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-140-LAK

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

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

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

Counsel for Webuild S.p.A

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Webuild hereby submits this Consolidated Sur-Reply in Opposition to Panama and WSP's motions to vacate the Court's May 19, 2022 Order and quash the WSP Subpoena (ECF 15, 23). This Sur-Reply is supported by the Second Expert Report of Christoph Schreuer ("Schreuer II").[1]

ARGUMENT

For years, in multiple fora, Panama has actively avoided production of the documents that Webuild seeks in its § 1782 Application. It now seeks to intervene in this action to prevent Webuild from obtaining those documents from a third party. Panama's primary argument, however, rests on an overly narrow and incorrect interpretation of the Supreme Court's decision in *ZF Automotive ("ZF")*, 142 S. Ct. at 2084–86, and should be rejected.

I. ICSID TRIBUNALS ARE "FOREIGN OR INTERNATIONAL" TRIBUNALS UNDER § 1782

The parties agree that the proper test under *ZF* for deciding whether a tribunal is a "foreign or international tribunal" for purposes of § 1782 is to determine whether the tribunal is "imbued with governmental authority" by one nation or multiple nations. 142 S. Ct. at 2087. But the Supreme Court declined to provide an exhaustive list of such indicia of governmental authority, and expressly did not "attempt to prescribe" how tribunals imbued with such authority should be structured. *Id.* at 2090–91. Thus, even if ICSID tribunals lacked some of the features that the Supreme Court identified, they possess several others that demonstrate they are imbued with governmental authority, and which materially distinguish them from ad hoc tribunals.

A. The Origins and Structure of ICSID, Its Tribunals, and Annulment Committees Materially Distinguish ICSID Tribunals from Ad Hoc Tribunals

As explained (Opp'n 12–25, ECF 39), representatives of the ICSID Member States and of the World Bank drafted the ICSID Convention, which establishes a comprehensive framework for the formation and operation of ICSID tribunals to resolve investor-state disputes. Panama's attempt to exclude ICSID tribunals from § 1782 rests on the flawed assertion that ICSID tribunals

[1] Webuild interprets the Court's order (ECF 55) as permitting its submission of the Second Schreuer Report because the Report is an attachment to the Sur-Reply and is offered only in support of the *ZF* issues. If Webuild is mistaken in its interpretation, it understands that the Court will disregard the Second Schreuer Report and consider only this Sur-Reply memorandum.

should be examined divorced from their origins in the ICSID Convention and their relationship to ICSID itself. But ICSID tribunals are governed and guided by the structure and rules prescribed by Member States in the ICSID Convention and the arbitral rules promulgated thereunder. And ultimately, if annulment is sought, their awards are reviewed by arbitrators appointed to the Panel by the Member States. ICSID tribunals thus differ in precisely the manner contemplated in *ZF*—they are imbued with governmental authority by the ICSID Member States.

The ICSID Convention and the ICSID Arbitration Rules. The ICSID Convention was drafted by representatives of ICSID's Member States and of the World Bank, Opp'n 13–14, and restricts the parties' "free[dom] to structure" ICSID arbitrations in significant ways. *ZF*, 142 S. Ct. at 2089. Panama is wrong to say (Reply 18–19, ECF 42) the ICSID Convention reflects the same level of governmental authority as the UNCITRAL Rules applicable to ad hoc arbitrations because the latter are also drafted by an intergovernmental organization, the U.N. General Assembly. The UNCITRAL Rules provide only a framework of procedural rules that the parties may (or may not) choose to apply to their ad hoc arbitration, and which can be modified by the parties' agreement alone. Unlike the ICSID Convention and Rules, the UNCITRAL Rules do not regulate the jurisdiction or the annulment and enforcement of ad hoc awards. ICSID Convention, art. 25(1); Schreuer II, 5–6. Nor do the UNCITRAL Rules create a permanent body like ICSID to administer arbitrations. The Member States' influence over ICSID tribunals is thus more significant than the U.N. General Assembly's influence over ad hoc tribunals.

