23-0073-cv

United States Court of Appeals

for the

Second Circuit

WEBUILD S.P.A.,

Plaintiff-Appellant,

SACYR S.A.,

Plaintiff,

– v. –

WSP USA INC.,

Miscellaneous-Appellee,

REPUBLIC OF PANAMA,

Interested Party-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Webuild S.p.A. by its undersigned counsel certifies as follows:

Webuild S.p.A. is a publicly held corporation formed under and governed by the laws of the Italian Republic. Webuild S.p.A. is subject to the management and coordination of Salini S.p.A., which owns 40.14% of Webuild S.p.A.'s ordinary share capital. Four Italian banks, Cassa Depositi e Presiti Equity S.p.A., Intesta Sanpaolo S.p.A., Unicredit S.p.A., and Banco BPM S.p.A. own, respectively, 16.67%, 4.78%, 5.48%, and 0.93% of Webuild S.p.A.'s share capital.

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PRELIMINARY STATEMENT

Consistent with the principle of international comity, Congress has long sought to provide U.S. judicial assistance in aid of proceedings before "foreign and international tribunals" through 28 U.S.C. § 1782. Although the Supreme Court recently limited the availability of that discovery mechanism in commercial and *ad hoc* arbitration proceedings, the Supreme Court's decision made no mention whatsoever of § 1782's availability for disputes before tribunals constituted under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" and "ICSID tribunals"). Instead, the Supreme Court held that § 1782 discovery was available to aid proceedings before any tribunal "imbued" by one or multiple sovereign states with "governmental authority"—that is, "official power to adjudicate disputes." *ZF Auto. US, Inc. v. Luxshare Ltd.*, 142 S. Ct 2078, 2087 (2022).

Unlike commercial and *ad hoc* arbitration tribunals, ICSID tribunals are quintessential "international tribunals," and until the decision below, no district or appellate court had ever held otherwise in the context of § 1782. Indeed, numerous features of ICSID tribunals make clear that ICSID tribunals are imbued with governmental authority to adjudicate disputes, and in this regard materially distinguish ICSID tribunals from commercial and *ad hoc* arbitrations. As described below and in the supporting expert testimony of international law

professor Christoph Schreuer (A-641-66), these distinguishing features include that ICSID tribunals (1) operate in conjunction with a permanent inter-governmental institution, the ICSID Centre; (2) are regulated in their formation and operation by an international treaty signed by 158 Member States; (3) are subject to transparency rules and other requirements established by ICSID Member States; and (4) issue awards that are subject to a unique annulment and enforcement regime under which ICSID Member States cede any judicial review by their national courts.

Because ICSID tribunals are imbued with governmental authority—as indicated by those distinguishing features—the district court below was wrong to hold that *ZF Automotive* foreclosed § 1782 discovery in aid of Appellant's ICSID arbitration, *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Republic of Panama*, ICSID Case No. ARB/20/10 (the "*Webuild* arbitration" or "*Webuild* ICSID arbitration"). In reaching that erroneous conclusion, and quashing the subpoena it had issued under § 1782 before *ZF Automotive* was decided, the district court took note of certain similarities between the *Webuild* ICSID arbitration and the *ad hoc* arbitration at issue in *ZF Automotive*. SPA-1-6. Failing, however, to appreciate the fundamental distinctions between ICSID and *ad hoc* tribunals, the district court began its exercise in analogizing by incorrectly referring to the *Webuild* tribunal as an "*ad hoc*" tribunal. SPA-2. The district

court then either improperly discounted or completely overlooked each of the key distinguishing features of an ICSID arbitration—including a total failure to discuss both ICSID's unique self-contained mechanism for annulment and the "full faith and credit" afforded to ICSID awards. Appellant Webuild S.p.A. ("Webuild"), an Italian investor, seeks to use § 1782 to discover from a third party (Appellee WSP USA Inc. ("WSP")) certain evidence that Appellee the Republic of Panama ("Panama") has failed to produce in the *Webuild* ICSID arbitration. The district court was correct in initially granting Webuild's § 1782 application for a subpoena of WSP. And contrary to the district court's decision on review here, the intervening *ZF Automotive* opinion did *not* compel vacatur of the district court's earlier decision to issue the subpoena. Accordingly, this Court should reverse and direct the district court to reinstate the quashed subpoena subject to further proceedings.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. On May 19, 2022, the district court entered an order granting Webuild's application and request for leave to serve a subpoena on WSP pursuant to 28 U.S.C. § 1782. Following motions of the Appellees (one of which intervened in the case), the district court vacated its prior order and quashed the resulting

