also to capital-importing countries," and the "self-contained system" was designed to give sovereigns "some assurance that compliance with an award made in their favor would be just as automatic as it would be if they lost the case." *Id.* at 427; *id.* at 574 ("If a State lost an arbitral proceeding it was under direct international obligation to comply with the decision; if a State won in a proceeding against an investor, it should be able

to secure compliance by the investor who was not a party to the Convention."). Put differently, while the Convention facilitates enforcement of ICSID awards by precluding judicial review, it does not follow that the *reason* for such treatment is that ICSID tribunals wield any governmental authority. Rather, the relative ease of enforceability of ICSID awards derives from an agreement by the parties to abide by the outcome of the arbitral process.

* * *

In sum, the Webuild Tribunal, an investor-State arbitral panel, is materially indistinguishable from the ad hoc investor-State arbitral panel that the Supreme Court determined in *ZF Automotive* did not qualify as an "international tribunal" for purposes of § 1782. The touchstone of the analysis is whether the tribunal is imbued with or was intended to exercise "governmental authority," and here, all indications are that the Webuild Tribunal is not.

This conclusion also avoids the same anomalies that the Supreme Court identified as further reason to adhere to a narrow interpretation of § 1782. ICSID arbitrations are identical in all material respects to ad hoc investor-State arbitrations like the one in *ZF Automotive*. Under Webuild's theory, however, parties to ICSID arbitrations would have broader discovery rights than their counterparts in ad hoc investor-State disputes. Webuild identifies no basis to believe that Congress intended such a result. Nor is there any indication in § 1782's text or history that Congress meant to afford private foreign entities like Webuild access to a wide range of pre-trial discovery tools for use in disputes against foreign states, when it has denied U.S. companies and residents access to those same tools in the context of domestic arbitration, *see* 9 U.S.C. § 7. Rather than create such asymmetry, the Court should hold, following the logic of *ZF Automotive*, that ICSID tribunals do not qualify as "foreign or international tribunals" for purposes of § 1782.

C. The Court Should Exercise its Discretion to Deny Discovery

Even assuming for purposes of argument that the Webuild Tribunal qualifies as a "foreign

or international tribunal" for purposes of § 1782, that does not end the analysis. Section 1782 vests district courts with broad discretion to decide whether discovery is appropriate. And "[a] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004). Here, the Court should exercise its discretion to vacate the May 19 Order and quash the subpoena: Webuild's request is nothing more than "an attempt to circumvent" the methods and procedures for the collection of evidence that apply in the Webuild arbitration. *Id.* at 264-65 (courts may consider "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States").

As Panama previously explained, procedural orders in the Webuild arbitration set forth an agreed-upon comprehensive framework for the collection and exchange of evidence. *See* Panama Mem. 22-25; First Hodgson Decl. ¶¶ 11-13, 15. Importantly, Procedural Order No. 1 specifically refers to Rule 3 of the IBA Rules on the Taking of Evidence. Procedural Order No. 1, ¶ 15.2. That rule directs Webuild to raise a request for third-party discovery and abide by the conclusions and directions of the Webuild Tribunal *before* seeking such discovery pursuant to § 1782. Panama Mem. 24-25. Webuild does not dispute that it has entirely ignored that procedure and instead seeks to have this Court order discovery of those documents—without seeking a ruling from the Webuild Tribunal as to whether the documents would be relevant or material to the proceeding. This Court should not countenance such an attempt to sidestep the rules applicable to the Webuild arbitration.

Webuild argues (at 29), citing *In re Petition of the Republic of Turkey*, No. CV1920107ESSCM, 2020 WL 4035499, at *5 (D.N.J. July 17, 2020), that "§ 1782 discovery is not prohibited by the ICSID Arbitration Rules." But that is not dispositive. That case did not address IBA Rule 3.9, which Webuild and Panama agreed serves as a guide, and under which

Webuild should have sought advance authorization from the Webuild Tribunal before making this § 1782 application. Webuild, relying on *Mees v. Buiter*, 793 F.3d 291, 303 (2d Cir. 2015), tries to brush aside this agreed framework by arguing that the fact that the discovery sought "is unavailable in the foreign court" does not compel denial of a § 1782 request. Opp. 30. But *Mees* is not applicable here; Panama has not argued that the discovery Webuild seeks exceeds the scope of discovery permitted by the Webuild Tribunal's rules. The point is that Webuild has pursued § 1782 discovery without first following IBA Rule 3.9, which would have allowed the Webuild Tribunal to consider the propriety of seeking such evidence. Webuild's disregard for those procedures is an attempt to circumvent the proof-gathering rules applicable to the Webuild arbitration.

