UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Application of Webuild S.p.A. and Sacyr S.A., *Applicants*, To Obtain Discovery for Use in an International Proceeding	Misc. Action No. 22-140

MEMORANDUM OF LAW IN SUPPORT OF
***EX PARTE* APPLICATION FOR AN ORDER UNDER 28 U.S.C. § 1782**
TO OBTAIN DISCOVERY FROM WSP USA
FOR USE IN AN INTERNATIONAL PROCEEDING

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Webuild S.p.A ("Webuild"), formerly known as Salini Impregilo S.p.A., successor company to Impregilo ("Salini Impregilo"), and Sacyr S.A. ("Sacyr") (together, the "Applicants"), submit this memorandum of law in support of their application for an Order under 28 U.S.C. § 1782 to obtain discovery from WSP USA ("WSP") for use in two international proceedings. This application is further supported by the declarations of Carolyn B. Lamm and Carmen Martinez Lopez, who are counsel to Webuild and Sacyr, respectively, in the underlying arbitration proceedings at issue, and the declaration of Antonio Maria Zaffaroni, a former manager of Salini Impregilo and former director at Sacyr.

STATEMENT OF FACTS

I. NATURE OF THE DISPUTES

The international proceedings underlying this application for discovery are two investment arbitrations relating to major investments by Webuild and Sacyr in an international infrastructure project to build the Third Set of Locks Project for the Panama Canal (the "Project"). *See Webuild S.p.A. v. Republic of Panama*, ICSID Case No. ARB/20/10, filed March 11, 2020; *Sacyr S.A. v. Republic of Panama,* ICSID Case No. UNCT/18/6, filed August 3, 2018. The arbitrations concern breaches by the Republic of Panama ("Panama") of certain treaties and international law by, *inter alia*, failing to provide complete and accurate information during the bidding and procurement processes for the Project. 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. Respondent WSP is such a consultant and the information that it possesses is needed for use in the pending treaty arbitrations against Panama.

A. The Parties

Applicants Webuild and Sacyr are global construction firms specialized in building large works and complex infrastructure projects. Together with two other companies, they form the consortium, GUPC S.A. ("GUPC"),[1] that constructed the Panama Canal expansion that was completed in 2016. Lamm Decl. ¶ 3; Zaffaroni Decl. ¶ 4; *see also* Webuild Request for Arbitration dated Mar. 11, 2020 (Lamm Decl., Ex. 10) ("Webuild Request for Arbitration") ¶ 2. Webuild's investment includes 48% of the shares in GUPC and equity and capital in the Project. Lamm Decl. ¶ 3; Zaffaroni Decl. ¶ 18; *see also* Webuild Request for Arbitration ¶¶ 46, 47. Sacyr's investment in the Project also included 48% of the shares in GUPC. Martinez Decl. ¶ 3. To effect their respective investments, Webuild and Sacyr invested billions of dollars in the Project, as well as technical and managerial support, know-how, and goodwill. Zaffaroni Decl. ¶¶ 4, 17-18; *see also* Webuild Request for Arbitration ¶¶ 11-12, 47, 61.

Panama is the sole respondent in each arbitration. Through its organ and instrumentality the Panama Canal Authority ("ACP"), Panama has exclusive responsibility for the "operation, improvement, and modernization of the Canal, as well as supervising its management." ACP, "Board of Directors," *available at* https://pancanal.com/en/board-of-directors/ (last accessed May 13, 2022) (Lamm Decl., Ex. 5); *see also* Webuild Request for Arbitration ¶ 8.

WSP, from which discovery is sought in this proceeding, is a multinational company with its U.S. headquarters at One Penn Plaza, New York, New York. *See* WSP, "Our Offices," *available at* https://www.wsp.com/en-CH/who-we-are/our-offices (last accessed May 13, 2022)

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[1] GUPC was incorporated in November 2009 with Panama's acquiescence for the purpose of compliance with Panamanian law. Lamm Decl. ¶ 3; Zaffaroni Decl. ¶ 4. As described in Webuild's request for arbitration, the GUPC member companies also included Jan De Nul N.V. and Constructora Urbana S.A. Webuild Request for Arbitration dated Mar. 11, 2020 (Lamm Decl., Ex. 10) ¶ 46. Hereinafter, reference to GUPC is to both the joint venture and the later incorporated entity.