subpoena in an order dated December 19, 2022. Webuild timely noticed its appeal of that order on January 17, 2023.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because orders on motions to vacate and quash subpoenas issued under 28 U.S.C. § 1782 are final, appealable orders. *See Luxshare, Ltd. v. ZF Auto. U.S.*, 15 F.4th 780, 782 (6th Cir. 2021) ("We thus join the steady drumbeat of our sister circuits, which uniformly hold that orders under § 1782, including on motions to quash subpoenas, are final, appealable orders under 28 U.S.C. § 1291.") (collecting cases); *see also In re Application of Adulante*, 3 F.3d 54, 57 (2d Cir. 1993) (exercising jurisdiction pursuant to § 1291 for review of order denying motion to vacate § 1782 order and quash subpoena).

STATEMENT OF THE ISSUE

1. Whether the arbitral tribunal hearing the case of *Webuild S.p.A. v. Republic of Panama* (ICSID Case No. ARB/20/10)—an arbitration proceeding brought pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention")—is "imbued" with sufficient governmental authority under the ICSID Convention to qualify as a "foreign or international tribunal'" within the meaning of 28 U.S.C. § 1782 and *ZF Automotive US Inc. v. Luxshare Ltd.*, 142 S. Ct. 2078 (2022).

STATEMENT OF THE CASE

A. Nature of the Present Action

This is an appeal of an Order of the U.S. District Court for the Southern District of New York (Kaplan, J.) that (i) vacated the court's prior order granting the application of Appellant Webuild for discovery in aid of a proceeding in an international tribunal under 28 U.S.C. § 1782 and (ii) quashed the subpoena issued therewith.

B. Underlying International Proceeding

The international proceeding underlying Webuild's § 1782 application arises from an international investment dispute between Webuild and the Republic of Panama.

Webuild is an Italian company specializing in major infrastructure projects. In 2009, together with three other companies, Webuild incorporated GUPC S.A. ("GUPC") to carry out its investment in the Third Set of Locks Project (the "Project"), as part of the Panama Canal Expansion Program that was completed in 2016. *See* A-36-37.

Around 2011 to 2012, after beginning the Project, Webuild and its partners began to suspect (and later learned) that Panama had made a number of critical misrepresentations and failed to disclose key information regarding the Project site conditions. A-60-67. If not for these misrepresentations and failures to disclose

key information, Webuild and its partners would have structured and designed their bid for the Third Set of Locks Project differently. *See id.* Panama then forced Webuild and its partners to cover nearly the entirety of the additional Project costs arising from Panama's own misrepresentations and failures to disclose information. A-67-68.

These misrepresentations and Panama's other wrongful acts and omissions violated the international treaty protections assured to Webuild's investment under the bilateral investment treaty between Panama and Italy—*i.e.*, the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (the "Panama-Italy BIT")—and international law. *See* A-69; A-203. Specifically, Panama's treaty violations included its failure to accord fair and equitable treatment to Webuild, including by, among other things, making critical misrepresentations and failing to disclose key information during the tender process; creating legitimate expectations that induced Webuild's investment, and then, acting in contravention to those expectations; making clandestine adjustments to the regulatory framework in bad faith; engaging in a smear campaign to disparage Webuild; and unjustly enriching itself at Webuild's expense. *See* A-40-71. Panama also impaired Webuild's investment through unjustified and discriminatory measures, including, *inter alia*, by making targeted changes to the legal framework solely applicable to the Project and treating

Webuild and its partners less favorably than other similarly situated investors. *See* A-65-67. Finally, Panama failed to provide full legal protection to Webuild's investment, including, among other things, by failing to provide regulatory conditions known to be necessary to the Investment's success. *Id.*

As a result, on March 11, 2020, Webuild submitted its international investment dispute with Panama to arbitration pursuant to the terms of the Panama-Italy BIT.[1] A-41. To do so, Webuild filed its Request for Arbitration with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") and pursuant to the ICSID Arbitration Rules. *See id.* Shortly thereafter, on April 1, 2020, ICSID's Secretary-General provided formal notification of the registration of the Request for Arbitration to Webuild and Panama and assigned the action ICSID Case No. ARB/20/10 (the "*Webuild* arbitration"). *See* ECF No. 7-19 (Letter from ICSID Secretariat). Webuild is the claimant in the ICSID proceeding, and Panama (including its organ the Panama Canal Authority ("ACP")) is the sole respondent.

