IN THE UNITED STATES DISTRICT COURT
FOR THE 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***

MEMORANDUM OF LAW IN SUPPORT OF
SUBPOENA RECIPIENT WSP USA INC.'S MOTION
TO QUASH SUBPOENA AND TO VACATE THE COURT'S MAY 19, 2022 ORDER

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Subpoena recipient WSP USA Inc. (f/k/a Parsons Brinkerhoff) ("WSP") respectfully submits this Memorandum of Law in support of its Motion to Quash Subpoena and to Vacate the Court's May 19, 2022 Order granting Petitioners Webuild S.p.A. ("Webuild") and Sacyr S.A.'s ("Sacyr") (collectively, "Applicants") e*x parte* application under 28 U.S.C. § 1782 to obtain discovery from WSP for use in an international proceeding ("Application").

PRELIMINARY STATEMENT

Through the *ex parte* Application, filed pursuant to an inapplicable federal statute, Applicants improperly seek overly burdensome and intrusive discovery from WSP, a nonparty, for use in two investor-state arbitrations filed against the Republic of Panama ("Panama"). The Subpoena should be quashed and the Court's May 19, 2022 Order granting the Application vacated for two reasons.

First, Applicants do not satisfy the statutory requirements of § 1782. The United States Supreme Court's recent decision in *ZF Automotive US Inc. v. Luxshare Ltd*., 596 U.S. ____, ____ S. Ct. ____, No. 21-401, 2022 WL 2111355 (U.S. June 13, 2022), *rev'g Fund for Prot. of Invs.' Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 228 (2d Cir. 2021) reverses the Second Circuit authority on which the Application is predicated and unanimously holds that parties engaged in investor-state arbitrations like those at issue here cannot obtain discovery in the United States under § 1782. And, even if Applicants could satisfy the threshold statutory requirements of § 1782, the discretionary factors this Court must consider militate against permitting any discovery here.

Second, the discovery sought is far too broad, unduly burdensome and improper under the Federal Rules of Civil Procedure. Most, if not all, of the documents that Applicants seek from WSP are in the possession, custody or control of parties to the underlying arbitrations or can more easily be obtained in connection with those proceedings. According to the declaration submitted on behalf of Panama, discovery has not commenced in the arbitrations and Applicants have made no efforts to obtain these documents in the arbitrations before coming to this Court and burdening WSP with extensive nonparty discovery. Rules 26 and 45 require that this Court protect nonparties like WSP

from the undue burden imposed here, and WSP requests that the Court exercise its discretion to quash the subpoena on this basis alone.

I. FACTUAL BACKGROUND

Without any advance notice, on May 26, 2022, Applicants served the Subpoena authorized by this Court on WSP, a leading engineering professional services consulting firm, seeking documents from WSP for use in their commercial investor-state arbitrations with Panama. Applicants' Mem. at 5-6. (ECF No. 3).[1] WSP is not involved in the disputes between Applicants and Panama, nor is WSP a party to the Arbitrations. Applicants' Mem. at 24 (ECF No. 3).

Upon information and belief, the Arbitrations arise out of Applicants' role in a multi-billion dollar project involving the construction of a third set of locks on the Atlantic and Pacific sides of the Panama Canal ("Project"). Applicants' Mem. at 5 (ECF No. 3).[2] Together with two other companies, Applicants form the consortium, GUPC S.A. ("GUPC") that contracted with the Panama Canal Authority ("ACP") for the construction of the Project. Applicants' Mem. at 2-3, 6 (ECF No. 3). ACP awarded the Project to GUPC in or around 2009 and the work was completed in or around 2016. Applicants' Mem. at 12, 15 (ECF No. 3); Zaffaroni Decl. Ex. 15, at 43 (ECF No. 8-22, at 48). Parsons Brinkerhoff was retained as a consultant to ACP in 2002 to provide certain design and program management services for the Project. Applicants' Mem. at 3 (ECF No. 3). WSP, from whom discovery is sought in this proceeding, acquired Parsons Brinckerhoff in 2014. *Id.*

A. Prior § 1782 Applications

This is not Applicants' first or only outstanding § 1782 application seeking discovery from WSP concerning the Project and their disputes with Panama and ACP. Applicants—through their Panamanian

[1] According to Applicants, the underlying arbitrations are captioned *Webuild S.p.A. v. Republic of Panama*, ICSID Case No. ARB/20/10 ("Webuild Arbitration"), and *Sacyr S.A. v. Republic of Panama*, ICSID Case No. UNCT/18/6 ("Sacyr Arbitration") (collectively, the "Arbitrations"). *Id.*

[2] As WSP is not a party to the Arbitrations, it incorporates by reference the factual averments set forth in Panama's supporting Memorandum of Law and Declaration as to the history, nature and procedural posture of the Arbitrations. *See* Panama Mem. (ECF No. 15); Hodgson Decl. (ECF No. 16).

