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

ORAL ARGUMENT REQUESTED

THE REPUBLIC OF PANAMA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE, TO VACATE THE COURT'S MAY 19, 2022 ORDER, AND TO QUASH THE WSP USA SUBPOENA

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The Republic of Panama ("Panama"), the sole respondent in *Webuild S.p.A. v. Republic of Panama*, ICSID Case No. ARB/20/10, filed March 11, 2020 (the "Webuild Arb."), and *Sacyr S.A. v. Republic of Panama*, ICSID Case No. UNCT/18/6, filed August 3, 2018 (the "Sacyr Arb.") (collectively the "Underlying Proceedings"), respectfully submits this memorandum in support of its motion to intervene, to vacate the Court's order granting Applicants Webuild S.p.A. ("Webuild") and Sacyr S.A.'s ("Sacyr") *ex parte* application under 28 U.S.C. § 1782, and to quash the subpoena served on WSP USA ("WSP") on May 26, 2022.

PRELIMINARY STATEMENT

Panama seeks to intervene and oppose Applicants' requests for discovery under 28 U.S.C. § 1782. Panama has a right to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2). As the party against whom Applicants purportedly intend to use the requested discovery, Panama has an interest in the outcome of these proceedings, which will not be adequately represented by the party from whom the documents are sought, and Panama has applied to intervene in a timely manner.

As an initial matter, Applicants—represented by the same counsel—have a pending, preexisting § 1782 request before Judge Gardephe seeking substantially the same documents from the same entity. The instant § 1782 request sidesteps Judge Gardephe's consideration of that request and unnecessarily expends judicial resources. Accordingly, Panama is filing a Related Case Statement, consistent with this Court's Local Rules.[1]

The Court should vacate its prior Order and quash the subpoena because Applicants cannot satisfy the statutory requirements of § 1782. Applicants have failed to meet their burden of

[1] Pursuant to Rule 13 of the Rules For The Division Of Business Among District Judges, Southern District of New York, simultaneously with this filing, Panama has filed a Related Case Statement with respect to *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-00405.

establishing that the Underlying Proceedings are "foreign or international proceedings." 28 U.S.C. § 1782(a). And even if Applicants could, the Court should exercise its discretion to deny the application because the nature of the Underlying Proceedings weighs against granting Applicants' request and the request circumvents the arbitration rules to which Panama and Applicants have consented.

In an effort to discuss Panama's requested intervention in this matter and its objections to the discovery sought, counsel for Panama communicated with counsel for Applicants via electronic mail and during a telephonic conference conducted on June 8, 2022. Hodgson Decl. ¶ 22. Applicants, among other things, refused to consent to Panama's intervention in this action, disagreed that their instant § 1782 request violates Panama's proof-gathering and document production rules in the Underlying Proceedings, and rejected Panama's position that any discovery of WSP stemming from Applicants' subpoena, which was served pursuant to § 1782, should be delayed pending the Supreme Court's forthcoming guidance in *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, 142 S. Ct. 638 (2021), which is expected to be dispositive of whether the Underlying Arbitrations constitute "foreign or international tribunal[s]," as is required by § 1782.

For these and other reasons described below, Panama respectfully requests that this Court grant its motion to intervene, to vacate its prior Order, and to quash the subpoena.

BACKGROUND

A. The Parties & the Panama Canal Expansion

The Underlying Proceedings relate to Applicants' role in the construction of a third set of locks on the Atlantic and Pacific sides of the Panama Canal.

Applicants and other entities formed the Grupo Unidos Por El Canal consortium (the "GUPC") to participate in the tender process conducted by the Autoridad del Canal de Panamá

(the "Panama Canal Authority" or "ACP") . *See* Zaffaroni Decl. ¶¶ 4, 18; Lamm Decl. Ex. 10, ¶ 46, (ECF No. 7-16, at 21). An autonomous entity that operates independent of Panama's political branches, ACP "is exclusively responsible for the administration, operation, conservation, maintenance and modernization of the Canal." Panama Canal, *About the Organization*, https://pancanal.com/en/history-of-the-panama-canal/ (last visited June 9, 2022).

Soon after the United States relinquished control of the Canal at the end of 1999, the ACP initiated in earnest a process that would lead to the construction of a third set of locks. As part of the process that eventually led to the construction of the third set of locks, ACP sought the advice of a wide range of technical experts, including the engineering firm Parsons Brinckerhoff, both in designing the project and in the evaluation of the bids that were received. *See generally* Zaffaroni Decl. Exs. 3-6 (detailing ACP's preparations). ACP developed a Master Plan for the Panama Canal and a Proposal for the Expansion of the Panama Canal: Third Set of Locks Project. *See id.* Exs. 6, 8. ACP subsequently issued a public tender for the Third Set of Locks Project, including a Request for Qualifications and a Request for Proposals. *Id.* Exs. 9-10.[2]

In 2009, ACP awarded the project to construct the third set of locks for the Panama Canal to GUPC. *Id.* Ex. 14, at 43 (ECF No. 8-22, at 48). ACP and GUPC signed the contract for the design and construction of the third set of locks, which they later assigned to a local Panamanian entity, GUPC S.A., ("GUPCSA"), which was created specifically to execute the project. Hodgson Decl. Ex. B (Assignment and Acceptance Agreement between GUPC Consortium, GUPCSA and ACP, dated May 31, 2010). The contract included clear provisions to ensure that the original GUPC members, including Applicants, remained liable and directly responsible for the

[2] Pursuant to Article 56 of Law No. 19 of 1997 (the Organic Law of the Panama Canal Authority), the ACP has independent contracting regulations distinct from Panama's procurement regulations. Hodgson Decl. Ex. A.

performance of the agreement that they had signed for the construction of the third set of locks. *Id*. Ex. C.

