

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Application of

Webuild S.p.A. and Sacyr S.A.,

Applicants,

To Obtain Discovery for Use in an International
Proceeding

Case No. 1:22-mc-00140-LAK

SECOND DECLARATION OF MÉLIDA N. HODGSON

I, Mélida N. Hodgson, declare as follows:

1. I am a member of the law firm Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”), counsel for the Republic of Panama (“Panama”) in the above-captioned matter.

2. Arnold & Porter also serves as counsel for Panama in *Webuild S.p.A. v. Republic of Panama*, ICSID Case No. ARB/20/10, filed March 11, 2020 (the “Webuild Arb.”), an arbitration initiated by Applicant Webuild, S.p.A. (“Webuild”) in March 2020 against Panama pursuant to the arbitration rules of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Rules”), as administered by its International Centre for Settlement of Investment Disputes (“ICSID”), and the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (entered into force on 4 October 2010) (the “Panama-Italy Treaty”).

3. I submit this declaration so that the Court can have a complete understanding of the assertions made in the Second Declaration of Ms. Carolyn B. Lamm (“Second Lamm Decl.”) in support of Webuild S.p.A.’s (“Webuild”) Consolidated Opposition (“Webuild’s Consolidated Opposition”).

4. As a preliminary matter, it is important for the Court to understand that the attribution of actions to Panama in paragraphs 13 through 15 of Ms. Lamm’s Second

declaration (and throughout Webuild's Consolidated Opposition), whether directly or as "Panama/ACP," is at best misleading. As will be further explained below, Panama is not a party to, and has not been involved in, the commercial arbitrations between the Panama Canal Authority ("ACP" by its Spanish acronym) and Webuild and its consortium members. Whether or not the ACP will be considered to be an "organ" of Panama at international law such that its acts are attributable to Panama under the Panama-Italy Treaty is a principal, among others, jurisdictional issue before the Webuild Tribunal. Indeed, Ms. Lamm relates Webuild's failed attempt to persuade the arbitral tribunal to decide the attribution issue on a preliminary basis. Second Lamm Decl. ¶ 6. But even if that determination did exist (such that the acts of the ACP were attributable under international law to Panama), it is factually inaccurate and misleading to refer to acts that are the subject of this dispute as those of "Panama/ACP."

5. By agreement of the parties, the Webuild Arb. is conducted by three arbitrators ("Webuild Tribunal"). Webuild and Panama each appointed one arbitrator of their choice, and then mutually agreed upon the procedure for the parties' joint selection of the third arbitrator, whose role is to serve as the president of the Webuild Tribunal.

6. Webuild appointed Stanimir Alexandrov, a Bulgarian national. While at the time he was appointed to the Webuild Tribunal, Mr. Alexandrov appeared on the ICSID Panel of Arbitrators ("ICSID Panel") as a designee of the Chairman of the ICSID Administrative Council. Pursuant to ICSID Convention Article 40(1), Webuild was not required to select an arbitrator from the ICSID Panel, and there is no indication that Webuild felt compelled to appoint him to the Webuild Tribunal because his name appeared on the ICSID Panel. Indeed, upon information and belief, Mr. Alexandrov had previously been appointed two times by Webuild's Counsel in ICSID investment arbitrations and is generally appointed by investors in treaty arbitrations. See *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia* (ICSID

Case No. ARB/15/5) and *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23).

7. Panama appointed H el ene Ruiz Fabri, a French national, who was not a member of the ICSID Panel.

8. Panama and Webuild were unable to agree to a president after exchanging several lists of potential arbitrators. Accordingly, Panama and Webuild agreed to seek the assistance of ICSID. Building on a procedure used by the ICSID Secretary-General, the parties proposed, and the Secretary-General followed, a mutually developed and agreed-upon process that resulted in the parties selecting Ms. Lucy Reed, a U.S. national, to serve as President of the Webuild Tribunal. The use of this process reflects a strong preference of the ICSID Secretariat to maximize the involvement of the parties in the appointment process in order to select a tribunal by agreement, and thereby promote respect for ICSID awards. The Secretary General works closely with the parties in order to avoid the need to deploy the formal default appointment process involving an appointment by the Chairman of the Administrative Council.

9. After various rounds of discussion between Panama and Webuild, including after seeking ICSID's assistance, the agreed-upon procedure required the Secretary-General of ICSID to propose a list of ten candidates, whereafter each party would strike four of the ten candidates and then rank the remaining candidates (1-6). Following each party's submission of its strike and rank selections, the Secretary-General tallied the ranking values of each remaining candidate, and the candidate with the lowest aggregated rank, Ms. Reed, was appointed as President of the Tribunal. The process that led up to that selection was very much driven by the parties, as is reflected in their communications with the Secretary-General.

- a. Attached hereto as Ex. A is a true and correct copy of email communications from counsel for Webuild and Panama, dated Sept. 14, 2020, which outlined

the initial proposed procedure for selecting a mutually-agreed upon president of the Tribunal.

- b. Attached hereto as Ex. B is a true and correct copy of a letter from the Secretary-General to Panama and Webuild, dated November 23, 2020, which confirmed the parties' finalized procedure and proposed the ten candidates.¹ The letter makes reference to three prior communications in October and November 2020 regarding the procedure. This was because there was disagreement between the parties regarding the qualifications of the candidates to be placed on the list, and regarding Webuild's objection to certain persons on the original list provided by the Secretary-General. Further, this letter notes that if there is no agreement on a President as a result of the procedure, the parties would consult further.
- c. Attached hereto as Ex. C is a true and correct copy of a letter from the Secretary-General to Panama and Webuild, dated December 4, 2020, which informed the parties of their mutual selection of Ms. Lucy Reed. At that time, Ms. Reed was not a member of the ICSID Panel. To be clear, in the context of a selection process agreed by the parties with the assistance of the ICSID Secretary General, there is and was no requirement that the persons on the list be members of the ICSID Panel.