(Lamm Decl., Ex. 9) ("WSP, Our Offices").[2] WSP describes itself as a "globally-recognized professional services firm" that "provides technical expertise and strategic advice to clients . . . as well as offering project and program delivery and advisory services." WSP, "Our Story," *available at* https://www.wsp.com/en-US/who-we-are/our-story (last accessed May 11, 2022) (Lamm Decl., Ex. 8) ("WSP, Our Story"). Since at least 2002, WSP (through its predecessor, Parsons Brinckerhoff ("Parsons"), which WSP acquired in 2014) served as a primary consultant to ACP for the Project. *See* ACP, "Message from the Chairman of Board of Directors" (Lamm Decl., Ex. 6) ("ACP, Message from the Chairman"); *see also* WSP, Our Story. According to WSP, "as program advisors" to ACP in connection with the Panama Canal expansion, it "worked alongside the ACP to decide what the final project was going to look like." WSP, "Panama Canal: Expansion into the 21st Century," *available at* https://www.wsp.com/en-US/projects/panama-canal-expansion (last accessed May 15, 2022) (Lamm Decl., Ex. 7) ("WSP, Panama Canal: Expansion into the 21st Century").

In connection with the Project, WSP also "reviewed over a hundred studies and reports about what currently existed and what was possible, in order to build a plan that took all opportunities and restrictions into account." *Id.* Further, WSP "developed and integrated five models—capability, operation costs, market demand, hydrologic and financial—to determine how to maximize economic value of the Canal" that were "used to design an implementation strategy and ultimately to prepare and strategize the bid process." *Id.* As part of its models, WSP "built a 27-year demand forecast, accompanied by a working model for the operation of [the] Panama Canal" that "was used during the financing stage of the expansion project." *Id.*

[2] In December 2014, GUPC filed an *ex parte* application for an order under 28 U.S.C. § 1782 to obtain discovery from Parsons Brinckerhoff, WSP's predecessor, for use in a separate international proceeding. *See In Re Application of Grupo Unidos Por El Canal, S.A., To Obtain Discovery For Use In An International Proceeding*, No. 1:14-mc-00405-P1 (S.D.N.Y. Dec. 5, 2014). That application remains pending.

Because of its role (through the predecessor company Parsons) as a primary consultant to Panama in connection with the Project, WSP has information in its custody and control that bears directly on the two international investment arbitrations. In particular, WSP has information material to Applicants' claims regarding (i) Panama's breach of its bilateral investment treaty obligations to the Spanish and Italian investors based on a failure to provide fair and equitable treatment; (ii) Panama's creation of legitimate expectations that it then failed to deliver; (iii) Panama's violation of its duty of good faith and its duty to inform and ensure transparency due, *inter alia*, to concealment and misrepresentation of critical information regarding the expected cost, financing, and development of the Project; and (iv) failure to afford prompt and reasonable treatment with respect to claims for additional costs. The proposed subpoena to WSP pursuant to this Application is attached as Exhibit 1 to the Declaration of Carolyn Lamm.

B. The Project

Following the transfer of the Panama Canal from the United States to Panama pursuant to the Neutrality Treaty and Panama Canal Treaty on December 31, 1999, Panama prepared a strategic plan to induce foreign investment to expand the Canal. *See* Webuild Request for Arbitration ¶¶ 40-44. In particular, Panama enacted a legal and economic framework to promote and protect investment and issued a Master Plan for the Panama Canal ("Master Plan") that was to serve as the strategy for the Canal's next twenty years. *See* Master Plan dated Jun. 7, 2006 (Zaffaroni Decl., Ex. 6) ("Master Plan"); *see also* Zaffaroni Decl. ¶ 7.

The Master Plan states that, in its development, Panama had taken into account the results of various studies it had conducted, which had "undoubtedly . . . been the most intense, comprehensive and in-depth initiative performed by the Canal since its inauguration." Master Plan § 2.6. The Master Plan also states that the document "acts as a summary and integrating

link of the more than 120 studies, diagnoses and investigations, and the models on which they are based." *Id.* § 2.4; *see also* Zaffaroni Decl. ¶ 7; Webuild Request for Arbitration ¶ 50.