B. GUPCSA's ICC Proceedings

The Underlying Proceedings are not Applicants' first arbitration proceedings related to the Canal expansion. Applicants, both directly and acting as GUPCSA (the project company in which Applicants own 96% of shares)[3] have brought a total of seven international commercial arbitrations against the ACP (*not* Panama) under the International Chamber of Commerce ("ICC") arbitration rules (the "ICC arbitrations") in accordance with the contract.[4] Following several consolidation procedures, the seven matters became five distinct ICC arbitrations:

1. *(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**");
2. *(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**");
3. *(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"**);
4. *(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**");
5. *(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**").

As discussed below, three of the ICC arbitrations have concluded with final awards adverse to Applicants' interests.

[3] *See* Applicants' Mem. 2 (stating that Webuild and Sacyr each own "48% of the shares in" GUPC S.A.).

[4] As ACP, not Panama, is the respondent in the ICC arbitrations, Panama relies on a declaration from ACP's counsel filed in litigation in the Southern District of Florida regarding the ICC arbitrations. Unless otherwise stated, the facts in this section are taken from that declaration. *See* Hodgson Decl. Ex. D.

The first ICC arbitration case against the ACP, the "Cofferdam Arbitration," was filed on December 28, 2013, while the project was still ongoing. On July 25, 2017 the ICC Cofferdam tribunal rendered an award in favor of the ACP, Hodgson Decl. Ex. E, which Applicant Sacyr requested the United States District Court for the Southern District of Florida vacate. On June 18, 2018, that court denied Sacyr's request and instead granted ACP's petition to confirm and recognize the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Grupo Unidos Por El Canal, S.A. v. Autoridad del Canal de Panama,* No. 17-cv-23996, 2018 WL 3059649, at *7 (S.D. Fla. June 20, 2018). *See generally* 9 U.S.C. §§ 9, 207.

The second ICC arbitration against the ACP, the "Concrete Arbitration," was filed by Applicants and GUPCSA on March 17, 2015, while both the project and the previous arbitration were ongoing. A final award by the Concrete Arbitration tribunal, also in favor of the ACP, was issued on February 17, 2021. Hodgson Decl. Ex. F. Once again that award was challenged by GUPCSA in the Southern District of Florida. But once again, on December 9, 2021, that court denied GUPCSA's request to vacate the award and instead granted the ACP's petition to confirm and recognize the award. *See Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, No. 20-cv-24867, 2021 WL 5834296, at *12 (S.D. Fla. December 9, 2021), *appeal filed*, No. 21-14408 (11th Cir. Dec. 20, 2021).

Applicants and GUPCSA filed two more arbitrations against the ACP on December 8, 2016, comprising the third and fourth ICC arbitrations, which would be later identified as the "Lock Gates Arbitration" and the "Disruption Arbitration" once each of them was consolidated with additional arbitrations later initiated by Applicants and GUPCSA. Panama is unaware of any award issued in these two arbitrations and believes they remain pending.

Finally, the seventh arbitration initiated against ACP, which was consolidated into the fifth ICC arbitration—the "Advance Payments Arbitration"—was filed by Applicants and GUPCSA on January 31, 2017, with all previous arbitrations pending. On December 10, 2018, the tribunal rendered an award favorable to the ACP, ordering the claimants to repay over US$800 million in advance payments to the ACP, as well as ACP's costs in the arbitration. Hodgson Decl. Ex. G.

C. The Investor-State Arbitrations Against Panama

Notwithstanding that Applicants' claims against ACP have been rejected on multiple occasions by various independent tribunals (as discussed above), Applicants initiated the Underlying Proceedings, which are investor-state arbitrations against Panama.

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 governmental agreement to be resolved by independent arbitrators. *See generally* Brief for United States 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).

The state "offers" or "consents" to arbitrate based on acceptance by a claimant of the conditions for that arbitration. The conditions of a state's consent, as set out in the relevant treaty, are fundamental. The pertinent treaties here are the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (entered into force on October, 4 2010) (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 (entered into force on July 31, 1998) (the "Panama-Spain Treaty"), Martinez Lopez Decl. Ex. 10 (ECF No. 9-10).[5]

Panama's bilateral investment treaties with the Kingdom of Spain and the Italian Republic that potentially enable Applicants to bring their claims in the Underlying Proceedings; articulate the specific pathways through which Webuild and Sacyr can pursue their claims; and set forth the foundational procedural principles that Panama has agreed to and which the Sacyr Arb. and Webuild Arb. must follow. *See generally* Lamm Decl. Ex. 12 (ECF No. 7-18); Martinez Lopez Decl. Ex. 10 (ECF No. 9-10). The treaties also include Panama's consent that the arbitral awards are "final and binding." Lamm Decl. Ex. 12, art. IX, ¶ 5 (ECF No. 7-18, at 6) ("Arbitral awards shall be final and binding on the Parties to the dispute. Each Contracting Party shall enforce such awards in accordance with its own laws and the applicable International Conventions."); Martinez Lopez Decl. Ex. 10, art. XII, ¶ 5 (ECF No. 9-10, at 5) (same).

On August 3, 2018, Sacyr invoked its right to initiate arbitration under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). Martinez Lopez Decl. Ex. 8. On February 3, 2022, the Sacyr Tribunal decided on the basis of Article 4 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts that certain alleged actions of the ACP could, if so proven, be attributed to Panama, such that it had jurisdiction to hear some of Sacyr's claims. Hodgson Decl. ¶ 10. On May 18, 2022, Sacyr and Panama reached agreement on the procedural calendar for the merits phase of the arbitration, as well as the timing and procedures for document production. *Id.* ¶ 11. Per agreement, the document production phase is to begin in May 2023 and conclude in July

[5] These are the relevant treaties because Webuild is an Italian company, and Sacyr is a Spanish company.