The ICSID Administrative Council, Centre, and Secretary-General. Contrary to Panama's suggestion (at 19), important aspects of ICSID tribunals' operation are dictated by ICSID's Administrative Council, through which Member States participate in ICSID governance. For example, only the Council enacts and amends the ICSID Arbitration Rules. Opp'n 15. And, arbitrators not appointed by the parties are appointed by the Chairman of the Council from the Panel of Arbitrators, designated by the Member States. *Id.* at 16–17. Critically, the Chairman appoints arbitrators from the Panel to sit on annulment committees—in a self-contained system for oversight—that decide *all* petitions to annul ICSID awards. *Id.* at 17; Annex I.

Panama also wrongly contends (at 20) that ICSID (*i.e.*, the Centre itself) is irrelevant to ICSID tribunals' governmental authority. But while ad hoc tribunals may operate with or without an administering institution, ICSID tribunals may *not* operate without the administrative support of the Centre. Notably, the Convention imbues the Centre with legal personality to ensure "the proper functioning of proceedings under the auspices of the Centre[,]" indicating that the Centre is directly relevant to the function of ICSID tribunals. Opp'n 15 (quoting ICSID Convention Preliminary Draft at 200). Thus, Panama's attempt (at 20 n.12) to compare the role of the Centre in ICSID arbitration with the role of the Permanent Court of Arbitration ("PCA") in ad hoc arbitrations is wrong. If the parties to ad hoc arbitration appoint the PCA as an administering institution, the PCA is limited to providing administrative support to the ad hoc tribunal. The PCA's administrative council does not designate panels that have the authority to review awards, nor can it mandate the application of procedural rules different from those selected by the parties. The PCA member states further did not participate in drafting a treaty, like the ICSID Convention, that governs the conduct of ad hoc arbitration. ICSID Convention, art. 25(1); Schreuer II, 5–6, 12.

Contrary to Panama's contention (at 10), ICSID tribunals' governmental authority is also indicated by the fact that the ICSID Member States are responsible under the Convention for funding ICSID in case the Centre's expenses exceeds its income. Opp'n 15. Other than a filing fee by the parties, the Member States, *not* the parties, must bear the expenses of the Centre. Panama's expert omits that only once in the past ten years, in 2021, have the parties' fees fully covered ICSID's expenses. For every other year in the last decade, ICSID has depended on income from its publications, investments and in-kind contributions from the World Bank to cover its expenses. *See* ICSID Annual Reports, *available at* https://icsid.worldbank.org/resources/publications. This directly contrasts with party-funded ad hoc arbitrations discussed in *ZF*. 142 S. Ct. at 2090.

The jurisdictional screening of every request for arbitration by the Secretary-General of the Centre (who is appointed by the Member States) is also an indicator of governmental authority. Opp'n 19. Panama disagrees, contending (at 22) that an ICSID tribunal's jurisdiction is determined by the consent of the parties, which the Secretary-General may not "override." But while the

parties' consent is *one* requirement for an ICSID tribunal's jurisdiction, the Secretary-General may reject a request for arbitration (and thus "override" the parties' consent) for manifestly failing to comply with one of the Convention's additional requirements, such as the requirement the host State and investor's home State be ICSID Member States. ICSID Convention, art. 25(1); Schreuer II, 12–14. The Member States thus retain a measure of control over the jurisdiction of ICSID tribunals, not only by participating in drafting the Convention's jurisdictional provisions, but also by electing the official in charge of screening arbitration requests for compliance with those provisions. In other arbitral institutions, such screening is conducted by private individuals not appointed by sovereign States. *Governance*, ICC, *available at* https://iccwbo.org/about-us/governance/; SCC Arbitration Rules, Appendix I, Art. 4 (2017); Schreuer II, 11–12.

Formation and Composition of ICSID Tribunals. Panama contends (at 12) that ICSID tribunals lack governmental authority because they are not "standing or pre-existing" bodies. But *ZF* was clear that nothing in its analysis "foreclose[d] the possibility" that a body formed solely to decide a particular dispute could be imbued with governmental authority. 142 S. Ct. at 2091. Moreover, Panama's argument artificially separates ICSID tribunals from the framework in which they operate and ignores the influence that ICSID, a permanent institution, has on the functioning and administration of ICSID tribunals.

