

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

SECOND DECLARATION OF CAROLYN B. LAMM

I, Carolyn B. Lamm, state as follows:

1. I am a member of the law firm White & Case LLP, counsel for Applicant Webuild S.p.A. (“Webuild”) in the above-referenced matter. I am also lead counsel for Webuild in the arbitration proceeding before the International Centre for Settlement of Investment Disputes (“ICSID”) that underlies Webuild’s application for discovery under 28 U.S.C. § 1782 (the “*Webuild* arbitration”). See 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> (ECF 7-21).

2. I submit this declaration in support of Webuild’s Consolidated Opposition to (i) the Republic of Panama’s (“Panama”) Motion to Intervene, to Vacate the Court’s May 19, 2022 Order, and to Quash the WSP USA Subpoena (ECF No. 13); and (ii) WSP USA Inc.’s Motion to Quash Subpoena and to Vacate the Court’s May 19, 2022 Order (ECF No. 22) (collectively, the “Motions”), filed contemporaneously herewith.

3. This is the second declaration I have submitted in this action.

A. Status of the *Webuild* Arbitration

4. As I explained in my First Declaration dated May 17, 2022 (ECF No. 7), in the *Webuild* arbitration, Webuild asserts claims for violation of its international treaty rights under the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments, signed on February 6, 2009, and entered into force on October 4, 2010 (the “BIT”), including violations of the BIT’s fair and equitable treatment provision and protections against unjust and discriminatory measures. ECF No. 7, ¶ 7.

5. As discussed in my First Declaration, Webuild appointed Stanimir Alexandrov to the Tribunal. ECF No. 7, ¶ 9. Mr. Alexandrov is a Bulgarian national who was designated to the ICSID Panel of Arbitrators by the Chairman of the ICSID Administrative Council. *See Exhibit 1* (ICSID, Members of the Panels of Conciliators and of Arbitrators dated May 3, 2022, *available at* icsid.worldbank.org/sites/default/files/ICSID2010/ICSID10.pdf). Panama appointed H el ene Ruiz Fabri, a French national, to the Tribunal. ECF No. 7, ¶ 9. When the Parties could not agree on a Tribunal President, the ICSID Secretary-General provided a list of ten potential nominees, from which Lucy Reed, a U.S. national, was selected as Tribunal President. *See id.* Lucy Reed previously had been designated to the ICSID Panel of Arbitrators by the Chairman of the ICSID Administrative Council. *See Exhibit 2* (ICSID, Members of the Panels of Conciliators and of Arbitrators dated October 2016, *available at* <https://www.international-arbitration-attorney.com/wp-content/uploads/2016/12/ICSID-Panel-of-Arbitrators.pdf>).

6. Pursuant to ICSID Arbitration Rule 31 and the Tribunal’s Procedural Order No. 1 (ECF 16-13), the *Webuild* arbitration is currently in the written phase, during which Webuild is required to submit all relevant evidence and legal argument to substantiate its claims under the BIT. On February 25, 2021, following the First Session of the Tribunal, Webuild requested to

bifurcate the proceeding into a jurisdictional phase and a merits phase; Panama strongly opposed bifurcation. Following briefing on that question by the Parties, the Tribunal rejected Webuild's request for bifurcation. The Tribunal denied Webuild's request for bifurcation in part because the jurisdictional issues "are so likely to be intertwined with the merits that to bifurcate them would not promote efficiency."

7. Following the Tribunal's denial of Webuild's request for bifurcation, the Tribunal issued a procedural schedule for the arbitration in Procedural Order No. 2 dated May 3, 2021, which it amended in Procedural Order No. 4 dated October 26, 2021. Webuild filed its Memorial on the Merits on November 12, 2021, in accordance with Procedural Order No. 4. Panama's Counter-Memorial on the Merits was originally due on August 5, 2022.

8. On May 5, 2022—six months into the preparation of its Counter-Memorial and only three months before its Counter-Memorial was due—Panama filed a Notice of Intended Objection and Request for Bifurcation. In the Notice, Panama asserted that it intended to submit an objection to the Tribunal's jurisdiction and requested that the Tribunal bifurcate the proceedings so that this objection would be resolved prior to any further briefing on the merits of Webuild's claims. Webuild objected to bifurcation, both on the basis that Panama's request for bifurcation and jurisdictional objection were not well founded and because, if the proceedings were bifurcated at this stage of the proceedings, after Webuild had filed its Memorial on the Merits, and an entire jurisdictional phase were conducted, Panama would have over a full year to prepare its response on the merits issues—an issue of fundamental unfairness and unequal treatment of the parties.