2023. *Id.* ¶ 12. Notably, this phase comes between the first and second round of pleadings, enabling Sacyr to request documents after it has had an opportunity to review Panama's substantive pleadings, and allowing the Tribunal to determine whether Sacyr's requests are relevant and material to the determination of the dispute. *Id.* ¶ 13.

In the case of Webuild, after having noticed a dispute on July 16, 2015 (as predecessor company Salini Impregilo S.p.A.), it filed a Request for Arbitration on March 11, 2020 pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), which is governed by the ICSID Arbitration Rules (the "ICSID Rules"). Lamm Decl. Ex. 10, ¶ 29. The parties agreed to a procedural calendar that includes a document production phase that would take place between August 2022 and November 2022. Hodgson Decl. ¶ 15; *id.* Exs. J-K. On May 5, 2022, Panama submitted a jurisdictional objection and requested that the Webuild Tribunal bifurcate the proceedings to determine first whether Panama's consent to arbitration under the Panama-Italy Treaty requires that Webuild's claims be heard under the dispute settlement provisions of the Contract or any other relevant vehicle. *Id.* ¶ 16. The issue of bifurcation of Panama's jurisdictional objection, which could potentially dispose of the entire case, is currently pending before the Webuild Tribunal. In light of Panama's objection, there is a very real possibility that the Webuild Tribunal will determine that it lacks jurisdiction over Webuild's claims, and in such event, there will be no Webuild investment arbitration proceeding or tribunal for this Court to assist.

In each of the Underlying Proceedings, the parties agreed that the arbitrations would proceed under a set of arbitration rules (UNICTRAL Rules in the Sacyr case and ICSID Rules in the Webuild case). The parties also agreed that the 2010 International Bar Association Rules

("IBA Rules") should serve as supplemental guidelines for document production.[6] Both proceedings have extensive, agreed-upon document production schedules that have yet to commence. Hodgson Decl. ¶¶ 11-12, 15; *id.* Exs. J-K. Notwithstanding that under the UNCITRAL Rules, the ICSID Rules, and the IBA Rules, such document production is governed by the arbitrators' discretion,[7] the Tribunals overseeing the Underlying Proceedings were not presented with advance (i) notice of Applicants' § 1782 request, (ii) opportunity to determine whether the documents that each Applicant seeks here are material and relevant, or (iii) opportunity to direct the parties to the Underlying Proceedings in any way with respect to production of the documents sought in Applicants' § 1782 request. Hodgson Decl. ¶ 20.

D. Applicants' § 1782 Applications

On May 17, 2022, Applicants filed the instant application, seeking documents from WSP purportedly for use against Panama in the Underlying Proceedings. *See* Applicant's Mem. at 10, ECF No. 3. The Court entered an Order granting that *ex parte* application on May 19, 2022. ECF No. 11. Applicants served the subpoena on May 26, 2022. ECF No. 12. But this is not Applicants' first or only outstanding § 1782 application seeking discovery from Parsons Brinckerhoff and other

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[6] Hodgson Decl. Ex L, ¶ 7.1 (Sacyr); *id.* Ex. M, ¶ 15.2 (Webuild).

[7] *Id*. Ex. H (UNCITRAL Rules, Article 24 - Evidence states: "1. Each party shall have the burden of proving the facts relied on to support his claim or defense. 2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."); *id.* Ex. I (ICSID Convention, Regulations and Rules, Rule 34 of Procedure for Arbitration Proceedings states, in part: "Evidence: General Principles (i) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."); *id.* Ex. Q (IBA Rules, Article 3.9 states, in part: "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.").

entities with respect to the Panama Canal expansion project. In connection with ICC proceedings involving the ACP (not Panama), Applicants—through their Panamanian consortium, GUPCSA—filed multiple § 1782 applications in late 2014.

On September 30, 2014, GUPCSA filed an *ex parte* application in the Northern District of California, seeking documents from URS Corporation and URS Holdings, Inc., who "worked as environmental and engineering consultants to ACP in connection with the Panama Canal expansion project." *In re Grupo Unidos Por El Canal S.A.*, (*GUPCSA I*), No. 14-mc-80277, 2015 WL 1815251, at *2 (N.D. Cal. Apr. 21, 2015).

The very next day, on October 1, 2014, GUPCSA filed another § 1782 application in the District of Colorado, this time seeking documents from CH2M Hill, the "program manager for the Panama Canal expansion program." *In re Grupo Unidos Por El Canal S.A.* (*GUPCSA II*), No. 14-mc-00226, 2015 WL 1810135 (D. Colo. Apr. 17, 2015). Both of those applications were subsequently denied at least partially on the basis that the underlying ICC arbitrations were private commercial arbitrations that did not constitute "proceeding[s] in a foreign or international tribunal" under § 1782. *GUPCSA I*, 2015 WL 1815251, at *6-11; *GUPSCA II*, 2015 WL 1810135, at *6-9.