consortium, GUPC—filed multiple § 1782 applications in late 2014.[3] Applicants fail to fully disclose to this Court that in December 2014, GUPC—through the same counsel— filed an *ex parte* application for an order under § 1782 to obtain *substantially the same discovery* as Applicants now seek from WSP in this proceeding for use in a separate arbitration. *See In re Grupo Unidos Por El Canal S.A.*, No. 14-mc-00405 (S.D.N.Y. Dec. 5, 2014), Dkt. No. 1 ("2014 SDNY § 1782 Action"); *compare id.,* Dkt. No. 2 (Memorandum of Law) & Dkt. No. 3-2 (Subpoena), *with* Applicants' Mem. (ECF No. 3) & Subpoena (ECF No. 7-1); *see also* Hodgson Decl. Exs. O-P (ECF Nos. 16-15 – 16-16). That related application and the associated motions to quash and to vacate filed by ACP and WSP remain pending before Judge Gardephe. *See* 2014 SDNY Action, Dkt. No. 60 (Letter from C. Lamm, Counsel to GUPC, conceding that the underlying arbitration against ACP for which the documents were sought had been resolved but nonetheless arguing that the requested discovery of Parsons Brinckerhoff remains relevant to at least two other ongoing arbitration proceedings against ACP).

The action before Judge Gardephe is particularly relevant here because Parsons Brinckerhoff was acquired by WSP in 2014. *See* Applicants' Mem. at 3 (ECF No. 3); Lamm Decl. ¶ 6 (ECF No. 7); *id.* Ex. 8 (ECF No. 7-14). As such, in the instant Application before this Court, Applicants make a second request for documents from WSP, Parsons Brinckerhoff's legal successor, that is substantially similar to their existing request that is currently pending before Judge Gardephe. In other words, Applicants (through their § 1782 Application here), and GUPC, which includes Applicants as members (through a prior § 1782 application currently before Judge Gardephe), seek largely duplicative materials from the same entity. *See* Hodgson Decl. Exs. O-P (ECF Nos. 16-15 – 16-16). To the extent the application in the 2014 SDNY § 1782 Action is not deemed moot, the instant Application sidesteps Judge Gardephe's consideration of that pending request.

[3] *See In re Grupo Unidos Por El Canal S.A.*, No. 3:14-MC-80277-JST, 2015 WL 1815251 (N.D. Cal. Apr. 21, 2015) (application denied); *In re Grupo Unidos Por El Canal, S.A.*, No. 14-MC-00226-MSK-KMT, 2015 WL 1810135, at *6-9 (D. Colo. Apr. 17, 2015) (application denied); *In Re Application of Grupo Unidos Por El Canal, S.A.*, No. 1:14-mc-00405-P1 (S.D.N.Y. Dec. 5, 2014) (application pending).

B. The Underlying Investor-State Arbitrations

Applicants initiated the underlying Arbitrations, which are styled as investor-state arbitrations against Panama. Applicants' Mem. at 13-14 (ECF No. 3). Investor-state arbitration, also known as investment arbitration, is a procedure to resolve disputes between a foreign investor and a host state by an independent arbitral tribunal pursuant to a treaty or other agreement to be resolved by independent arbitrators. *See generally* Hodgson Decl. Ex. R, at 30 (ECF No. 16-18) (Amicus Br. for United States, *ZF Automotive* 2022 WL 333383, at 27-32 (providing background on investor-state arbitration). These obligations are set out in the treaties and include prohibitions against expropriation and discrimination. *See, e.g.*, Lamm Decl. Ex. 12, Art. V (ECF No. 7-18, at 4-5); Martinez Lopez Decl. Ex. 10, Art. VI (ECF No. 9-10, at 3-4). Applicants and Panama agree that the pertinent treaties here for the Webuild Arbitration and the Sacyr Arbitration, respectively, are the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (the "Panama-Italy Treaty"), Lamm Decl. Ex. 12 (ECF No. 7-18), and the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and Panama (the "Panama-Spain Treaty"), Martinez Lopez Decl. Ex. 10 (ECF No. 9-10).

Sacyr allegedly invoked its right to initiate the Sacyr Arbitration pursuant to the Panama-Spain Treaty under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). Applicants' Mem. at 13 (ECF No. 3); Martinez Lopez Decl., Exs. 8-10 (ECF Nos. 9-8 – 9-10). Webuild allegedly initiated the Webuild Arbitration pursuant to the Panama-Italy Treaty under the International Centre for Settlement of Investment Disputes ("ICSID") Convention and the ICSID Arbitration Rules ("ICSID Rules"). Applicants' Mem. at 13 (ECF No. 3); Lamm Decl., Exs. 11-13 (ECF Nos. 7-11 – 7-13). In addition to the UNCITRAL Rules and ICSID Rules, Panama claims that it agreed with Webuild and Sacyr, individually, that the 2010 International Bar Association Rules ("IBA Rules") would apply and provide supplemental guidelines for discovery in the Arbitrations.