According to the Master Plan, Panama hired WSP in 2002 as a consultant for the execution of the "Study Plan and development of the Master Plan." *See* Master Plan § 2.7. The Master Plan states that "[t]he cost of the construction of the third set of locks has been estimated using the most rigorous methods of analysis, and with the advice of internationally recognized experts." *Id.* at § 6.9.1. In particular, the "cost estimate and execution schedule were developed by ACP personnel, with advisory by consultants specializing in cost estimation from Parsons Brinckerhoff International [and others]." *See* Master Plan §§ 2.7, 6.9.1; *see also* Zaffaroni Decl. ¶ 10; ACP, Message from the Chairman; WSP, Panama Canal: Expansion into the 21st Century (Zaffaroni Decl., Ex. 4).

Panama subsequently prepared and issued a Proposal for the Expansion of the Panama Canal Third Set of Locks Project dated April 24, 2006 ("Proposal"). *See* Proposal (Zaffaroni Decl., Ex. 8); *see also* Zaffaroni Decl. ¶ 10. Among other things, the Proposal referenced multiple studies prepared by Parsons, including on managerial recommendations and costs. *See* Proposal, Annex: Master Plan Study List. The Proposal also stated that its content and statements "are extensively detailed in the 2005-2025 Canal Master Plan, and are fully supported by the over 120 studies conducted" by Panama. Proposal at 70; *see also* Zaffaroni Decl. ¶ 10. The Proposal estimates the costs for the canal expansion at US$5.25 billion, which includes US$3.35 billion for the new locks, relying on work performed by consultants, including Parsons. Proposal at 10-11. This estimate "includes contingencies to cover risks and unforeseen events such as those that might be caused by accidents, design changes, price increases, and possible delays, among others." *Id.*; *see also* Zaffaroni Decl. ¶ 10; Webuild Request for Arbitration ¶ 45.

In the Proposal, ACP represented that the "probability that the construction will be performed within the estimate, or less, is high." *See* Proposal at 11-12.

As part of its work for ACP, Parsons assisted in preparing a cost, schedule and constructability analysis for the Project, which established a "cost breakdown structure, calculated the quantities based on the cost breakdown structure, evaluated the methods and equipment required for constructing the Atlantic and Pacific locks as well as the Pacific access channel, and established the schedule for completing the project within a reasonable timeframe." *See* Parsons Cost Schedule and Constructability Analysis for Proposed Post-Panamax Locks, Concept Level Design Estimates Report dated April 2004 (Zaffaroni Decl., Ex. 5) at 2.

In October 2006, Panamanians overwhelmingly approved the Project by national referendum. Zaffaroni Decl. ¶ 9; *see also* Webuild Request for Arbitration ¶ 44. Subsequently, in late 2007, Panama commenced with a public tender for execution of the Project. Zaffaroni Decl. ¶ 12. As part of the public tender, Panama disseminated a Request for Qualifications and a Request for Proposals to potential contracting bidders for the Project. *See* Zaffaroni Decl. ¶¶ 12-13; Request for Qualifications (Zaffaroni Decl., Ex. 9); Request for Proposals (excerpts) (Zaffaroni Decl., Ex. 10); *see also* Webuild Request for Arbitration ¶ 46.

In connection with the Request for Qualifications, Panama provided bidders with certain detailed conceptual designs, drawings and geotechnical data and reports, but failed to provide the tenderers certain studies that it had conducted in relation to costs estimates of the Project and the nature of the existing conditions at the Project site, including those developed with Parsons. *See* Zaffaroni Decl. ¶ 16; Webuild Request for Arbitration ¶ 52.

In particular, in the Request for Qualifications, Panama stated that "[t]he Panama Canal Capacity Expansion Proposal is the result of an exhaustive study and planning process,

commenced in 1996, involving analyses of market and competition, capacity and operations, technical and engineering options, risk and financial aspects and environmental and socio-economic considerations" and that these were incorporated in the Master Plan. *See* Request for Qualifications (Zaffaroni Decl., Ex. 9) at 11.The Request for Qualifications, which expressly incorporated the Master Plan and the Proposal, further assured potential investors that the "Project will be funded from a combination of ACP generated funds and external financing" and that the "Contractor of the Project will not be required to provide financing for the Project." *Id.* at 12.