Panama claims (at 13–14) that ICSID tribunals lack governmental authority because parties may select their own arbitrators. But the Member States still retain influence over arbitrator appointments in ways that do not feature in ad hoc arbitration. Opp'n 16–18. Panama itself notes (at 13) one such way: the Convention's requirement that the majority of arbitrators on an ICSID panel not have the same nationality as either of the parties, unless the parties agree otherwise. ICSID Convention, art. 39. And more significantly, the Convention requires that, absent agreement otherwise, any arbitrators not appointed by the parties must be appointed by ICSID's Chairman from the Panel of Arbitrators designated by the Member States, and *all* arbitrators appointed to an annulment panel must be appointed by the Chairman from the Panel. *Id.* at 16–17; Annex I. Indeed, the fact that the Member States entrust arbitrators appointed from the Panel with the sole authority

to adjudicate the annulment of ICSID awards—a function exercised by domestic judges in ad hoc arbitrations—demonstrates that the Panel is not of "limited significance," as Panama contends (at 14). As Panama acknowledges (at 24), the Panel members ensure ICSID awards comply with "fundamental principles of law." *See* History of the ICSID Convention, vol. II-2, at 854–55.

Finally, Panama suggests (at 21) that the immunities granted to arbitrators on ICSID tribunals are unremarkable because rules applicable to private arbitrations confer equivalent immunities. But the protections granted by the Convention are significantly broader—they do not merely limit the liability of arbitrators, but also grant them absolute immunity from *legal process*. ICSID Convention, art. 21; Schreuer II, 8–9. This broad grant of immunity is comparable to that granted to judges of intergovernmental courts, such as the ICJ. Schreuer I, 8 n.28.[2] While these broad immunities apply to every ICSID arbitrator by virtue of the Convention, arbitrators in ad hoc tribunals only enjoy any degree of partial immunity *if* the parties select procedural rules that confer such immunities. Panama's contention (at 20) that the immunities granted to ICSID arbitrators were intended to ensure that they "'would act with independence'" only underscores Member States' agreement to confer protections on ICSID arbitrators, which stem from the States' sovereign authority to ensure the proper functioning of ICSID tribunals.

The Jurisdiction and Operation of ICSID Tribunals. Unlike ad hoc tribunals, whose jurisdiction is purely a function of the parties' consent to arbitration, the jurisdiction of an ICSID tribunal requires—in addition to consent—that both the host State and the investor's home State be signatories to the Convention. Opp'n 18–19. Far from a "distinction without a difference"

[2] Panama is mistaken (at Reply 4 n.6, ECF 42) that Professor Schreuer's first opinion (ECF 38) is an inadmissible legal opinion. Under Federal Rule of Civil Procedure 44.1, courts may admit legal opinions on matters of foreign law. *Bugliotti v. Republic of Argentina*, 952 F.3d 410, 413 (2d Cir. 2020); *In re Initial Public Offering Securities Litig.*, 174 F. Supp. 2d 61, 65 (S.D.N.Y. 2001). Numerous courts have extended Rule 44.1 to questions of international law, and have permitted legal experts to submit opinions on matters such as the interpretation of international human rights and international treaties, among others. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 143 n. 47 (2d Cir. 2010); *U.S. v. Jurado-Rodriguez*, 907 F. Supp. 568, 574 (E.D.N.Y. 1995)); *Sunglory Maritime Ltd. v. PHI, Inc.*, No. 15-896, 2016 WL 9414283, at *3–4 (E.D. La. Mar. 15, 2016). Professor Schreuer's first and second opinions are admissible under Rule 44.1 as an opinion on the ICSID Convention and the inner-workings of ICSID tribunals—*i.e.*, matters of international law—and on the effect of that international law on matters before this Court.