Panama Mem. at 8-9 (ECF No. 15); Hodgson Decl. Ex. L, ¶ 7.1 (Sacyr) (ECF No. 16-12); *id.* Ex. M, ¶ 15.2 (Webuild) (ECF No. 16-13).

Applicants do not offer any specific evidence as to what the underlying rules and procedures in the Arbitrations provide with respect to discovery, much less allege to have undertaken any efforts to obtain discovery in the Arbitrations. To the contrary, Applicants acknowledge that "[a]t present, both Webuild and Sacyr are in the written phases of their respective arbitrations." Applicants' Mem. at 14 (ECF No. 3). Panama claims that both Arbitrations have extensive, agreed-upon discovery schedules governing both the scope and timing of discovery, and that discovery has yet to commence. Panama Mem. at 7-9 (ECF No. 15); Hodgson Decl. ¶¶ 11-12, 15 (ECF No. 16); *id.* Exs. J-K (ECF Nos. 16-10 – 16-11). Panama has filed with its Motion copies of the operative Procedural Orders issued in the Arbitrations, which confirm that both proceedings provide for a document production phase that has not yet commenced. *Id.* Panama states that in May 2022, it submitted a jurisdictional objection in the Webuild Arbitration that is pending before the tribunal for a determination as to whether it even has jurisdiction over Webuild's claims in the first instance. Panama Mem. at 8 (ECF No. 15); Hodgson Decl. ¶ 16 (ECF No. 16).

Panama further represents that notwithstanding that such discovery is governed by the tribunals' discretion under the UNCITRAL Rules, the ICSID Rules, and the IBA Rules, the tribunals overseeing the Arbitrations were not presented with advance (1) notice of Applicants' § 1782 request, (2) opportunity to determine whether the documents that Applicants seeks here are material and relevant, or (3) opportunity to direct the parties to the Arbitrations in any way with respect to the Application or any proposed nonparty discovery. Panama Mem. at 8-9 (ECF No. 15); Hodgson Decl. ¶ 20 (ECF No. 16).

C. Applicants' Instant § 1782 Application

On May 17, 2022, Applicants filed their most recent Application in this Court, seeking, for a second time, an Order under § 1782 to obtain discovery from WSP, purportedly now for use against Panama in the Arbitrations. *See* Applicants' Mem. at 1, 10 (ECF No. 3). The Application was *ex parte*

in every sense. Applicants never notified WSP of the proceeding. Panama similarly asserts that Applicants failed to provide notice to either Panama or the tribunals in the Arbitrations of their intent to initiate § 1782 proceedings prior to filing the Application, which, as a result, was unopposed. Panama Mem. at 8-9 (ECF No. 15); Hodgson Decl. ¶ 20 (ECF No. 16). As a consequence, the Court entered an Order granting the unopposed Application on May 19, 2022 (ECF No. 11). Applicants served the Subpoena issued pursuant to the Application on May 26, 2022 (ECF No. 12).

On June 9, 2022, WSP served objections to the Subpoena in accordance with Rule 45 of the Federal Rules of Civil Procedure and invited a meet and confer with Applicants. On June 9, 2022, Panama filed its Motion to Intervene, to Quash and to Vacate the Court's May 19, 2022 Order (ECF Nos. 13, 15-17) along with a Statement of Relatedness pertaining to the 2014 SDNY § 1782 Action pending before Judge Gardephe (ECF No. 14). On June 13, 2022, Panama filed a Notice of Supplemental Authority in Support of its Motion, bringing to this Court's attention the United States Supreme Court's decision in *ZF Automotive* issued earlier that day (ECF No. 19). On June 16, 2022, WSP served another letter on Applicants requesting that they withdraw the Subpoena in light of the Supreme Court's recent and controlling decision in *ZF Automotive* to avoid unnecessary motion practice. Applicants have not yet agreed to withdraw the Subpoena, so WSP now joins in Panama's Motion and files its own Motion in further support of the requested relief.

II. ARGUMENT

A. This Court Should Quash the Subpoena and Vacate the May 19, 2022 Order Permitting Discovery Under 18 U.S.C. § 1782

"The analysis of a district court hearing an application for discovery pursuant to § 1782 proceeds in two steps." *Fed. Republic of Nigeria v. VR Advisory Servs., Ltd.*, 27 F.4th 136, 148 (2d Cir. 2022). First, Applicants must establish that: (1) they are "interested persons;" (2) the discovery is "for use in a proceeding in a foreign or international tribunal;" and (3) the person from whom discovery is sought "resides or is found" in the district in which the application is made. 28 U.S.C. §

1782(a); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246 (2004); *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015). Second, if the application meets the statutory requirements, the Court ***may*** permit discovery "in light of the twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Id.* In the *Intel* case, the Supreme Court articulated four factors implicated by those twin aims that this Court is to consider:

> (1) whether the person from whom discovery is sought is a participant in the foreign proceeding, in which case the need for § 1782(a) aid generally is not as apparent; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) 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; and (4) whether the request is unduly intrusive or burdensome.