In these materials, Panama represented that it had performed decades-long analyses of the Panama Canal site in anticipation of the Project, and had engaged multiple consultants. Among the consultants Panama engaged was Parsons (now WSP). *See* Zaffaroni Decl. ¶¶ 11, 13; Master Plan §§ 2.7, 6.9.1; Proposal at 10, 70; Webuild Request for Arbitration ¶¶ 45, 50.

Based on these representations by Panama, as well as Panama's consistent representations that it had worked with multiple private-sector consultants—including Parsons, who appeared to provide reliable information, and thereby created part of the reasonable expectations that Webuild and Sacyr relied on to invest—Webuild and Sacyr prepared to invest the relevant personnel, talent, and services necessary to perform the Project. Zaffaroni Decl. ¶ 17.

Webuild and Sacyr submitted their price proposal for the Project through GUPC—for US$3.22 billion—which was consistent with Panama's estimated cost of US$3.35 billion for the Project. Zaffaroni Decl. ¶ 18; Webuild Request for Arbitration ¶ 46.

On July 15, 2009, Panama awarded the Project to Webuild, Sacyr, and their partners, and, slightly over a month later, Webuild began its investment. Webuild Request for Arbitration ¶ 46.

C. Panama's Breaches of the Treaties and International Law

During Webuild and Sacyr's involvement in the Project, Panama failed to perform its obligations under the treaty between Panama and Italy with respect to Webuild, and between Panama and Spain with respect to Sacyr, in numerous respects, including, *inter alia*, by:

- Unfairly and inequitably demanding that Webuild and/or Sacyr make contributions to finance and pay for the Project;
- Acting without any transparency in withholding material information and, in violation of good faith and reasonable treatment, rejecting all requests for reimbursement of additional costs that Webuild, Sacyr, and their partners were forced to bear, thereby shifting the financial burden of the Project onto Webuild, Sacyr, and their partners;
- Acting in an arbitrary manner by availing itself and taking advantage of the asymmetrical information in its possession;

Panama's acts and omissions constitute breaches of various provisions of Panamanian law, the respective treaties, and international law. *See, e.g.*, *id.* ¶¶ 48-69.

Despite Panama's multiple treaty violations, by 2016 Webuild, Sacyr, and their partners successfully completed the Project—with their own invested funds—and handed over the Project to Panama. On June 26, 2016, Panama hosted a gala event to inaugurate the Canal's Third Set of Locks, at which Panama's President declared it "a historic moment for Panama," and pledged that revenue from the expanded Canal would improve the lives of Panamanians. *See El canal de Panamá inauguró su ampliación y apunta hacia una nueva era*, EL UNIVERSO (Jun. 26, 2016), *available at* https://www.eluniverso.com/noticias/2016/06/26/nota/5659887/canal-panama-inauguro-su-ampliacion-apunta-nueva-era/ (Lamm Decl., Ex. 16); *Panamá inaugura su Canal ampliado con un tercer carril que triplica la capacidad de carga*, RTVE NOTICIAS (Jun. 26,

2016), *available at* https://www.rtve.es/noticias/20160626/rey-juan-carlos-llega-panama-para-inauguracion-del-canal-ampliado/1363087.shtml (Lamm Decl., Ex. 17); Webuild Request for Arbitration ¶ 12.

II. THE INTERNATIONAL PROCEEDINGS

On August 3, 2018, Sacyr submitted its dispute with Panama regarding the Project to international arbitration pursuant to the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama, signed on November 10, 1997, and entered into force on July 31, 1998 (the "Spain-Panama Treaty" (Martinez Decl., Ex. 10)). *See* Sacyr Notice of Arbitration dated Aug. 3, 2018 (Martinez Decl., Ex. 8). The arbitration is to proceed under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules" (Martinez Decl., Ex. 9)), which are administered by the International Centre for Settlement of Investment Disputes ("ICSID"). Sacyr is the claimant in the proceeding; Panama is the sole respondent.

On March 11, 2020, Webuild submitted its dispute with Panama regarding the Project to international arbitration pursuant to the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (the "Italy-Panama Treaty" (Lamm Decl., Ex. 12)), under the ICSID Arbitration Rules (Lamm Decl., Ex. 11). *See* Webuild Request for Arbitration. Webuild is the claimant in the proceeding; Panama (including its wholly-owned operator of the Panama Canal) is the sole respondent. Webuild initiated the proceeding by filing the Request for Arbitration with the ICSID Secretariat in Washington, D.C. Letter dated Apr. 1, 2020 (Lamm Decl., Ex. 13).