(Reply 17), the Convention's jurisdictional restrictions evidence sovereign states' influence on the formation and operation of ICSID tribunals. *See* History of ICSID Convention, vol. II-1, at 37 (describing ICSID tribunals' jurisdiction derives from "the consent of the parties" *and* the "applicability of the Convention," and explaining that while the "first interests only the parties, the second is of interest to the Contracting States").[3] The Convention further restricts the types of claims that may be brought before an ICSID tribunal, requiring that they are a legal dispute arising directly out of an investment. Opp'n 18.[4] While Panama notes (at 21) that the authority to hear investment claims arising from state actions is not exclusive to ICSID tribunals, this restriction emphasizes that ICSID tribunals, unlike ad hoc tribunals, may not be convened by private parties to decide private commercial disputes.

Panama also suggests (at 16) that confidentiality requirements for ICSID tribunals undermine any suggestion of governmental authority. But not all governmental courts publish their decisions. Schreuer II, 18.[5] And in any event, ICSID tribunals *are* subject to transparency rules that are not present in ad hoc arbitration. Ad hoc tribunals are not required to publish any part of their decisions unless the parties agree to transparency rules in their arbitration agreement. ICSID, in contrast, is required to publish excerpts of all ICSID awards, including the tribunal's reasoning. ICSID Rules (2022), Rule 62; Schreuer II, 18–19. The new ICSID Rules, effective as of July 1, 2022, in fact *presume* the parties' consent to the publication of awards unless the parties timely object, and require the publication of all interim orders and decisions by ICSID tribunals. *Id.*

B. ICSID's Review and Enforcement Mechanisms Show ICSID Tribunals Are Imbued With Governmental Authority in Ways Ad Hoc Tribunals Are Not

Above all, the Member States' intent to imbue ICSID tribunals with governmental authority is reflected in ICSID's unique, self-contained mechanisms for annulling and enforcing

[3] As an analogous example, the ICJ's jurisdiction requires *both* compliance with the requirements of the ICJ Statute—such as the requirement the parties be states—*and* specific consent of the parties to a dispute. ICJ Statute, Art. 36(1).
[4] In the relevant instrument (BIT or contract), the Member States also specify the applicable law and types of claims to which they consent.
[5] *See, e.g.,* El Ameir Noor et al., *Legal Systems in the United Arab Emirates: Overview*, Thomson Reuters Practical Law (2021), *available at* https://uk.practicallaw.thomsonreuters.com; Saudi Arabia Law of Criminal Procedure, art. 183, *available at* http://hrlibrary.umn.edu/research/saudiarabia/criminal_procedure.html.

ICSID awards. Opp'n 19–24. The Convention (art. 54(1)) imbues ICSID tribunals with the authority to issue awards that *must* be enforced by Member States as if they were a final judgment of the States' own courts. Once issued, an ICSID award may be reviewed only by Annulment Committees composed of arbitrators appointed by the Chairman of the Council from the Panel of Arbitrators, who are designated by the Member States. ICSID Convention, art. 52. The exclusive grounds for annulling ICSID awards are set out in the Convention. *Id.* at 52(1).

Panama attempts to minimize these critical features, asserting (at 22) that mechanisms for annulling and enforcing awards are irrelevant to whether a tribunal is clothed with governmental authority. But this argument ignores that the Convention directly confers on ICSID tribunals and Annulment Committees certain powers *otherwise reserved to governmental courts*—namely, the authority to issue awards equivalent to domestic court judgments, and the authority to review awards, respectively. Opp'n 19–22. In contrast, national courts retain the sole authority to review ad hoc awards, and may deny enforcement of such awards on substantive grounds. *Id*. at 21–24.[6]

In imposing ICSID's unique system of annulment and enforcement, the Member States significantly restrict the parties' "free[dom] to structure" ICSID arbitration "as they see fit[,]" indicating an exercise of governmental authority over how ICSID tribunals operate. *ZF*, 142 S. Ct. at 2089. Unlike parties to ad hoc arbitration, parties to ICSID arbitrations do not control which courts have authority to review their awards, or the legal grounds for review, by selecting the arbitration seat.[7] Indeed, as Panama notes, ICSID parties are bound by the "*Member States'* decision" to accord ICSID awards the same "high degree of finality" as domestic judgments. Reply 25; *see also Mobil Cerro*, 863 F.3d at 117; History of the ICSID Convention, vol. II-1, at 272 (explaining Article 54(1) was intended to "[go] beyond any known forms of recognition of foreign

[6] Panama notes (at 22) that the Supreme Court in *ZF* did not consider enforcement and annulment mechanisms in its analysis of ad hoc and commercial tribunals, but this is unsurprising given that such mechanisms are unique to ICSID and the Court was clear it had not provided an exhaustive list. *ZF*, 142 S. Ct. at 2091.