Fed. Republic of Nigeria, 27 F.4th at 148 (*citing Intel Corp.*, 542 U.S. 241) (internal quotations omitted).

Because Applicants cannot meet the statutory requirements of § 1782, and because the *Intel* factors weigh in favor of denying the discovery Applicants seek to obtain, WSP requests that this Court quash the Subpoena and vacate its prior Order granting the *ex parte* Application.

1. The Underlying Investor-State Arbitrations are Not "Foreign or International Tribunals" Under the Statute.

With respect to the first step of this Court's statutory analysis, it is well-settled that "[t]he party seeking the discovery bears the burden of establishing that the statutory requirements are met." *In re Escallon*, 323 F. Supp. 3d 552, 555 (S.D.N.Y. 2018) (*citing Certain Funds, Accounts, and/or Inv. Vehicles v. KPMG, LLP*, 798 F.3d 113, 118 (2d Cir. 2015)). "[T]he statutory requirements of § 1782 are jurisdictional in nature," and each one "implicates the Court's authority to grant [an applicant] the relief it seeks." *In re Gorsoan Ltd.*, No. 17-cv-5912, 2021 WL 673456, at *4 (S.D.N.Y. Feb. 22, 2021); *see also, e.g.*, *In re Guo*, 965 F.3d 96, 102 (2d Cir. 2020) (describing § 1782's "statutory preconditions" as "mandatory requirements"); *Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore*

LLP, 895 F.3d 238, 243 (2d Cir. 2018) ("A district court possesses *jurisdiction* to grant a Section 1782 petition *if* [the statutory requirements are met]." (emphasis added)); *In re OOO Promnefstroy*, No. M 19-99, 2009 WL 3335608, at *4 (S.D.N.Y. Oct. 15, 2009) (explaining that § 1782 "authorizes district courts to grant such relief *only where*" all of the statutory requirements are met (emphasis added)).

WSP does not challenge that Applicants are "interested persons" or that WSP resides in New York. However, Applicants have not, and cannot, satisfy their burden of establishing that each of the underlying Arbitrations constitutes a "proceeding in a foreign or international tribunal." WSP incorporates by reference the arguments raised by Panama with respect to the statutory requirements under § 1782 and will not rehash those arguments here. *See* Panama Mem. at 15-21 (ECF No. 15); Panama Supp. (ECF No. 19). Instead WSP will focus its argument on the Supreme Court's subsequent decision in *ZF Automotive,* which is squarely on point, controlling and dispositive on the matter. *See ZF Automotive,* 2022 WL 2111355.[4]

In support of their Application, Applicants, in reliance on the Second Circuit's holding in *AlixPartners*, argue merely that because "the requested discovery is 'for use in' the international ICSID arbitration between Webuild and Panama under the Italy-Panama Treaty and/or the UNCITRAL arbitration between Sacyr and Panama under the Spain-Panama treaty," the Application "meets the 'foreign or international tribunal' requirement" of § 1782. Applicants' Mem. at 15-16 (ECF No. 3).

Since the filing of the Application, the Supreme Court reversed the Second Circuit's decision in *AlixPartners*. *See ZF Automotive,* 2022 WL 2111355. The Supreme Court held that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under § 1782. Such bodies are those that exercise governmental authority conferred by one nation or

[4] The Supreme Court consolidated *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, with *ZF Automotive* for briefing and oral argument. *See* Docket for 21-518, available at https://www.supremecourt.gov/docket/docketfiles/html/public/21-518.html (last accessed June 15, 2022).

multiple nations." *Id.* at *10 (slip op. at 16-17). The Supreme Court further held that an investor-state arbitration "under a bilateral investment treaty between Lithuania and Russia," *id.* at *4 (slip op. at 4), did not meet this test because "nothing in the treaty reflects Russia and Lithuania's intent that [the arbitral] panel exercise governmental authority," *id.* at *9 (slip op. at 13-14).

Applicants have not alleged any facts establishing that the either of the underlying tribunals overseeing the Arbitrations possess governmental authority. To the contrary, Applicants and Panama appear to agree, among other things, that neither of the tribunals is associated with either government, both tribunals function independently from the sovereign states, Panama is bound to recognize any award of the tribunals, and that the parties selected their own arbitrators in each of the Arbitrations. *See* Panama Mem. at 16-18 (ECF No. 15); Lamm Decl. Ex. 12, Art. IX, ¶ 5 (ECF No. 7-18, at 6); Martinez Lopez Decl. Ex. 10, Art. XII, ¶ 5 (ECF No. 9-10, at 5). Based on the record before this Court, these tribunals are materially indistinguishable in form and function to the panel in the investor-state arbitration at issue in *AlixPartners*.

The Supreme Court's holding in *ZF Automotive* applies with equal force here, based on which, neither of the Arbitrations are "foreign or international tribunals" under § 1782. Based on this precedent, there is no longer any legal or factual basis for the Application or the discovery Applicants seek to obtain from WSP. Pursuing the Subpoena further notwithstanding this controlling precedent from the Supreme Court serves no purpose other than to improperly harass and burden WSP, a nonparty to the underlying disputes.