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[1] *See* A-209 (Panama-Italy BIT) ("In the event that such disputes cannot be resolved amicably within six months from the date of the written request for conciliation, the investor concerned may submit the dispute to . . . [t]he 'International Centre for Settlement of Investment Disputes' (ICSID), for implementation of the arbitration procedures established in the Washington Convention of 18 March 1965, on the 'Settlement of Investment Disputes between States and Nationals of Other States.'").

After the Centre officially registered the action, the parties began the process of composing the arbitral panel (the "*Webuild* tribunal") in coordination with the Secretary-General of the Centre. The parties each selected their party-appointed arbitrator and attempted to agree on a tribunal president. Webuild appointed as its party-appointed arbitrator Stanimir Alexandrov, a Bulgarian national, and Panama appointed Hélène Ruiz Fabri, a French national. A-38. Ultimately, when the parties could not agree on a tribunal president, the ICSID Secretary-General provided the parties a list of ten potential nominees. The parties selected U.S. national Lucy Reed from the Secretary-General's list. *See id.*; *see also* A-238. After the *Webuild* tribunal was constituted, it established the written and oral procedure for the arbitration and set a procedural calendar pursuant to Rules 31 and 32 of the ICSID Arbitration Rules. *See* A-241; A-188-89.

Under the written procedure, as provided by ICSID Arbitration Rule 31, Webuild is required to submit to the tribunal sufficient factual evidence and legal arguments to prove each substantive treaty breach that it claims. A-39; A-188-89. Webuild filed its initial submission on November 12, 2021. Thus, Webuild must include all additional evidence it intends to submit with its forthcoming final reply submission. The deadline for Webuild's reply was suspended due to Panama's failure to produce documents in the arbitration in accordance with the *Webuild* tribunal's order. *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 (last accessed April 25, 2023). Panama's failure to comply with the *Webuild* tribunal's discovery orders makes the discovery Webuild has sought in the district court all the more important.

C. The Discovery Sought

In the proceedings below, Webuild sought discovery from Appellee WSP. A-10. Since at least 2002, WSP (through its predecessor company Parsons Brinckerhoff) served as a principal advisor to Panama for the Expansion Program, including for the Project. In this role, WSP (through Parsons Brinckerhoff) was involved in assessment, design, planning, management, and coordination across various issues and stakeholders concerning the Expansion Program and the Project. ECF No. 7-12 (ACP, Message from the Chairman). In particular, WSP developed cost models to maximize the economic impact of the Canal that were eventually "used to design an implementation strategy and ultimately prepare and strategize the bid process." *See* A-254.

WSP thus possesses information that is directly relevant to the international proceeding at issue, including with respect to Panama's misrepresentations and withholding of information regarding the development, cost, and financing of the Project. The information WSP possesses is not available through discovery

mechanisms in the international proceeding because WSP is not, nor can it ever be made, a party to that case. Moreover, as noted above, Panama has failed to produce this evidence in the *Webuild* arbitration, despite the tribunal's order to do so.

D. The District Court Proceedings

On May 17, 2022, Webuild commenced a district court proceeding and submitted an *ex parte* application under 28 U.S.C. § 1782 to obtain discovery from WSP for use in the *Webuild* arbitration. A-10. Finding that Webuild met its burden under § 1782, the district court granted Webuild's application on May 19, 2022, and authorized Webuild to obtain from the clerk of court and serve a subpoena in substantially the same form Webuild initially requested from the district court (the "WSP Subpoena"). A-368. Webuild obtained the WSP Subpoena from the clerk and served it on WSP on May 26, 2022. ECF No. 12.

On June 9, 2022, Panama sought to intervene in the district court action in order to quash the WSP Subpoena and vacate the district court's May 19 Order. ECF No. 13. Panama argued that it was permitted to intervene as of right because, as the sole respondent in the *Webuild* arbitration, it had a pertinent interest in the § 1782 proceeding. Panama then argued that the district court should quash the WSP Subpoena and vacate its May 19 Order because, under the factors propounded by this Court in *In re Guo*, 965 F.3d 96 (2d Cir. 2020), the *Webuild*

tribunal is not a "foreign or international tribunal" within the meaning of § 1782. Panama further urged the district court to vacate its May 19 Order and quash the WSP Subpoena on various discretionary grounds. *See* ECF No. 15.

Four days after Panama filed its motion to vacate and quash the subpoena, the U.S. Supreme Court entered its decision in *ZF Automotive*, which held that § 1782 discovery was unavailable in aid of commercial or *ad hoc* arbitrations because "[o]nly a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under § 1782." 142 S. Ct. at 2091. Panama then submitted the Supreme Court's *ZF Automotive* decision in these proceedings as a supplemental authority, arguing that the decision further supported granting Panama's motion. ECF No. 19.