[7] Panama points (at 24 n.13) to "exceptional circumstances" in which parties to ICSID arbitration may request that ICSID replace an Annulment Committee member with another candidate, such as when the arbitrator has a conflict of interest. But even in these exceptional circumstances, the replacement Annulment Committee member is appointed by the Chairman from the Panel of Arbitrators. Background Paper on Annulment, ICSID (April 2016), ¶ 37.

judgments in requiring that the award of the tribunal be treated as final").

Regarding annulment, Panama is wrong (at 24–25) to minimize the authority of ICSID Annulment Committees by contending they may only annul ICSID awards on narrow grounds. As Panama's expert concedes, the grounds for annulling ICSID awards significantly overlap with grounds applied by national courts reviewing ad hoc awards. Legum ¶¶ 92–94.[8] In any event, the scope of review is irrelevant; the point is that the Convention imbues Annulment Committees with the sole authority to review ICSID awards, such that Committees take the place of domestic courts for purposes of annulment.[9] Nor is it relevant, as Panama contends (at 24), that Annulment Committees are not "standing" bodies. *ZF* holds that bodies imbued with governmental authority may "take many forms," 142 S. Ct. at 2091, and Panama's logic does not square with the fact that U.S. appellate panels, for example, also are not "standing" bodies.

Regarding enforcement, Panama contends (at 25) that ICSID awards are not equivalent to domestic judgments because their enforcement is not automatic. Relying on *Mobil Cerro*, which describes the procedure for enforcing ICSID awards in U.S. courts, Panama observes that parties seeking to enforce ICSID awards must still file an action for enforcement in a national court, where defenses of sovereign immunity remain available. *Id.*; Legum ¶ 82. This argument is misleading. To take Panama's example, 22 U.S.C. § 1650a(a) requires U.S. courts to enforce ICSID awards by granting them "the same full faith and credit as if the award were a final judgment" of a U.S. state court. Referring to this provision, *Mobil Cerro* holds that an action must be filed in U.S. court to enforce an ICSID award *only to the extent* that an action would also need to be filed to enforce the judgment of a state court entitled to full faith and credit. 863 F.3d at 116–18. Thus, while the ICSID award creditor must file an enforcement petition in a U.S. court and furnish a certified copy

[8] Specifically, the grounds for annulment contained in Article 52 of the ICSID Convention are very similar to those found in Article 34 of the UNCITRAL Model Law and in Article V of the New York Convention. The only key difference between the two is that Article 52 does not permit annulment for public policy concerns. *Compare* ICSID Convention, Art. 52, *with* New York Convention, art. V *and* UNCITRAL Model Law, Art. 34, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf.

[9] Indeed, U.S. courts routinely stay enforcement proceedings pending a decision by an ICSID Annulment Committee. Opp'n 24. ICSID Annulment Committees even have their own power to stay the parties from seeking enforcement of an award while they conduct annulment proceedings. ICSID Convention, art. 52(5).

of the award, the award debtor can challenge only the U.S. court's *own jurisdiction* to enforce the award—for instance, on venue or sovereign immunity grounds; the enforceability of the award itself may not be challenged on substantive grounds. *Mobil Cerro*, 863 F3d at 117–18. By contrast, a U.S. court, once assured of its jurisdiction, may deny enforcement of an ad hoc international arbitration award on any of the substantive grounds provided in the New York Convention or other relevant treaty, including that the award violates a public policy of the United States. Opp'n 19.