Later that year, on December 5, 2014, GUPCSA filed yet another § 1782 application in this Court, this time seeking documents from Parsons Brinckerhoff for use against ACP in an ICC proceeding. *See In re Grupo Unidos Por El Canal S.A.* (*GUPSCA III*), No. 14-mc-00405 (S.D.N.Y. Dec. 5, 2014), ECF No. 1. This application remains pending before Judge Gardephe. *See* Letter from Carolyn B. Lamm, Counsel to GUPCSA, *GUPSCA III* (S.D.N.Y. Aug. 24, 2020), ECF No. 60 (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* Lamm Decl. ¶ 6; *id.* Ex. 8. As such, in their current application before this Court, Webuild and Sacyr make a second request for documents from WSP, Parsons' legal successor, that is substantially similar to the request that is currently pending before Judge Gardephe. In other words, Webuild and Sacyr (through their § 1782 application here), and GUPCSA, which includes Webuild and Sacyr as members (through a § 1782 application that is currently before Judge Gardephe), seek largely duplicative materials from the same entity. *See* Hodgson Decl. Exs. O-P.

ARGUMENT

I. Panama May Intervene of Right

"In a section 1782 proceeding, 'parties against whom the requested information will be used may have standing to challenge the lawfulness of discovery orders directed to third parties.'" *In re Klein*, No. 20-mc-203, 2022 WL 1567584, at *3 (S.D.N.Y. May 18, 2022) (quoting *In re Sarrio, S.A.*, 119 F.3d 143, 148 (2d Cir. 1997)). Intervention as of right under Rule 24(a)(2) is granted when an applicant: "(1) timely file[s] an application, (2) show[s] an interest in the action, (3) demonstrate[s] that the interest may be impaired by the disposition of the action, and (4) show[s] that the interest is not protected adequately by the parties to the action." *"R" Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 240 (2d Cir. 2006) (internal quotation marks omitted). Courts in this Circuit routinely permit a party to the underlying proceeding to intervene and oppose an application for discovery under § 1782. *See, e.g.*, *Klein*, 2022 WL 1567584, at *3 (granting unopposed intervention of right to the defendants in the underlying proceeding because they "have an interest in the property or transaction that is subject to this [§ 1782] proceeding and its outcome may impair or impede that interest"); *In re JSC BTA Bank*, No. 21-mc-824, 2021 WL 6111916, at *2 (S.D.N.Y. Dec. 27, 2021) (finding intervenor "satisfied his

burden to intervene" because the § 1782 application revealed an "intention to use the records against [him]"); *In re Kuwait Ports Auth.*, No. 20-mc-046, 2021 WL 5909999, at *5 (S.D.N.Y. Dec. 13, 2021) (permitting intervention where the requested information would be used against the intervenor and "none of the discretionary factors weigh[ed] against intervention").

Panama meets the requirements for intervention of right under Rule 24(a)(2). *First*, the motion is timely because Panama took prompt action to intervene upon learning of Applicants' *ex parte* application. Applicants served the § 1782 subpoena on May 26, 2022. Notwithstanding that Applicants chose to file their *ex parte* application for discovery of WSP without first notifying Panama or the Tribunals overseeing the Webuild Arb. and the Sacyr Arb. of its actions, Panama subsequently learned of the application and promptly prepared and filed the instant motions and Related Case Statement.

Second, because Panama is the sole respondent in the Underlying Proceedings, it has a clear interest in opposing the application and moving to quash the subpoena to protect its bargained-for treaty rights, to participate in the proceeding concerning potential discovery of documents that are purportedly sought for use against Panama, and to explain to the Court why the *ex parte* application fails to meet the standards for § 1782 discovery. As such, Panama's interest in this matter is "direct, substantial, and legally protectable." *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010).

Third, "without [Panama's] intervention[,] disposition of the action may, as a practical matter, impair or impede [Panama's] ability to protect its interest." *In re Bear Stearns Cos., Inc. Sec., Derivative, & Erisa Litig.*, 297 F.R.D. 90, 96 (S.D.N.Y. 2013) (internal citation omitted). As discussed in detail below, Applicants' *ex parte* application represents an attempt to circumvent Panama's bargained-for treaty rights and side-step the agreed-upon document production

procedures in the Underlying Proceedings. Indeed, Panama, a sovereign nation, voluntarily entered into bilateral investment treaties with the Italian Republic and the Kingdom of Spain, consenting *only* to arbitration in accordance with the ICSID rules and UNCITRAL rules, respectively, and other rules expressly agreed-upon by the parties. These rules reflect Panama's document exchange and proof-gathering agreements, and therefore, permitting discovery outside of the agreed-upon rules by a sovereign nation would offend the notions of international comity that gave rise to § 1782. *See infra* Point II.B.2. As the sole respondent in the Underlying Proceedings, there can be little doubt that absent Panama's intervention here, Panama's interests in the Underlying Proceedings would be impaired.

Fourth, no existing party represents Panama's interests. WSP does not—and cannot—represent Panama's interests here. WSP is neither a party to the treaties relevant to the Applicants' claims against Panama, nor a party to the Underlying Proceedings themselves. While WSP may seek similar relief, *i.e.*, seek to quash the subpoena, only Panama can adequately demonstrate how Applicants' *ex parte* application undermines agreed-upon document production schedules in the Underlying Proceedings and represents an attempt by Applicants to abuse the § 1782 process. Accordingly, Panama's justified intervention undoubtedly would add unique value to this action.

For the reasons discussed above, the Court should grant Panama's motion to intervene as of right and allow Panama to defend its cognizable interests in this matter. Alternatively, the Court should exercise its discretion and permit Panama to intervene pursuant to Rule 24(b). The factors considered by the Court for intervention as a matter of right under Rule 24(a)(2) and permissive intervention under Rule 24(b) are "substantially the same." *"R" Best Produce, Inc.*, 467 F.3d at 240.

II. The Court Should Vacate Its § 1782 Order and Quash the WSP Subpoena

"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, the application must meet three statutory requirements:

> (1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign [or international] tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.