At present, both Webuild and Sacyr are in the written phases of their respective arbitrations, during which they are required to include all evidence related to the substantive breaches of each respective treaty, which may include evidence currently held by WSP. ICSID,

"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 May 13, 2022) (Lamm Decl., Ex. 15); ICSID, "Case Details: Sacyr S.A. v. Republic of Panama (ICSID Case No. UNCT/18/6)," *available at* https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=UNCT/18/6 (last accessed May 13, 2022) (Martinez Decl., Ex. 12). Webuild's last pleading on the merits is currently scheduled to be filed in January 2023. Lamm Decl. ¶ 10. Sacyr's briefing of the merits begins this fall. Martinez Decl. ¶ 9. The discovery sought by the instant application is needed expeditiously by November 2022, so it may be used in the parties' arbitration submissions.

III. THE REQUESTED DISCOVERY

WSP's involvement (through its predecessor Parsons) in the Panama Canal expansion program—since at least 2002—predates Webuild and Sacyr's investment in the Project. *See* ACP, Message from the Chairman. As a principal advisor to Panama/ACP, WSP (through Parsons) has been involved in assessment, design, planning, management, and coordination across various issues and stakeholders. *Id.* As a result of this role, WSP possesses information that is directly relevant to the international arbitration proceedings—including with respect to the dispute regarding Panama's selective disclosure and withholding of Project information from the outset, including as to the development, cost, and financing of the Project, in breach of several provisions of the respective applicable treaties. The information WSP possesses will not be available through discovery mechanisms in the international arbitration proceedings because WSP is not, nor can it ever be made, a party to either case.

Accordingly, Webuild and Sacyr seek to obtain narrowly tailored discovery from WSP, and in particular, the production of documents as specified in Annex A to the subpoena (Lamm

Decl., Ex. 1). The requested discovery is directly relevant to the issues in dispute and the claims asserted by Webuild and Sacyr under their respective treaties.

Treaty Claim	***Issues***	***Requested Discovery***
Panama violated its duties under the respective treaties to accord Webuild and Sacyr fair and equitable treatment (Italy-Panama Treaty, Art. II(3); Spain-Panama Treaty, Art. IV(1)).	Panama's incomplete and misleading disclosures of technical, costing, and financing information related to the Project, on which Webuild's and Sacyr's legitimate expectations were based, and which served to induce their investment.	− 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); − 6 (Parsons' documents related to its 2012 Project study); − 10-13 (Parsons' documents related to Panama's tender preparation); − 14 (Parsons' documents related to cost contingencies); − 15-16 (Parsons' documents related to Panama's review of Project bids); − 17 (Parsons' documents related to Panama's failures to disclose).
Panama violated its duties under the respective treaties by implementing unjustified and discriminatory measures (Italy-Panama Treaty, Art. II(3); Spain-Panama Treaty, Art. IV(2)).	Panama's policy that shifted project costs onto Webuild, Sacyr, and their investment partners.	− 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).
Panama violated its duty under the respective treaties not to discriminate against the Applicants (Italy-Panama Treaty, Art. II(2); Spain-Panama Treaty, Art. V(1)).	Panama's discrimination against Webuild and Sacyr in favor of other investors, including those working on other components of the Project.	− 20-22 (Parsons' documents related to Panama's differential treatment of other investors in Panama, including on the PAC-4 and Canal Bridge projects).

Webuild and Sacyr reserve the right to request the issuance of subpoenas for the testimony of WSP representatives that may be relevant to the international proceedings.

ARGUMENT

The Court should grant Webuild and Sacyr's *ex parte* Application because it satisfies all of the statutory requirements of 28 U.S.C. § 1782, as well as the discretionary factors set forth by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004). *See In re Hornbeam Corp.*, 722 F. App'x 7, 11 (2d Cir. 2018) ("[I]t is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*.") (quoting *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012)) (alterations in original); *see also Gorsoan Ltd. v. Bullock*, 652 F. App'x 7, 8 (2d Cir. 2016) (affirming district court's finding that *ex parte* § 1782 application met the statutory requirements and holding that if the "statutory requirements are met, a district court may exercise its discretion to grant the § 1782 application").