2. The Discretionary § 1782 Factors Weigh in Favor of Rejecting the Discovery and the Judicial Assistance Requested.

Even if Applicants were able to satisfy the statutory requirements (and they have not), § 1782 is discretionary in nature; it permits but does not require judicial assistance. *Intel,* 542 U.S. at 264 (the district court "*may* order" discovery; "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so") (emphasis added)). In exercising this

discretion to determine whether, and to what extent, to honor the request of a foreign litigant, the Second Circuit has instructed that this Court must consider the four *Intel* factors outlined above, which are not to be applied mechanically. *Gushlak v. Gushlak*, 486 Fed. App'x. 215, 128 (2d Cir. 2012) (citing *Intel*, 542 U.S. at 264-65).

Here, application of the second, third, and fourth *Intel* factors conclusively weigh against the exercise of discretion to permit the discovery and the judicial assistance requested.

a. The Nature and Character of the Proceedings Demonstrate that any Discovery from WSP is Premature and There Is No Evidence that the Tribunals Are In Need of, or Receptive To, This Court's Judicial Assistance.

The second *Intel* factor promotes international comity. *Intel,* 542 U.S. at 261. Specifically, this Court must consider "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Id*. at 264.

There is nothing concerning the nature or character of the Arbitrations as described by both Applicants and Panama that would warrant this Court's exercise of discretion under § 1782. As noted above, Applicants do not event allege to have taken ***any*** discovery in the Arbitrations or that either of the tribunals are aware of and receptive to the evidence they seek through this § 1782 proceeding.[5] According to Panama, the parties have not even commenced document discovery in either of the Arbitrations. Panama Mem. at 7-9 (ECF No. 15); Hodgson Decl. ¶¶ 11-12, 15 (ECF No. 16); *id.* Exs. J-K (ECF Nos. 16-10 – 16-11).

Moreover, with respect to the Webuild Arbitration in particular, Panama represents that it recently submitted a jurisdictional objection and request that the Webuild tribunal bifurcate the

[5] Applicants' reliance on *In re Republic of Turkey*, 2020 U.S. Dist. LEXIS 126512, at *16 (D.N.J. 2020) for the proposition that, in the past, ICSID tribunals have been receptive to evidence obtained through a § 1782 proceeding is fundamentally flawed. *See* Applicants' Mem. at 24 (ECF No. 3). In that case, unlike here, the petitioners established that the tribunal was not only aware of the application but in fact stated that it was "open in principle (i.e., would not rule out) admitting evidence obtained through the 1782 proceeding." *Id*. at *16-17.

proceedings to determine whether it has jurisdiction over Webuild's claims. Panama Mem. at 8, 22 (ECF No. 15); Hodgson Decl. ¶ 16 (ECF No. 16).[6] Inasmuch as Applicants do not allege that any of the discovery they seek from WSP pertains to the jurisdictional issues in the Webuild Arbitration, should the tribunal determine it lacks jurisdiction, the requested discovery will be of no use in the defunct proceeding, regardless of how it is characterized by Applicants. It is not apparent why Applicants filed their § 1782 Application jointly, but even assuming there is a valid basis for doing so, at a minimum, this Court should bifurcate Webuild's and Sacyr's requests and stay any subpoena pursued on behalf of Webuild until the ICSID tribunal has ruled on the threshold jurisdictional question as to whether there will be any arbitration on the merits in that proceeding at all.

Likewise, there is no evidence that the tribunals in either of the Arbitrations are even aware of this proceeding, let alone in need of or receptive to this Court's judicial assistance. According to Panama, Applicants failed to provide any notice to the tribunals regarding either the Application or the Subpoena propounded on WSP, much less ask for their receptivity to the evidence sought through this broad nonparty discovery. Panama Mem. at 8-9 (ECF No. 15); Hodgson Decl. ¶ 20 (ECF No. 16). This fact alone warrants the Courts intervention to quash or at least defer enforcement of the Subpoena. *See, e.g., In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008) (exercising discretion "by denying [petitioner's] discovery requests until if and when the arbitral panel provides some affirmative indication of its receptivity to the requested materials").

[6] *See also* "Case Details: *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Republic of Panama* (ICSID Case No. ARB/20/10)," available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/10 (last accessed June 8, 2022) (noting as the "Latest Development" a May 27, 2022 rejoinder filed by Claimant on the request to address the objections to jurisdiction as a preliminary question); Applicants' Mem. at 14 (ECF No. 3) ("Webuild's last pleading on the merits is currently scheduled to be filed in January 2023 [citing Lamm Decl. ¶ 10 (ECF No. 7)]. Sacyr's briefing of the merits begins this fall [citing. Martinez Lopez Decl. ¶ 9 (ECF No. 9)])."

b. The Application Allows Applicants to Circumvent Procedural and Discovery Limitations in the Arbitrations.