10. Subsequent to learning of Webuild's subpoena to WSP, Panama endeavored to inform the Webuild Tribunal of Webuild's conduct and to reserve all of its rights in that regard. Panama neither requested any action on the part of the Webuild Tribunal nor invited any other comment or response. Accordingly, there would have been no reason for the Webuild Tribunal

¹ Out of respect for the confidentiality of the ICSID process for selecting names to be placed on a ballot, I have redacted the names and nationalities of candidates not chosen. The Republic of Panama is prepared to submit an unredacted version, under seal, to the Court upon request.

to respond. Nonetheless, the Court is aware of Webuild's extensive response to Panama's email to the Webuild Tribunal. Attached hereto as Ex. D is a true and correct copy of the email from Panama to the ICSID Legal Counsel, dated May 26, 2022, which requested that the Tribunal be informed of the instant action and reserving all rights.

11. In its Consolidated Opposition, Webuild alleges that Panama failed to produce allegedly responsive documents in certain ICC arbitration proceedings. Opp. at 7 (citing Second Lamm Decl. ¶¶ 13-15). As indicated above, this is disingenuous as Panama was not, and is not, a party to the ICC proceedings.

12. Those ICC proceedings, which began as seven arbitrations, were consolidated into the following five distinct arbitrations (hereinafter, "ICC Arbitration Proceedings"):

- a. (1) *Grupo Unidos por el Canal, S.A.*, (2) *Sacyr S.A.*, (3) *Salini-Impregilo S.p.A.*, and (4) *Jan de Nul N.V. v. Autoridad del Canal de Panama*, ICC Case No. 19962/ASM ("Cofferdam Arbitration");
- b. (1) *Grupo Unidos por el Canal, S.A.*, (2) *Sacyr S.A.*, (3) *Salini-Impregilo S.p.A.*, and (4) *Jan de Nul N.V. v. Autoridad del Canal de Panama*, ICC Case No. 20910/ASM/JPA ("Concrete Arbitration");
- c. (1) *Grupo Unidos por el Canal, S.A.*, (2) *Sacyr S.A.*, (3) *Salini-Impregilo S.p.A.*, and (4) *Jan de Nul N.V. v. Autoridad del Canal de Panama*, ICC Case No. 22465/ASM/JPA (C-22966/JPA) ("Lock Gates Arbitration");
- d. (1) *Grupo Unidos por el Canal, S.A.*, (2) *Sacyr S.A.*, (3) *Salini-Impregilo S.p.A.*, and (4) *Jan de Nul N.V. v. Autoridad del Canal de Panama*, ICC Case No. 22466/ASM/JPA (C-22967/JPA) ("Disruption Arbitration");
- e. (1) *Grupo Unidos por el Canal, S.A.*, (2) *Sacyr S.A.*, (3) *Salini-Impregilo S.p.A.*, and (4) *Jan de Nul N.V.*, *Constructora Urbana S.A.*, and (5) *Sofidra*

S.A. v. Autoridad del Canal de Panama, ICC Case No. 22588/ASM/JPA (“Advance Payments Arbitration”).

13. As Panama was not a party to any of the ICC Arbitration Proceedings (and could not have been made a party), no documents could have been requested of Panama in the ICC Arbitration Proceedings, and therefore, Panama could not have failed to produce any documents in response to requests in the ICC Arbitration Proceedings.

14. It should be noted that in both instances where the procedural calendar in the Webuild Arb. has been revised, it has been the result of one party requesting more time to file its pleading. In October 2021, Webuild requested a one week extension to file its Memorial. Procedural Order No. 4 of October 26, 2021, discussed in paragraph 7 of Ms. Lamm’s Second Declaration, reflects the agreement reached between Panama and Webuild, and approved by the Webuild Tribunal, to extend Webuild’s time for filing its Memorial to November 12, 2021. Similarly, Procedural Order No. 5 reflects the Webuild Tribunal’s approval of the agreement reached between Panama and Webuild for Panama to file its Counter-Memorial on Merits and Memorial on Jurisdiction on September 16, 2022. *See* Second Lamm Decl. ¶ 11. Attached hereto as Ex. E is a true and correct copy of Procedural Order No. 5, dated July 21, 2022, updating the Procedural Calendar of the Webuild Arb..

15. Finally, as the Court is aware, Christoph Schreuer authored a “legal opinion” entitled “The Nature of ICSID Arbitration for Purposes of 28 U.S.C. § 1782,” which was submitted on July 15, 2022, in support of Webuild’s Consolidated Opposition. *See* ECF No. 38. On July 21, 2022, the Republic of Panama requested that Webuild voluntarily make Mr. Schreuer available for deposition so that Panama could assess the nature and scope of Mr. Schreuer’s opinions. Webuild declined to do so. Attached hereto as Ex. F is a true and correct copy of the email communications, dated July 21 and 25, 2022, between counsel for Panama and Webuild concerning making Mr. Schreuer available for a deposition.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of August 2022 in New York, New York.


Mélida N. Hodgson