I. THE APPLICATION SHOULD BE GRANTED BECAUSE IT SATISFIES ALL OF THE REQUIREMENTS OF 28 U.S.C. § 1782

28 U.S.C. § 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," states in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782(a) (2012).

Section 1782 encompasses two primary aims: "'[(1)] providing efficient means of assistance to participants in international litigation in [U.S.] federal courts and [(2)] encouraging foreign countries by example to provide similar means of assistance to [U.S.] courts.'" *In re Catalyst Managerial Servs., DMCC*, 680 F. App'x 37, 38 (2d Cir. 2017) (citation omitted); *see also Intel*, 542 U.S. at 247 ("Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals."). Further to these aims, "the statute has, over the years, been given 'increasingly broad applicability.'" *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012) (citations omitted).

Webuild and Sacyr's discovery requests satisfy all of the requirements of § 1782.

First, WSP "resides or is found" in the Southern District of New York, as demonstrated by the location of its U.S. headquarters and principal place of business at One Penn Plaza. *See* WSP, Our Offices; *see also In re BNP Paribas Jersey Trust Corp.*, No. 18-mc-00047 (PAC), 2018 U.S. Dist. LEXIS 24379, at *5-6 (S.D.N.Y. Feb. 14, 2018) (granting application and finding that the entity "'resides' or 'is found' in th[e] district because it has a principal place of business in New York, New York"); *In re Aso*, No. 19-MC-190 (JGK) (JLC), 2019 U.S. Dist. LEXIS 120873, at *5, 14-15 (S.D.N.Y. Jul. 19, 2019) (granting application in part for entities headquartered in Manhattan because they reside or are found in the district). Accordingly, the Court may order discovery from WSP.

Second, the requested discovery is "for use in" the ICSID and UNCITRAL arbitrations (*see* Lamm Decl. ¶ 10; Martinez Decl. ¶ 9), each of which constitutes a "proceeding in a foreign or international tribunal" within the meaning of § 1782. In *Intel Corp. v. Advanced Micro Devices*, the Supreme Court found that Congress had implemented that particular language so

that § 1782 would extend to foreign "quasi-judicial proceedings," and not only foreign court proceedings. *Intel*, 542 U.S. at 257-58 (recognizing that "Congress understood" the language "to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]'") (quoting S. Rep. No. 1580, at 7-8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788) (alteration in original); *see also In re Accent Delight Int'l Ltd.*, 869 F.3d 121, 131 (2d Cir. 2017) (finding "for use" requirement met where there is a "*practical ability* of an applicant to place a beneficial document—or the information it contains—before a foreign tribunal") (emphasis in original). The Supreme Court also cited favorably to legal authority, written by the drafter of the statute, defining the term "tribunal" as including "arbitral tribunals." *Intel*, 542 U.S. at 258 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-27 & nn.71, 73 (1965)).

While U.S. courts are split on whether private commercial arbitrations are subject to § 1782 discovery, that is not the case for treaty-based investment disputes, such as the ICSID and UNCITRAL arbitrations commenced by Webuild and Sacyr, respectively.[3] The Second Circuit has recently held that arbitral tribunals convened pursuant to Bilateral Investment Treaties—such as the treaties pursuant to which the Webuild ICSID arbitration and the Sacyr UNCITRAL arbitration proceedings have been commenced—constitute a "foreign or international tribunal" under § 1782. *See Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th

[3] There currently are two pending cases involving § 1782 questions before the Supreme Court. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401 (U.S. Sep 14, 2021); *AlixPartners, LLP, et al., v. Fund for Prot. of Investors' Rights in Foreign States*, No. 21-518 (U.S. Oct 07, 2021). These cases present the issue of whether commercial arbitrations are subject to § 1782 discovery in U.S. courts. The underlying arbitration in *ZF Automotive* is a private commercial proceeding. *See* Petition for a Writ of Certiorari, *ZF Automotive*, No. 21-401 (U.S. Sep. 10, 2021) at i (ECF 1). The underlying arbitration in the *AlixPartners* case is treaty-based, and under the UNCITRAL Rules. *AlixPartners*, No. 21-518 (U.S. Oct. 5, 2021) at 2, 4 (ECF 1). The petitioners in *AlixPartners* argue that their dispute is a private commercial arbitration for the purpose of § 1782, even though it was brought pursuant to a treaty, and is being conducted under the UNCITRAL Rules. *Id.* at i, 24-25. The official questions presented in both cases are limited to whether § 1782 applies to "commercial" disputes. *Id.* at i; Petition for a Writ of Certiorari, *ZF Automotive*, No. 21-401 (U.S. Sep. 10, 2021) at i (ECF 1). The arbitrations involving Webuild, Sacyr, and Panama, by contrast, are considered "investment" (not "commercial") disputes.