9. During the briefing on Panama's Notice and Request for Bifurcation, Panama wrote to the Tribunal on May 26, 2022, informing it of the instant § 1782 proceedings, arguing

that Webuild's Application was "an abusive circumvention of the Tribunal's discretion to control document production" in the *Webuild* arbitration. Webuild opposed Panama's request for the Tribunal's intervention regarding the § 1782 application, and advised the Tribunal that (i) Webuild's application seeks production from a third party not before the Tribunal, (ii) the documents that Webuild seeks are those that Panama, through its organ ACP, had failed to produce previously, notwithstanding ICC Tribunal orders for ACP to produce, and (iii) any relevant information that Webuild obtained from the subpoena would be provided to the Tribunal to assist its consideration of issues related to Panama's sovereign conduct. The Tribunal has not responded.

10. On June 28, 2022, the Tribunal, by majority, denied Panama's request for bifurcation, in part because, as the Tribunal previously had ruled, "the factual and legal issues involved in deciding [jurisdiction] are potentially intertwined with other issues on the merits."¹ The Tribunal further observed that "the issues are not uncomplicated" and that, "taking into account the primary efficiency goals of bifurcation," Panama's request was not warranted.

11. Following the Tribunal's denial of Panama's request for bifurcation, Panama requested an extension of the deadline for its first submission. The Parties have now agreed to a new procedural schedule, under which Panama's Counter-Memorial on the Merits and Memorial on Preliminary Objections is due September 16, 2022; Webuild's Reply on the Merits and Counter-Memorial on Preliminary Objections is due April 21, 2023; Panama's Rejoinder on the Merits and Reply on Preliminary Objections is due on October 27, 2023; and Webuild's Rejoinder on Preliminary Objections is due on January 19, 2024. See **Exhibit 3** (Tribunal's

¹ The documents underpinning Panama's request for bifurcation, including Panama's Notice, Webuild's response, and the Tribunal's decision, are subject to ongoing confidentiality agreements.

Letter dated July 7, 2022, Annex A). A hearing is expected to be held sometime in March 2024.
Id.

B. Prior Requests for Discovery in Related Commercial Arbitration Proceedings

12. Panama’s motion refers to several international commercial arbitrations. Panama Mot. 4 (ECF 15). In those commercial arbitrations, Webuild, together with other shareholders of Grupo Unidos Por El Canal S.A. (“GUPC”), raise claims for damages against the Panama Canal Authority (“ACP”) arising under Panamanian law for breach of the August 11, 2009 Construction Contract Agreement between ACP and GUPC (the “Contract”). In accordance with the dispute resolution clause in the Contract, these arbitrations were filed before tribunals constituted under the International Chamber of Commerce arbitration rules (the “ICC arbitrations”). Some of the ICC arbitrations remain pending, and at least one has concluded.

13. In the context of these ICC arbitrations, Webuild and its partners have demanded production of many relevant documents; however, Panama and its organ, ACP, have failed to comply in good faith with multiple document production orders issued by the tribunals in those cases, resulting in an incomplete and distorted documentary record.

14. Specifically, although the tribunals in the ICC arbitrations ordered Panama/ACP to produce responsive documents in numerous requested categories, Panama/ACP failed to comply in good faith with the production orders, producing only a limited number of documents, many of which were heavily redacted, with a *de minimis* number left unredacted. *See Exhibit 4* (Excerpt of Claimants First Post-Hearing Brief – Table of Requests Not Produced). Indeed, the Chief Financial Officer of ACP testified in one of the ICC arbitrations that while ACP maintained extensive files of potentially responsive historical documents, he specifically *did not* examine them for responsiveness and production. Faced with such systematic intransigence, and

despite multiple orders for production, one of the ICC tribunals noted that, although “not many documents have been produced by [ACP],” the tribunal’s “hands are tied” with respect to its options for compelling such production from Panama. See **Exhibit 5** (Email from Cofferdam ICC Tribunal to ACP and GUPC Parties re: Document Production, dated April 5, 2016).

15. Not only did Panama/ACP fail to comply in good faith with document production orders in the ICC arbitrations, Panama/ACP also intervened and sought to prevent production of documents in the § 1782 proceedings initiated by GUPC in relation to the ICC arbitrations, asserting that “[m]any, if not all, of the documents [GUPC] seeks . . . are in ACP’s custody and control.” Letter from ACP, *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-405, ECF No. 40 at 4 (S.D.N.Y. June 24, 2016); see **Exhibit 6** (Transcript of Hearing on ACP’s Motion to Compel Compliance With the Court’s Order (excerpt), *Grupo Unidos Por El Canal, S.A.*, No. 3:14-mc-80277 (N.D. Cal.), ECF No. 32 at 30:1-31:16); see also ACP Reply, *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-226, ECF No. 14 at 13 (D. Colo. Dec. 11, 2014); Motion to Intervene, *Grupo Unidos Por El Canal, S.A.*, No. 14-mc-80277, ECF No. 13 (N.D. Cal. Jan. 5, 2015). Panama/ACP further represented that such evidence would be part of the document production process and would be produced during the course of the ICC arbitration proceeding, if the tribunal ordered Panama/ACP to do so—but, as noted above, Panama/ACP ultimately failed to do so. *Id.*

* * *

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

Executed this 15th day of July, 2022 in Washington, DC.



Carolyn B. Lamm