Id. (alteration in original) (quoting *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015)). 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.* The Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65, 124 S. Ct. 2466, 2483 (2004), articulated four factors implicated by those twin aims:

> (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 (internal quotation marks omitted).

Because Applicants cannot meet the statutory requirements of § 1782, and because the *Intel* factors weigh against allowing discovery, the Court should vacate its prior Order and quash the subpoena.

A. Because the underlying investor-state arbitrations here are outside the ambit of § 1782, the statutory requirements of § 1782 have not been met, and, at a minimum, the Court should reserve decision on this issue pending guidance from the Supreme Court.

"The 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)).

Applicants' failure to meet their burden on any one of the statutory requirements is grounds to vacate the Order and quash the subpoena. *See, e.g.*, *In re Escallon*, 323 F. Supp. 3d at 558 (denying § 1782 application as to two respondents because "they were not found in, and do not reside in, the Southern District of New York" and as to a third respondent "because the requested discovery is not 'for use in' foreign proceedings"); *In re Schlich*, No. 16-mc-319, 2017 WL 4155405, at *6 (S.D.N.Y. Sept. 18, 2017) (denying application because "the material sought is plainly . . . not 'for use' in a foreign proceeding within the meaning of § 1782").

Applicants fail to meet their burden of demonstrating that each of the pending arbitrations constitutes a "proceeding in a foreign or international tribunal." Relying heavily on the Second

Circuit's holding in *Fund for Prot. of Inv. Rts. in Foreign States v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir.), *cert. granted*, 142 S. Ct. 638 (2021), Applicants assert that "[t]he 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." Applicants' Mem. at 14.[8] The Second Circuit did not, however, create a categorical rule for investor-state arbitrations. Instead, it closely analyzed the specific treaty and arbitral panel at issue in *AlixPartners* "under the 'functional approach' and factors [the Second Circuit Court of Appeals] laid out in *Guo*" and held that the corresponding investor-state arbitration constituted a foreign or international tribunal under § 1782. *AlixPartners, LLP,* 5 F.4th at 225-26. Applicants have failed to meet their burden in this regard as they present no similar analysis.

Application of the *Guo* factors here shows that the Underlying Proceedings are not "proceeding[s] in a foreign or international tribunal" under § 1782. *Guo* identified four factors relevant to the 'foreign or international tribunal' inquiry: "(1) the degree of state affiliation and functional independence possessed by the arbitral entity," (2) "the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision," (3) "the nature of the jurisdiction possessed by the panel," and (4) "the ability of the parties to select their own arbitrators." 965 F.3d at 107-08. Each of these factors demonstrate that the underlying investor-state arbitrations here are outside the ambit of § 1782.

[8] Applicants state "U.S. courts are split on whether private commercial arbitrations are subject to § 1782 discovery" and note that the Supreme Court in *Intel* "cited favorably to legal authority, written by the drafter of the statute, defining the term 'tribunal' as including 'arbitral tribunals.'" Applicants' Mem. at 14 (quoting *Intel*, 542 U.S. at 258). However, Applicants fail to mention that the Second Circuit recently reaffirmed that § 1782 "does not extend to private international commercial arbitrations" and dismissed the portion of *Intel* cited by Applicants as "cursory dicta." *In re Guo*, 965 F.3d at 100.

The focus of the first *Guo* factor "is on the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body." *Id.* at 107. Here, both the ICSID Tribunal in the Webuild Arb. and the UNCITRAL Tribunal in the Sacyr Arb. function "independently."[9] Like the Chinese arbitral body in *Guo*, ICSID "maintains confidentiality from all non-participants during and after arbitration, . . . offers parties a pool of arbitrators who are not selected by any entity other than [ICSID] and who do not purport to act on behalf of, or have any mandatory affiliation with, [any foreign] government." *Id.* This factor, therefore, weighs against finding that the underlying arbitrations are before a foreign or international tribunal.

Second, Panama possesses no authority "to intervene to alter the outcome of [the] arbitration[s] after the panel has rendered a decision." *Id.* Indeed, under the terms of the treaties, Panama is bound to recognize any award of the arbitrators. 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).

The third factor looks at the nature of the jurisdiction possessed by the panel. Although the arbitral body in *Guo* was created by the Chinese government, it "derive[d] its jurisdiction exclusively from the agreement of the parties and has no jurisdiction except by the parties' consent." *In re Guo*, 965 F.3d at 107. "By contrast," the Second Circuit explained, "state-affiliated tribunals often possess some degree of government-backed jurisdiction that one party may invoke even absent the other's consent." *Id.* at 108.

The jurisdiction possessed by the arbitral panels here is likewise consensual in nature. As the United States explained in its amicus brief in support of reversal in *AlixPartners*, "[a]s in a

[9] That the ICSID was created by international agreement is irrelevant. *See Guo*, 965 F.3d at 107 (explaining that "the 'foreign or international tribunal' inquiry does not turn on the governmental or nongovernmental *origins* of the administrative entity in question" and holding that an arbitral body "originally founded by the Chinese government" was not a foreign or international tribunal).

private commercial arbitration, the role of an investor-state arbitration panel in deciding a dispute derives from the parties' consent." Hodgson Decl. Ex. R, at 30 (Amicus Br. for United States, *ZF Automotive US Inc. v. Luxshare Ltd.* and *AlixPartners, LLP v. Fund for Prot. of Inv. Rts. in Foreign States,* Nos. 21-401, 21-518 (U.S. Jan. 31, 2022), 2022 WL 333383 (citing UNCITRAL Arbitration Rules and ICSID Convention). Applicants' ability to arbitrate their claims against Panama rests entirely on Panama's consent to do so.