Webuild fails to address the decisions of multiple courts that have exercised their discretion to deny § 1782 applications in near-identical circumstances. In *In re Application of Caratube International Oil Co.*, 730 F. Supp. 2d 101 (D.D.C. 2010), a party to an ICSID arbitration (in which the parties had agreed that the IBA Rules would be a "guideline") sought third-party discovery pursuant to § 1782, without first requesting that the tribunal authorize the party to take steps to obtain the documents. The district court rejected the § 1782 petition, reasoning that "by unilaterally filing [its] petition, Caratube ha[d] side-stepped these [IBA] guidelines, and ha[d] thus undermined the Tribunal's control over the discovery process." *Id.* at 108. This factor "weigh[ed] against granting" the petition. *Id.* (footnote omitted). And in *In re Bio Energias Comercializadora de Energia Ltda.*, No. 19-cv-24497, 2020 WL 509987 (S.D. Fla. Jan. 31, 2020), the requesting party's failure to observe IBA Rule 3.9's procedures to "put the arbitral panel on notice of its efforts to obtain discovery" was likewise "critical." *Id.* at *4. There, the court held that it was "not apparent that the Application is anything less than an attempt to circumvent the arbitral panel" and denied the discovery sought. *Id.* at *4. Webuild nowhere even acknowledges these cases, let alone

attempts to distinguish them.

Even more striking is Webuild's silence about *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-226, 2015 WL 1810135 (D. Colo. April 17, 2015). There, a Panama-based contractor (of which Webuild owns 48% of the shares, *see* Webuild Mem. 2) sought § 1782 discovery in aid of a private commercial arbitration it had initiated against the Panama Canal Authority. *Id.* at *2. That arbitration involves the same underlying dispute as this case. *See* Panama Mem. 4-6. ¶. The court denied the application because the tribunal did not qualify as a "foreign or international tribunal" under § 1782. But the court also noted that it "would have declined to order production in any event under *Intel*'s discretionary factors," including because "it would circumvent the arbitration panel's discovery restrictions." *Id.* at *10. The court explained that the IBA Rules, to which the parties had agreed, "requir[ed] advance authorization from the panel of arbitrators" for third-party discovery. *Id.* at *11. "Such advance authorization ha[s] apparently neither been sought nor obtained." *Id.* Thus, the court stated:

> GUPC's Application directly conflicts with the agreed IBA Rules and therefore it seems obvious to this court that such a grandiose document production would not be welcomed by the arbitration panel nor would the delay associated with the privilege and other review which would go along with such a discovery production be well-received. "[T]he receptivity of the foreign tribunal is particularly important in light of the purposes of § 1782(a) . . . ."

Id. (citation omitted). The court therefore stated that, even if the statutory requirement were met, it "would exercise its authority to deny [GUPC's] Application." *Id*.

Webuild argues (at 31) that the parties are only "guided," not bound, by the IBA Rules, and therefore Webuild is free to ignore them. But as the Supreme Court noted in *ZF Automotive*, "the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments … ." 142 S. Ct. at 2088. The converse is also true. As a matter of respect for whatever governmental authority

Webuild claims the Tribunal wields,[14] the Court should not order this discovery (and impose burdens on third parties) before the Tribunal has had a chance to consider whether the evidence would be relevant to the case and material to its outcome.[15]

Webuild relies on *In re Warren*, No. 20 MISC. 208, 2020 WL 6162214 (S.D.N.Y. Oct. 21, 2020), which authorized § 1782 discovery in aid of proceedings before a NAFTA tribunal despite the requesting party's failure to abide by IBA Rule 3.9. There, the court recognized that the requesting party had not followed IBA Rule 3.9, but nevertheless viewed the "practical reality" that the tribunal "has no power to compel third-parties … to produce documents" as a justification for granting the application. But in that case, there was no argument that the tribunal would not consider the evidence that the § 1782 application sought. *Id.* at *8. Here, by contrast, it is at least possible that the Webuild Tribunal would conclude that the evidence sought is irrelevant and immaterial to its resolution of the dispute. Webuild's tactics have improperly deprived the Tribunal of the opportunity to consider the issue in the first instance.

CONCLUSION

For the foregoing reasons, and those in its Memorandum of Law, Panama respectfully requests that the Court grant the motion to intervene, vacate its prior Order, and quash the subpoena.

[14] *ZF Automotive* recognized that § 1782 "makes the … unremarkable assumption that an 'international tribunal' defaults to the rules on which the relevant nations agreed." 142 S. Ct. at 2087 n.2. Assuming arguendo that the Webuild Tribunal is an "international tribunal," comity favors deference to the rules on which Panama agreed.

[15] Webuild contends (at 32) that "Panama has [] 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." That is misleading. Panama wrote to the Tribunal only to inform it of Webuild's conduct and to reserve all rights in that regard. Panama neither requested any action on the part of the Webuild Tribunal nor invited any other comment or response. Accordingly, there would have been no reason for the Webuild Tribunal to respond. *See* Second Hodgson Decl. ¶ 10. Moreover, under IBA Rule 3.9, it was Webuild's burden to submit a request to the Tribunal. In any event, the Webuild Tribunal's silence on the matter cannot be construed as an agreement that such evidence is relevant or material to the dispute, or that the Tribunal has authorized such discovery.

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