The third *Intel* factor is "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." *Intel*, 542 U.S. at 265.

Applicants include no specific information in their Application to this Court with respect to the discovery mechanisms available to them in the Arbitrations. WSP, as a nonparty, is not privy to any independent information in this regard and therefore must rely on Panama's submissions addressing the proof-gathering restrictions and other procedures that the govern in the Arbitrations. Among other things, Panama asserts that (1) the Arbitrations both provide for document discovery under the supervision of the respective tribunals; (2) there are agreed upon and governing policies with respect to document exchange and proof-gathering; and (3) Applicants' Application operates to circumvent those policies and procedures. *See* Panama Mem. at 22-25 (ECF No. 15); Hodgson Decl. ¶¶ 11-13, 15 (ECF No. 16); *id.* Exs. L-M (ECF Nos. 16-12 – 16-13).

According to Panama and the documentation included in support of its Motion, the parties agreed the IBA Rules would govern discovery in the Arbitrations. *See id.* The IBA Rules specifically address whether and how a party may seek documents from nonparties, such as WSP:

> If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, ***within the time ordered by the Arbitral Tribunal***, ***ask it to take whatever steps are legally available*** to obtain the requested Documents, ***or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing*** . . . . ***The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate*** if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3., as applicable, have been satisfied and (iii) none of the reasons for objections set forth in Article 9.2 applies.

Hodgson Decl. Ex. Q, IBA Rules, Art. 3.9 (emphasis added) (ECF No. 16-17); *see id.* Art. 3.10 ("At any time before the arbitration is concluded, the Arbitral Tribunal may . . . itself take, any step that it

considers appropriate to obtain Documents from any person or organisation"). As one federal court described IBA Article 3.9:

> Thus, the [IBA] guidelines that [applicant] proposed and the Tribunal accepted instructed [applicant] to "ask [the Tribunal] to take whatever steps are legally available to obtain the requested documents." Had [applicant] followed these guidelines, the Tribunal—if it believed the requested documents to be "relevant and material"—could have sought discovery assistance on its own through section 1782. But by unilaterally filing this petition, [applicant] has side-stepped these guidelines, and has thus undermined the Tribunal's control over the discovery process. This weighs against granting [applicant's] section 1782 petition [under the third *Intel* factor].

In re Caratube Int'l Oil Co., LLP, 730 F. Supp. 2d 101, 108 (D.D.C. 2010) (internal citations and footnotes omitted); *see also, e.g.*, *In re Bio Energias Comercializadora de Energia Ltda.*, No. 19-cv-24497, 2020 WL 509987, at *4 (S.D. Fla. Jan. 31, 2020) (reasoning that "Article 3.9 of the IBA Rules . . . requires at the very least that a party put the arbitral panel on notice of its efforts to obtain discovery" and that "the IBA Rules empower the arbitral tribunal to order a party to obtain documents or obtain itself any necessary documents").

By its own terms, IBA Article 3.9 prohibits Applicants from unilaterally seeking assistance from this Court in obtaining documents from nonparties such as WSP except as provided for by that rule. *See id.* Under the third *Intel* factor, Applicants' attempt to circumvent the procedural requirements in IBA Article 3.9, without first raising with and abiding by the conclusions and directions of the tribunals in the Arbitrations, should be rejected. The Second Circuit's decision in *Kiobel*, 895 F.3d 238, is instructive. The *Kiobel* Court held that the § 1782 application at issue in that case, which sought discovery of documents prior to the filing of a writ of summons notwithstanding that the Dutch Code of Civil Procedure permitted such discovery only after litigation had commenced, constituted an attempt to circumvent the Netherland's more restrictive discovery practices. *Id.* at 242, 245.

Consideration of the whole record reveals that Applicants again attempt to dispense with the rules governing discovery in the Arbitrations in favor of their § 1782 approach, in order to circumvent

those rules and to manipulate this Court's processes for a tactical advantage. This is exactly the use of § 1782 that *Intel* forbids. *See also Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (cautioning that "[e]mpowering arbitrators, or worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process ... [r]esort to § 1782 in the teeth of such [arbitration] agreements suggests a party's attempt to manipulate United States court processes for tactical advantage.").

Thus, the third *Intel* factor similarly weighs against the requested discovery, at least until Applicants have demonstrated efforts to obtain this information in accordance with the procedural rules governing their Arbitrations.

c. The Subpoena is Unduly Intrusive and Burdensome.

The fourth *Intel* factor is whether the discovery request is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 265. This factor is based on the incorporation by reference in § 1782 of the Federal Rules of Civil Procedure. 28 U.S.C. § 1782(a) (providing that discovery must be "in accordance with the Federal Rules of Civil Procedure"); *In re Metallgasellschaft AG*, 121 F.3d 77, 80 (2d Cir. 1997); *In re Sveaas,* 249 F.R.D. 96, 106 (S.D.N.Y. 2008) ("The proper scope of the discovery sought under § 1782, like all federal discovery, is governed by Federal Rule 26(b).").