Finally, "the ability of the parties to select their own arbitrators further suggests . . . a private arbitral body rather than a 'foreign or international tribunal' under § 1782." *Guo*, 965 F.3d at 108. As counsel for Applicants concedes, the parties selected their own arbitrators in both underlying arbitrations. Lamm Decl. ¶ 9; Martinez Lopez Decl. ¶ 8.

To the extent this Court believes *AlixPartners* compels a different result in this case, Panama respectfully submits the Second Circuit erred in *AlixPartners*. The Second Circuit's decision in that case turned on an incorrect application of the *Guo* factors, particularly the first and third factors: state affiliation and nature of jurisdiction. As to the first factor, the Second Circuit conceded that the arbitral panel "function[ed] independently from the governments of Lithuania and Russia" but emphasized that the panel was "convened pursuant to the terms of [a treaty]" and "thus retain[ed] affiliation with the foreign States, despite its functional independence in other ways." *AlixPartners*, 5 F.4th at 226-27. As to the third factor, the Second Circuit found that, "[c]ritically, the arbitral panel in this case derives its adjudicatory authority from . . . a bilateral investment treaty between foreign States entered into by those States to adjudicate disputes arising from certain varieties of foreign investment." *Id.* at 227.[10]

[10] *AlixPartners* also recognized that no foreign State could "influence or control" the arbitration and that the parties selected their own arbitrators, but found these factors "neutral" and "not determinative." 5 F.4th at 227-28.

The flaw in *AlixPartners*'s analysis is that it conflates the state origins of an arbitral panel with state power. But "an international tribunal owes both its existence ***and its powers*** to an international agreement." *Guo*, 965 F.36 at 105 (emphasis added) (internal quotation marks omitted). That the arbitral body in *Guo* was created by the Chinese government was irrelevant because it was not controlled by China and had no jurisdiction except by consent of arbitrating parties. Conversely, *AlixPartners* incorrectly discounted the "functional independence" of the arbitral body based on its mere "affiliation with . . . foreign states." Although foreign States express their consent to investor-State arbitrations through treaties, "a nation-state's status as a party to an arbitration before a private body does not transform the tribunal into an organ of that state." Hodgson Decl. Ex. R, at 34.

Applicants admit, albeit in a footnote, that the Supreme Court is poised to rule on this issue. Applicants' Mem. at 14 n.3. Applicants insist, however, that the issue before the Supreme Court is "limited to whether § 1782 applies to 'commercial' disputes." This is not accurate. As media coverage succinctly explained, "[i]n an oral argument that lasted almost two hours over two consolidated cases, *ZF Automotive US Inc. v. Luxshare Ltd.* and *AlixPartners LLP* v. *The Fund for Protection of Investors' Rights in Foreign States*, the justices wrestled with whether private commercial arbitrations ***and bilateral investment treaty arbitrations*** qualify as tribunals within the meaning of [28 U.S.C. § 1782]." Minyao Wang, *In Dispute Over Discovery Requests In International Arbitration, Justices Weigh Text, Comity, Academic Literature, and Their Own Role*, SCOTUSblog (Apr. 29, 2022, 10:51 AM) (emphasis added), https://www.scotusblog.com/2022/04/in-dispute-over-discovery-requests-in-international-arbitration-justices-weigh-text-comity-academic-literature-and-their-own-role/. The briefing confirms that the question of whether an investor-state arbitration is "a proceeding in a foreign or international tribunal" is

squarely before the Supreme Court. The merits brief for The Fund for Protection of Investors' Rights in Foreign States, who filed one of the underlying § 1782 applications in the Southern District of New York, frames the question presented as "[w]hether the phrase 'international tribunal' in 28 U.S.C. § 1782(a) excludes ***an international arbitral tribunal constituted pursuant to a treaty signed by two sovereign States*** and charged with the authority to adjudicate with finality whether one of the two sovereigns breached its obligations under the treaty." Br. for Respondent at i (Feb. 23, 2022) (emphasis added). And the United States' amicus brief also specifically addressed this issue. Hodgson Decl. Ex. R, at 2 ("***The application of Section 1782 to investor-state arbitrations*** is a matter of particular concern to the United States, which is a party to many international agreements that authorize investor-state arbitration." (emphasis added)).

The Supreme Court's forthcoming guidance in *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, 142 S. Ct. 638 (2021), is expected to be dispositive of whether the Underlying Proceedings constitute "foreign or international tribunals," as is required by § 1782. Additionally, even if the Supreme Court rules that investor-state arbitral tribunals can constitute a "foreign or international tribunal" for purposes of § 1782, this Court must still determine whether the Underlying Proceedings here constitute "foreign or international proceedings" under the Supreme Court's reasoning. Among other things, the United States has argued that "[i]nvestor-state arbitration before a nongovernmental arbitral panel (at issue in [*AlixPartners*]) lies outside Section 1782" and that the Second Circuit's functional approach to distinguishing between private and state-sponsored international commercial arbitration should be rejected as it "bears no relation to Section 1782's text[,] cannot be reconciled with the statutory context or history . . . [a]nd it invites indeterminacy and unpredictability regarding the scope of district courts' authority under Section 1782." Hodgson Decl. Ex. R, at 13, 33-34.

For the foregoing reasons, Applicants have failed to meet their burden of establishing that the Webuild Arb. and Sacyr Arb. constitute foreign or international tribunals under § 1782. At the very least, this Court should defer ruling on this issue pending the Supreme Court's ruling.