Finally, Panama notes (at 24–26) that the Convention drafters had various motivations in designing ICSID's annulment and enforcement mechanisms, such as a desire to compel the parties to participate in annulment, ensure arbitrators' objectivity in deciding annulment, and guarantee ICSID awards' finality. But these purported intentions are not inconsistent with an intent to imbue ICSID tribunals and Annulment Committees with governmental authority. They only emphasize the Convention drafters imposed their own standards of fairness, objectivity, and finality onto the review and enforcement of ICSID awards, rather than leave such decisions to the parties.

C. As an ICSID Tribunal, the *Webuild* Tribunal Is Imbued with Governmental Authority

As an ICSID tribunal, the *Webuild* Tribunal possesses all of the features described above which demonstrate it is imbued with governmental authority. Panama nevertheless suggests (at 12) that specific features of the *Webuild* Tribunal, and in particular the role of the Panama-Italy BIT in its formation, make the *Webuild* Tribunal "materially indistinguishable" from the ad hoc tribunal analyzed in *ZF* (the *Fund v. Lithuania* tribunal). Panama is wrong.

To begin, Panama is incorrect (at 16) that the *Webuild* Tribunal, like the *Fund v. Lithuania* tribunal, is a creature of the parties' consent. As explained in § I.A., the *Webuild* Tribunal is not a creature solely of the parties' consent, but also of Italy and Panama's consent as sovereign states to the applicability of the ICSID Convention, and their participation in the framework as Member States. *See* Jagusch & Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration*, *in* The Backlash against Investment Arbitration (2010) (explaining the ICSID Convention contains "jurisdictional requirements, which simply do not come into play under the UNCITRAL Rules").

Panama is also wrong to assert (at 12) that the treaties that form the *Webuild* Tribunal do not themselves "create the [tribunal]" and instead "simply reference[] the set of rules that govern the panel's formation and procedure." As noted, the *Webuild* Tribunal was created by the Italian investor's acceptance of Panama's offer to arbitrate in the BIT, *and* Italy and Panama's ratification of the Convention. By Panama's own admission (at 12), the Convention itself "govern[s] the panel's formation and procedure." Unlike the Convention, the Russia-Lithuania BIT did not govern the formation or procedure of the *Fund v. Lithuania* tribunal, but merely referenced a separate set of framework procedural rules (the UNCITRAL Rules) to guide the proceeding.

The fact that the Panama-Italy BIT includes domestic courts as an alternate option to ICSID arbitration does not undermine the conclusion that the *Webuild* Tribunal is imbued with governmental authority. *See* Reply 16–17. Various tribunals imbued with governmental authority, like the Mixed Claims Commissions and *I'm Alone* tribunal discussed in *ZF*, function as alternatives to domestic courts. 142 S. Ct. at 2091. That the Panama-Italy BIT includes both ICSID and ad hoc arbitration (ECF 7-18, art. IX(3)) just as easily could be used to highlight the *differences* between ICSID and ad hoc tribunals. If the options were so similar, the BIT would not need to include both.[10] Likewise, Panama's comparison (at 17) of ICSID arbitration to the state-to-state arbitration mechanism available under the Panama-Italy BIT only underscores the "higher level of governmental involvement" in ICSID arbitration as compared to ad hoc. *ZF*, 142 S. Ct. at 2090 n.4. Just as state-to-state tribunals are "funded by the two contracting parties," *id.*, ICSID tribunals depend on Member States to fund the Centre. And while the parties to state-to-state arbitration under the BIT may "ask" the ICJ President to make appointments "if no other arrangements are in place" (ECF 7-18, art X(4)), the ICSID Convention goes further to *require* the ICSID Chairman make appointments from the Panel of Arbitrators if the parties do not agree otherwise.

For the foregoing reasons and those stated in Webuild's Opposition, Webuild respectfully requests that the Court deny Panama and WSP's motions.

[10] Panama contends (at 17 n.10) that both options are included in the BIT to account for the more limited scope of ICSID tribunals' jurisdiction, but nothing in the BIT or its public negotiating history indicates that this was the BIT drafters' intent, as opposed to a perceived difference in the authority of ICSID and ad hoc tribunals.

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Respectfully submitted,

s/ Carolyn B. Lamm

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

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

Counsel for Applicant Webuild S.p.A.