216, 228 (2d Cir. 2021). Numerous other U.S. district courts have held the same. *See Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP*, No. 18-103 (RMC), 2019 U.S. Dist. LEXIS 61780, at *6 n. 1, 19 (D.D.C. Apr. 10, 2019) (noting that "The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment" and "[A]rbitrations conducted pursuant to Bilateral Investment Treaties, and specifically by the ICSID, qualify as international tribunals under [§ 1782]"); *In re Republic of Turkey*, No. 19-20107 (ES) (SCM), 2020 U.S. Dist. LEXIS 126512, at *9-10 (D.N.J. July 17, 2020) (finding that ICSID tribunals "qualify as a foreign tribunal under section 1782"); *In re Ex Parte Eni S.P.A.*, No. 20-mc-334-MN, 2021 U.S. Dist. LEXIS 52304, at *8-9 (D. Del. Mar. 19, 2021) (finding that ICSID arbitration was "proceeding in a foreign or international tribunal" for the purposes of § 1782); *In re Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff'd on other grounds*, 629 F.3d 297 (2d Cir. 2011) (finding international arbitration established by treaty and conducted under the UNCITRAL Rules was a "foreign or international tribunal" for the purposes of § 1782); *In re Veiga*, 746 F. Supp. 2d 8, 22 (D.D.C. 2010) (same); *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121, 1124 (D. Colo. 2011) (same); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 (JBA), 2009 U.S. Dist. LEXIS 109492, at *12 (D. Conn. Aug. 27, 2009) ("A reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, a body operating under the United Nations and established by its member states, and purely private arbitrations established by private contract.") (alterations and internal quotations omitted). In this case, 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 and thus meets the "foreign or international tribunal" requirement. Lamm Decl. ¶ 10; Martinez Decl. ¶ 9.

Third, Webuild and Sacyr are "interested person[s]" within the meaning of § 1782 because each is a claimant in its respective international arbitration, and therefore each has a clear interest in the proceedings and the evidence available for use therein. *See, e.g.*, *Intel*, 542 U.S. at 256 ("No doubt litigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke § 1782.") (alteration in original).

II. DISCRETIONARY CONSIDERATIONS FURTHER WARRANT GRANTING THE APPLICATION

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

> (1) whether the persons from whom the discovery is being sought are participants in the foreign proceeding;
>
> (2) the nature and character of the foreign proceeding and the receptivity of the foreign tribunal to U.S. federal court judicial assistance;
>
> (3) whether the request is an attempt to circumvent foreign proof gathering limitations; and
>
> (4) whether the discovery sought is unduly burdensome.

Intel, 542 U.S. at 264-65; *see also In re Accent Delight*, 696 F. App'x at 538-39 (citing *Intel* factors); *Brandi-Dohrn*, 673 F.3d at 80-81 (same). Here, all of the discretionary factors weigh in favor of granting the application.

First, WSP is not, and can never be made, a party to Webuild's ICSID arbitration or Sacyr's UNCITRAL arbitration against Panama. In *Intel*, the Supreme Court found that assistance under § 1782 is particularly warranted where the discovery is sought from parties that

are not participants in the international proceeding. *Intel*, 542 U.S. at 264 ("[N]onparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."). Because WSP is not a party to the ICSID or the UNCITRAL proceedings, each respective tribunal does not have jurisdiction to order it to produce information. Thus, without this Court's assistance, Webuild and Sacyr will have no other means to obtain the information that they seek.