B. The Court should exercise its discretion to deny the new petition

If Applicants do satisfy the statutory requirements (and they do not), § 1782 is inherently discretionary in nature, and in exercising its discretion, the Court should consider, among other things, the *Intel* factors. *Intel Corp.*, 542 U.S. at 264, 124 S.Ct. at 2482 ("[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so."); *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2nd Cir. 2004) (noting that § 1782 "*authorizes*, but *does not require*, a federal district court to provide judicial assistance") (emphasis in original). In exercising its discretion, a district court considers the four factors outlined by the Supreme Court in *Intel*.

"The *Intel* factors are not to be applied mechanically. A district court should also take into account any other pertinent issues arising from the facts of the particular dispute." *Kiobel by Samkalden*, 895 F.3d at 245. Other circumstances also militate against permitting discovery under § 1782. *See Pinchuk v. Chemstar Prods. LLC*, No. 13-mc-306, 2014 WL 2990416, at *3 (D. Del. June 26, 2014) ("The factors articulated by *Intel* are non-exhaustive." (citing *In re Godfrey*, 526 F. Supp. 2d 417, 419 S.D.N.Y. 2007)). An applicant's bad faith is one such circumstance. *E.g.*, *Mees*, 793 F.3d at 302 n.18.

Here, application of the second, third, and fourth *Intel* discretionary factors weigh in favor of vacating the Order and quashing the subpoena.

1. The Court should consider the character of the Webuild ICSID proceeding underway abroad

The second *Intel* factor states that "a court presented with a § 1782(a) request may consider . . . the character of proceedings underway abroad." 542 U.S. at 264, 124 S. Ct. at 2483.

With respect to the Webuild arbitration in particular, Panama recently submitted a jurisdictional objection and request that the Webuild Tribunal bifurcate the proceedings to determine whether it has jurisdiction over Webuild's claims. Hodgson Decl. ¶ 16. As such, the ICSID Tribunal is currently considering whether it even has jurisdiction over the arbitration. Should the Tribunal ultimately determine it lacks jurisdiction, the requested discovery will plainly be of no use in the defunct proceeding. Indeed, Applicants do not allege, because they cannot, that the discovery sought here pertains to jurisdictional issues in the Webuild Arb. This Court should, at a minimum, decouple Webuild's and Sacyr's § 1782 applications and stay Webuild's subpoena until the ICSID Tribunal has ruled on this pressing jurisdictional question.

2. The application circumvents Panama's document exchange and proof-gathering policies

The third *Intel* factor asks "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." 542 U.S. at 264-65, 124 S. Ct. at 2483. Panama's bilateral investment treaties with the Kingdom of Spain and the Italian Republic contain offers of Panama's consent to arbitration, in certain circumstances, before independent arbitrators, as opposed to a State-constituted tribunal. The offer of consent exists precisely to avoid the exercise of national jurisdiction by any given foreign state. Applicants have indicated their consent to participate in such proceedings by the initiation of the respective Underlying Proceedings. Panama has challenged the jurisdiction of each of the tribunals on several grounds, and the independent arbitrators will determine the scope of the jurisdiction granted to them by the parties. Other specific agreements Panama has reached

with Applicants in the Underlying Proceedings reflect the parties' document exchange and proof-gathering obligations to be administered by the independent arbitrators within the limits set by the parties. Hodgson Decl. ¶¶ 11-13, 15; *id.* Exs. L-M.

Here, Applicants' § 1782 application operates to circumvent Panama's policies. Therefore, this factor, as well as the notions of international comity that gave rise to § 1782, weigh heavily in favor of vacating the Order and quashing the subpoena. *See In re WinNet R CJSC*, No. 16-mc-484, 2017 WL 1373918, at *9 (S.D.N.Y. Apr. 13, 2017) ("Section 1782 serves important interests for our nation, international commerce, the rule of law, and international comity.").

Panama's bargained-for and consented-to bilateral investment treaties with the Kingdom of Spain and the Italian Republic form the foundation of the Sacyr Arb. and Webuild Arb., respectively. Those bilateral investment treaties, among other things, articulate the specific circumstances in which Panama has consented to arbitration before independent arbitrators and set forth the foundational procedural principles that Panama has agreed to accept and under which the Sacyr Arb. and Webuild Arb. must be conducted. *See generally* Lamm Decl. Ex. 12 (ECF No. 7-18); Martinez Lopez Decl. Ex. 10 (ECF No. 9-10). Moreover, it is the treaties that dictate that the ICSID and UNCITRAL rules govern the Sacyr Arb. and Webuild Arb., respectively.

Panama's proof-gathering and document exchange policies with respect to the Underlying Proceedings include additional agreements that it has entered into with Webuild and Sacyr. International arbitration, such as the Underlying Proceedings, inherently lack the broad discovery of civil litigation, and it is within this context that Panama agreed with Webuild and Sacyr, individually, to permit the IBA Rules to serve as supplemental guidelines for document production

in the Underlying Proceedings. *See supra* n.6.[11] The IBA Rules prescribe whether and how Webuild or Sacyr may seek production of documents from non-parties, 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); *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) (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

[11] With respect to the Underlying Proceedings, Panama has not consented to be part of or ruled by any other procedural rule.

discovery" and that "the IBA Rules empower the arbitral tribunal to order a party to obtain documents or obtain itself any necessary documents").[12]

By its own terms, IBA Article 3.9 prohibits Applicants from acquiring third-party documents except as provided for by that rule. For purposes of the Underlying Proceedings, this represents Panama's proof-gathering and document exchange policy. To permit Webuild and Sacyr to violate IBA Article 3.9 by obtaining discovery from WSP without first raising with and abiding by the conclusions and directions of the Tribunals in the Underlying Proceedings constitutes a violation of Panama's policies, and should be rejected. The Second Circuit's decision in *Kiobel ex rel. Samkalden v. Carath, Swaine & Moore LLP*, 895 F.3d 238 (2d Cir. 2018), is instructive here. The *Kiobel* court held that the § 1782 application, which sought to discover 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.