On June 24, 2022, WSP filed its own Motion to Quash the Subpoena and Vacate the [District] Court's May 19, 2022 Order. ECF No. 23. In its motion, WSP joined Panama's original arguments for quashing the subpoena, and further argued that the Supreme Court's decision in *ZF Automotive* required vacating the district court's May 19, 2022 order. *Id.* at 13. WSP also argued that the district court should quash the subpoena on discretionary grounds as well. *Id.* at 15.

Because many of the issues and arguments in Panama's and WSP's motions overlapped, the parties agreed that Webuild would file one consolidated opposition to both motions. ECF No. 24. Webuild's opposition (ECF No. 39) was supported

by the expert opinion of Christoph Schreuer pursuant to Federal Rule of Civil Procedure 44.1. *See* A-641-66.

Panama's reply was supported by a rebuttal expert opinion of Barton Legum (A-684-714), and WSP submitted its own reply, joining Panama's reply on the issues pertaining to the Supreme Court's decision in *ZF Automotive*. Because much of Panama's reply contained new arguments regarding *ZF Automotive*, Webuild sought leave of the district court to file a sur-reply (*see* ECF Nos. 53, 56), accompanied by a second expert opinion of Christoph Schreuer (A-777-96). Panama and WSP objected to the submission of additional expert testimony. ECF No. 53. Ultimately, the district court granted Webuild's request to submit a sur-reply but did not admit additional expert testimony and struck Mr. Schreuer's second opinion from the record. A-797.

On November 7, 2022, the district court granted Panama's motion with respect to Panama's request to intervene. A-800-01. Shortly thereafter, on December 19, 2022, the district court granted Panama and WSP's motions to vacate and quash the subpoena, holding that discovery under § 1782 was unavailable because the *Webuild* tribunal was not sufficiently imbued with governmental authority under the factors propounded in *ZF Automotive*. SPA-1-6. Webuild timely noticed its appeal of that decision on January 17, 2023. A-802.

SUMMARY OF ARGUMENT

In *ZF Automotive*, the Supreme Court held that judicial assistance pursuant to § 1782 extends to international tribunals "imbued with governmental authority." 142 S. Ct. at 2087. According to the Supreme Court, the exercise of governmental authority entitles a tribunal to comity, which is the "animating purpose" of § 1782. *Id.* at 2088. The core features of ICSID tribunals, like the *Webuild* tribunal at issue in this case, demonstrate that they are imbued with inter-governmental authority and thus are entitled to the comity envisioned in § 1782. These features are materially distinguishable from the features of *ad hoc* tribunals, and the district court erred in holding otherwise.

First, the ICSID Convention, a multilateral treaty drafted by representatives of sovereign states under the auspices of the World Bank, established a permanent international institution to administer ICSID tribunals. No such permanent international institution administers *ad hoc* tribunals.

Second, the ICSID Convention and the procedural arbitration rules enacted pursuant to the Convention (the ICSID Arbitration Rules) regulate the formation and operation of ICSID tribunals. Significantly, the Convention sets out specific requirements for the jurisdiction of ICSID tribunals. Under these requirements, in addition to the parties' consent to submit to arbitration, the host state and the home state of the investor involved in the dispute must both have ratified the ICSID

Convention, *i.e.*, they must both be ICSID Member States.

Third, the ICSID Member States influence the operation of ICSID tribunals in a number of significant ways through their membership in ICSID's Administrative Council, including by enacting the ICSID Arbitration Rules, participating in the funding of ICSID, and influencing the appointment of arbitrators to the Panel of Arbitrators for appointment in ICSID arbitrations.

Fourth, while proceedings before *ad hoc* tribunals are rarely known to the public, ICSID tribunals are subject to transparency rules established by the ICSID Administrative Council. The rules applicable to the *Webuild* tribunal require the publishing of excerpts of the tribunal's legal reasoning in every ICSID award. These published excerpts generally include a summary of the facts, the parties' claims, the tribunal's reasoning, and the tribunal's ultimate holdings.

Fifth, and critically, ICSID awards are subject to a unique enforcement mechanism that requires ICSID Member States to treat the awards of ICSID tribunals like final judgments of their own national courts. And in stark contrast to awards from *ad hoc* tribunals, ICSID awards are further subject to a self-contained annulment mechanism whereby the ICSID Member States relinquish the authority of their own courts to substantively review ICSID awards, and instead confer that authority exclusively on ICSID Annulment Committees, which are panels comprised exclusively of individuals designated by ICSID Member States.