Second, the nature of the arbitration proceedings is such that the ICSID and UNCITRAL tribunals can be expected to be receptive to information obtained by this request. The Webuild proceeding is governed by the ICSID Arbitration Rules, which permit the claimant to provide documents relevant to its submission. The ICSID Arbitration Rules generally provide for the use of discovery in ICSID arbitrations and require that "[t]he parties . . . cooperate with the Tribunal in the production of the evidence[.]" *See* ICSID Arbitration Rules, Rule 34 ("The Tribunal may, if it deems it necessary at any stage of the proceeding: . . . call upon the parties to produce documents, witnesses and experts[.]). Unfortunately, an ICSID tribunal cannot compel non-parties to produce documents. In the past, ICSID tribunals have been receptive to evidence obtained through a § 1782 discovery proceeding. *See In re Republic of Turkey*, 2020 U.S. Dist. LEXIS 126512, at *16 (finding discretionary factor met where ICSID tribunal stated to court it was "open in principle (*i.e.*, would not rule out) admitting evidence obtained through the 1782 Proceeding.").

The Sacyr proceeding is governed by the UNCITRAL Rules, which likewise are generally receptive to evidence obtained through a § 1782 proceeding. *See In re Veiga*, 746 F. Supp. 2d at 23-24 (finding "arbitral bodies operating under UNCITRAL Rules to be generally receptive to federal court assistance under § 1782(a)"); *see also* UNCITRAL Rules, Rule 24(3)

("At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence[.]").

In any event, for this factor to weigh against ordering discovery, there must be "authoritative proof" that the foreign tribunal would reject the evidence sought. *In re Veiga*, 746 F. Supp. 2d at 23-24; *see also In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *21 (S.D.N.Y. Dec. 29, 2006) ("[P]roof resting on equivocal interpretations of foreign policy or law generally provides an insufficient basis to deny discovery."). Specifically, where there is no dispositive proof that a foreign court would be "offended" by the discovery in question, courts should be guided by § 1782's overarching goal: to provide judicial assistance in foreign international proceedings. *See Miantec Fin. S.A.R.L. v. SI Group Inc.*, No. 1:08-CV-269 (LEK/RFT), 2008 U.S. Dist. LEXIS 63802, at *24 (S.D.N.Y. Aug. 18, 2008) ("[E]ven if a foreign tribunal may be too hesitant to order the level of production sought here, this does not mean that there is any resistance to receiving such evidence[.]"). In this case, there is no indication (let alone proof) that the tribunals would reject this evidence.

Third, for the same reasons, Webuild and Sacyr are not attempting to circumvent any applicable proof-gathering limitations in the ICSID or UNCITRAL proceedings. *Intel*, 542 U.S. at 264-65. In fact, the ICSID and/or UNCITRAL tribunals do not have any compulsive powers against third parties who are not before it. *See generally* ICSID Arbitration Rules; UNCITRAL Rules. Webuild and Sacyr seek in good faith the discovery of information from a non-party U.S. entity that will not be available for evidence gathering within the procedures of the arbitration. In any event, § 1782 does not require that the information sought be discoverable under the procedures of the foreign tribunal. *See, e.g.*, *Intel*, 542 U.S. at 259-64 (clarifying that § 1782 contains no "foreign-discoverability" prerequisite); *Mees v. Buiter*, 793 F.3d 291, 302 n.17 (2d

Cir. 2015) (Section 1782 does not "categorically bar a district court from ordering production of documents when the foreign tribunal or the 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction.") (quoting *Intel*, 542 U.S. at 259-60).

Fourth, the discovery sought is not unduly burdensome. Webuild and Sacyr seek only information that is directly relevant to the investment disputes concerning the Project now subject to the international arbitration proceedings detailed above. The proposed document requests in the subpoena are narrowly tailored to obtain information from WSP that relates to its involvement in the Project. *See generally* Subpoena (Lamm Decl., Ex. 1). This information will be critically important to Webuild and Sacyr's arbitration claims, including as to the Project information that Panama and ACP withheld or misrepresented at the outset of Webuild and Sacyr's involvement. The burden placed on WSP is reasonable, as the requested information should be readily available in electronic files, and any incidental burden is outweighed by the central importance of the requested information to the international proceedings.

CONCLUSION

For the foregoing reasons, Webuild and Sacyr respectfully request that the Court grant their *ex parte* Application for an Order under 28 U.S.C. § 1782 to obtain discovery from WSP, and grant Webuild and Sacyr leave to serve the subpoena attached as Exhibit 1 to the Lamm Declaration. Webuild and Sacyr reserve the right to request the issuance of subpoenas for the testimony of WSP representatives that may be relevant to the international proceedings. Given the timetable of the respective arbitrations, the applicants would appreciate any expeditious attention to this application.

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Respectfully submitted,

s/ *David Hille*

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