In conclusion, the third *Intel* factor weighs in favor of vacating the Order and quashing the subpoena, at least until Webuild and Sacyr have made efforts to obtain the requested information in accordance with Panama's proof-gathering and document exchange policies.

3. Applicants improperly attempt to side step their outstanding § 1782 application before Judge Gardephe

The fourth *Intel* factor addresses whether the applicant's request is "unduly intrusive or burdensome." 542 U.S. at 265, 124 S. Ct. at 2483. If a "district court determines that a party's

[12] Applicants state that they are resorting to § 1782 to obtain documents "that will not be available for evidence gathering within the procedures of the arbitration." Applicants' Mem. at 18. The Tribunals overseeing the Underlying Proceedings, however, may under certain circumstances have the power under § 1782 to seek discovery from a third-party, which provides that "[t]he order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal." *See* 28 U.S.C. § 1782(a).

discovery application under Section 1782 is made in bad faith, for the purpose of harassment, or unreasonably seeks cumulative or irrelevant materials, the court is free to deny the application *in toto*…." *Mees*, 793 F.3d at 302 n.18 (internal quotation marks omitted); *accord Pearson v. Trinklein*, No. 21-mc-770, 2022 WL 1315611, at *4 (S.D.N.Y. May 3, 2022). For the following reasons, this factor weighs heavily in favor of vacating the Order and quashing the subpoena.

Applicants have been arbitrating against ACP for years and continue to have ongoing arbitrations against it, but to date have been unable to obtain the documents that they seek through their instant § 1782 request. Moreover, Applicants, through GUPCSA, have an outstanding request before Judge Gardephe for substantially similar information from the same entity—*i.e.,* Parsons Brinckerhoff, WSP's predecessor—in connection with actions against ACP, not Panama. Applicants provide no explanation why they chose not to pursue that request and instead filed the instant § 1782 request, which operates to side step Judge Gardephe and expend valuable judicial resources to have a second judge in the Southern District of New York address these issues.[13]

Applicants also have a demonstrable history of lacking candor in their § 1782 applications. Northern District of California Magistrate Judge Ryu lamented the misleading nature of GUPCSA's applications, noting that "GUPC never noted the Miami venue of the Arbitration, instead describing it in conclusory terms as an 'international arbitration.'" *GUPCSA I*, 2015 WL 1815251, at *2. Judge Ryu further noted that the application "was likewise evasive about the private nature of the Arbitration." *Id.* at *2 n.1 ("GUPC must have known this at the time, yet chose to bury the issue when making its original *ex parte* (i.e., unopposed) application."). District of Colorado Magistrate Judge Tafoya observed GUPCSA's lack of candor as well. *GUPSCA II*,

[13] Panama is not aware of Applicants notifying Judge Gardephe of the instant § 1782 request. As discussed above, Panama has filed a Related Case Statement.

2015 WL 1810135, at *2 ("It is this Miami-based arbitration proceeding that is alleged to be the "international proceeding" supporting GUPC's Section 1782 request.").[14]

In sum, Applicants' instant § 1782 request operates to side step Judge Gardephe's consideration of Applicants' preexisting and pending § 1782 request for substantially similar information.[15] Additionally, Applicants fail to provide any explanation, let alone justification, for their request to unnecessarily expend duplicative judicial resources. This Court should vacate the Order and quash the subpoena. The § 1782 process, as an *ex parte* proceeding, demands the utmost candor and respect for the courts. *See e.g., Mees*, 793 F.3d at 302 n.18.

CONCLUSION

For the foregoing reasons, Panama respectfully requests that the Court grant its motion to intervene, to vacate its prior Order, and to quash the subpoena.

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[14] During a June 8, 2022 telephonic meet and confer, a member of White & Case represented that White & Case represents both Webuild and Sacyr in this § 1782 proceeding. This is not evidenced by the affidavits filed by attorneys for Applicants in support of their § 1782 application. *See* ECF 7, Lamm Decl. ¶ 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.") *and* ECF 9, Martinez Lopez Decl. ¶ 1 ("I am a member of the law firm Three Crowns LLP, counsel for Applicant Sacyr S.A. ("Sacyr") in the above-referenced matter.") If it were to be determined that White & Case does not represent Sacyr in this proceeding, because no attorney for Sacyr signed any pleading or appeared before the Court, the Court should decouple Webuild's and Sacyr's § 1782 requests and quash the subpoena and vacate the Order to the extent they allow Sacyr to take discovery for use in the Sacyr Arb. As a Spanish corporation, *see* ECF 9, Martinez Lopez Decl., Ex. 2, Sacyr can only act in this Court through counsel. *Kruman v. Christie's Int'l PLC*, No. 00-cv-6322, 2003 WL 21277116, at *1 (S.D.N.Y. June 2, 2003) (Kaplan, J.) ("[I]t is well established that neither corporations nor partnerships may appear in federal courts except by duly licensed attorneys."); *see also* Loc. Civ. R. 1.3(c) ("Only an attorney who has been so admitted [in accordance with Local Civil Rule 1.3(c)] or who is a member of the bar of this Court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders.").

[15] In at least one instance thus far, Sacyr has used documents produced by Panama in the Sacyr Arb. in a different arbitration against ACP. Hodgson Decl. ¶ 21.

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