Discovery under the federal rules is broad – but not unlimited. Fed. R. Civ. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). The federal rules instruct that this Court can and should limit or preclude discovery "if the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i). To illustrate, federal courts agree that "if it were clear that discovery were equally available in both foreign and domestic jurisdictions, a district court might rely on this evidence to conclude that the § 1782 application was duplicative." *Metallgasellschaft*, 121 F.3d at 79 (citations omitted); *see also In re Babcock Borsig Ag*, 583 F. Supp. 2d at 241 ("While there is no 'exhaustion' requirement for seeking

discovery under § 1782, the district court may, in its discretion, properly consider a party's failure first to attempt discovery measures in a foreign jurisdiction."); *accord In re Digitechnic*, 2007 U.S. Dist. LEXIS 33708, at *10 (W.D. Wash. May 8, 2007) ("[Petitioner] has not even tried to obtain any of the discovery sought here by way of French discovery tools. On this point, [Petitioner] emphasizes that there is no 'exhaustion' requirement in § 1782. While this is correct, there is nevertheless no reason that this Court should overlook [Petitioner's] failure to attempt any discovery measures in France in making the discretionary decision now before it.") (emphasis omitted)); *Maid of the Mist Corp. v. Alcatraz Media, LLC*, 2006 U.S. Dist. LEXIS 79872, at *7 n.5 (W.D.N.Y. Oct. 30, 2006) (quoting *Haworth, Inc. v. Herman Miller, Inc*., 998 F.2d 975, 978 (Fed. Cir. 1993) ("requiring party to 'seek discovery from its party opponent before burdening the nonparty' with discovery requests")).

Here, Applicants do not allege that the information they seek cannot be obtained in the Arbitrations and/or from parties to the Arbitrations. To the contrary, by Applicants' own admissions, much of the information they seek is or at least may be available to Panama, a party to the Arbitrations. *See, e.g.,* Applicants' Mem. at 5 (ECF No. 3) ("Much of the information ***that was available to Panama***, and which was not shared with Webuild and Sacyr during the bidding process, is in the possession of third party consultants and contractors that assisted Panama in designing and costing the Project.") (emphasis added). Indeed, the premise of Applicants' claims as it relates to the discovery they seek from WSP is that Panama allegedly had documents that it concealed or failed to provide to them. *See* Applicants' Mem. at 8, 10, 12 (ECF No. 3). Following Applicants' logic, to the extent such documents exist at all, they must have necessarily been in the possession of Panama at some time inasmuch as Panama could not have concealed or failed to provide documents that it did not have.

A cursory review of the documents Applicants seek to obtain from WSP, as drafted by Applicants, further suggests that this information, to the extent it exists, would likely be in the possession of Panama. *See, e.g.,* Applicants' Mem. at 11 (ECF No. 3) (quoting excerpt from table outlining the requested discovery) (emphasis added)):

Requested Discovery
1-2 (Parsons' technical documents ***for Panama***);
4 (Parsons' costs documents ***for Panama***);
3, 5, 7, 9 (Parsons' ***and Panama's*** communications related to Project costs);
10-13 (Parsons' documents related to ***Panama's tender preparation***);
15-16 (Parsons' documents related to ***Panama's review*** of Project bids);
17 (Parsons' documents related to ***Panama's failures*** to disclose).
8-9 (Parsons' documents related to ***Panama's conduct*** regarding potential claims and additional Project costs);
18-19 (Parsons' documents related to ***Panama's conduct*** in claims processes);
20-22 (Parsons' documents related to ***Panama's differential treatment*** of other investors in Panama).

The record before this Court demonstrates that Applicants are seeking to obtain this extensive discovery from WSP, a nonparty, before the agreed upon periods for discovery in the Arbitrations have even commenced, irrespective of the allegedly agreed upon limitations on and procedures governing discovery in those proceedings, and without any notice to or input from the respective tribunals. *See* Panama Mem. at 8-9 (ECF No. 15); Hodgson Decl. ¶ 20 (ECF No. 16). Exercising discretion to sanction any discovery under § 1782 under these circumstances would not further the animating purpose of the statute. *See Intel*, 542 U.S. at 252. The discovery would do nothing to "encourage foreign countries by example," unless that example is to open up their courts and invite parties to foreign or international arbitrations to freely engage in side trials abroad that allow them to circumvent their agreed upon rules and procedures and burden nonparties with discovery that they have not yet sought or are not entitled to in the underlying arbitrations. This runs contrary to that purpose and would

have the opposite effects of burdening the courts and parties in inefficient and abusive proceedings and creating significant tension with domestic arbitration law.

This is further demonstrated by the long history of Applicants' efforts to obtain discovery from WSP and other nonparties over the last decade during which they have been arbitrating these claims arising out of substantially the same facts and disputes with Panama and ACP. Undeterred, Applicants simply continue to bring claims in different fora, each time filing new § 1782 applications in hopes of obtaining a different result. This abuse of the statute and the United States judicial process should not be tolerated much less endorsed. This is particularly the case here, where Applicants already have a preexisting request pending before Judge Gardephe to compel the production of substantially the same documents from WSP. In doing so, Applicants seek to side step Judge Gardephe, unnecessarily expend valuable judicial resources, and further burden WSP by forcing it to defend not one but two proceedings after the significant expenses it has already incurred over the last eight years litigating many of these same issues in the 2014 SDNY § 1782 Action.

Thus, the third *Intel* factor further weighs in favor of denying the judicial assistance and the discovery that Applicants yet again seek from this Court and WSP.

B. The Subpoena is Overbroad and Unduly Burdensome in Violation of the Federal Rules of Civil Procedure

In addition, and independent of Applicants' failure to satisfy the statutory requirements and the discretionary factors militating against permitting the discovery sought, the Subpoena is improper under the Federal Rules of Civil Procedure. Under the terms of § 1782, the discovery process is guided by the Federal Rules. *See In re Gorsoan Ltd.,* 2014 U.S. Dist. LEXIS 175613, at *13-14 (S.D.N.Y. Dec. 10, 2014) (explaining that § 1782(a) mandates that third-party discovery be guided by Fed. R. Civ. P. 26 and 45) (citations omitted)).

Rule 26 requires this Court to limit discovery where "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less

burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(c)(1). And, under Rule 45, this Court has a duty to ensure that the party issuing the subpoena "take[s] reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1). "On timely motion, the issuing court ***must*** quash or modify a subpoena that . . . subjects a person to undue burden." *Id.* (emphasis added).

Applicants' overly-broad and unduly burdensome requests directed to WSP, a nonparty, should be quashed under the Federal Rules. Applicants resort to burdening WSP in the first instance with sweeping requests for practically every document that WSP has in connection with this mega Project, without regard to its relevance or need in the Arbitrations, where most, if not all of the documents sought, would be in the possession of parties to the Arbitrations, and before seeking any discovery in the Arbitrations. The document requests demand that WSP search for, collect and review essentially all records related to Parsons Brinkerhoff's services for a multi-billion dollar Project and one of the largest civil engineering construction projects in the world, going back almost 20 years. *See* Subpoena (ECF No. 3-2). Moreover, given the sensitive nature of the Project and its implications for public safety and security, many of the requested documents, to the extent they still exist, are covered under broad confidentiality and non-disclosure agreements for the benefit of ACP and other interested parties involved with the Project, the review and production of which would expose WSP to additional costs and potential liability.

Relief under § 1782 is routinely rejected where the proposed discovery, like that requested here, is "unduly intrusive or burdensome." *In re Kreke Immobilien KG* illustrates the principle. 2013 U.S. Dist. LEXIS 160283 (S.D.N.Y. Nov. 8, 2013). In *Kreke*, the Court denied a § 1782 subpoena because the applicant "made an unquestionably extensive request. It has identified sixteen categories of documents in the application ... and there is no territorial limit to the discovery sought. Overall, [the applicant] seems to be asking [the respondent] to gather all of its documents relating to the [project], a [$]1 billion purchase." *Id.* at *21. By way of comparison, the *Kreke* Court found that "recent cases

suggest 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 *20-21 (citing *In re Promnefstroy*, 2009 U.S. Dist. LEXIS 98610 (S.D.N.Y. 2009) (rejecting a broad § 1782 application as overly burdensome); *In re Gemeinschaftspraxis*, 2006 U.S. Dist. LEXIS 94161 (S.D.N.Y. 2007) (approving an application seeking discovery that concerned the production of a single report); *In re Pan Americano*, 354 F. Supp. 2d 269, 275 (S.D.N.Y. 2004) (approving an application for "documents related to . . . insurance coverage for a single loss on a single day")).

Remarkably, as noted above, Applicants have propounded these extensive requests on WSP where they have acknowledged that any relevant and responsive documents that may exist are or should be in the possession of Panama, before discovery has even commenced in the Arbitrations. WSP should not be forced to shoulder the burden and costs associated with collecting, reviewing, and producing any of these documents when Applicants will have an opportunity to obtain all information to which they are entitled from the parties to the Arbitrations and in the manner they agreed to and as prescribed or endorsed by their selected tribunals.[7]

III. CONCLUSION

For the foregoing reasons, WSP respectfully requests that this Court grant its Motion and issue an Order quashing the Subpoena and vacating the May 19, 2022 Order.

[7] In the alternative, in the event this Court enforces the Subpoena, in whole or in part, WSP respectfully requests that all costs of compliance, including for collection, processing and attorney review, be shifted to Applicants in advance. *See, e.g., First Am. Corp. v. Price Waterhouse LLP*, 184 F.R.D. 234, 1998 (S.D.N.Y. 1998) (*citing* Fed. R. Civ. P. 45) (conditioning the enforcement of the subpoena on the serving party's paying for the nonparty's costs)).

Respectfully submitted,

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