Because the *Webuild* tribunal, as an ICSID tribunal, possesses all of these relevant features, it is a tribunal imbued with governmental authority that falls within the scope of § 1782. Indeed, the text, history and purpose of § 1782 confirm that the statute was reformed with a view to broadening § 1782 assistance to international tribunals beyond conventional foreign courts, and ensuring "respect" to "foreign nations and the governmental and intergovernmental bodies they create." *ZF Automotive*, 142 S. Ct. at 2088. As a body created pursuant to a multilateral treaty, administered by an international institution, and governed by rules enacted by foreign nations, the *Webuild* tribunal plainly qualifies for such assistance, and the district court's decision should be reversed.

STANDARD OF REVIEW

The district court vacated its initial order granting Webuild's application for discovery under 28 U.S.C. § 1782, and quashed the WSP Subpoena, based solely upon the district court's interpretation of the statutory requirements of § 1782 in light of *ZF Automotive*. Therefore, the issue raised by this appeal is a question of law that this Court reviews *de novo*. Specifically, the Court of Appeals "review[s] de novo the district court's interpretation of the statutory requirements of [28 U.S.C.] § 1782." *The Fed. Republic of Nig. v. VR Advisory Servs.*, 27 F.4th 136, 147 (2d Cir. 2022) (reviewing district court order that quashed a subpoena and vacated a prior order granting a § 1782 application).

ARGUMENT

I. The District Court Erred in Holding That § 1782 Discovery Is Not Available in Aid of the *Webuild* Arbitration

Nearly 20 years ago, the Supreme Court recognized in *Intel Corp. v. Advanced Micro Devices, Inc.* that the language of § 1782 authorizing U.S. judicial assistance in aid of "foreign or international tribunals" allows parties to petition district courts for discovery "in connection with administrative and quasi-judicial proceedings abroad." 542 U.S. 241, 257-59 (2004) (cleaned up). The broad holding in *Intel* left open the question of whether international arbitration qualified as a proceeding before a foreign or international tribunal for the purposes of § 1782. A number of lower courts held that judicial assistance under § 1782 was not available in aid of private commercial arbitration, and a circuit split on that issue eventually emerged. *See, e.g.*, *NBC v. Bear Stearns & Co.*, 165 F. 3d 184, 191 (2d Cir. 1999) (§ 1782 discovery unavailable in private commercial arbitration); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F. 3d 880, 883 (5th Cir. 1999) (same); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F. 3d 689, 696 (7th Cir. 2020) (same); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 720 (6th Cir. 2019) (§ 1782 discovery available in private commercial arbitration); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020) (same).

No lower courts, however, doubted that § 1782 was available in aid of ICSID arbitrations. *See, e.g.*, *Islamic Republic of Pak. v. Arnold & Porter Kaye*

Scholer LLP, No. 18-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) ("[Respondent] has identified no split regarding ICSID cases."); *In re Ex Parte Application of Eni S.P.A.*, No. 20-mc-334-MN, 2021 WL 1063390, at *3 (D. Del. Mar. 19, 2021) ("Respondents have not identified contrary authority that puts [applicant's] ICSID arbitration outside the scope of § 1782.").

On June 13, 2022, the Supreme Court resolved the question as to the availability of § 1782 discovery in private commercial and *ad hoc* arbitrations and held that § 1782 discovery was not available in either such case. *See ZF Auto.,* 142 S. Ct. at 2089. The Supreme Court, however, left open the question of whether § 1782 discovery is available in aid of ICSID arbitrations. In fact, the Supreme Court's decision limiting the reach of § 1782 conspicuously omitted any reference to ICSID arbitrations at all.

The decision of the district court below—that § 1782 discovery is not available in aid of the *Webuild* arbitration—misapplied *ZF Automotive* and ignored critical features of ICSID tribunals and their powers. As described below, ICSID tribunals, like the *Webuild* tribunal, are in fact imbued with "official power to adjudicate disputes" (*ZF Auto.*, 142 S. Ct. at 2087) by the ICSID Member States. The district court's ruling to the contrary is, therefore, inconsistent with the text, history, and purpose of § 1782 as set out by the Supreme Court.

A. Under *ZF Automotive*, § 1782 Discovery Is Available For Proceedings Before Foreign Or International Tribunals "Imbued With Governmental Authority"

ZF Automotive involved applications for § 1782 discovery in aid of two separate, unrelated arbitration proceedings, neither of which was an ICSID arbitration: first, a private commercial arbitration between two corporations before a private arbitral institution seated in Germany; and second, an *ad hoc* arbitration between Lithuania and the assignee of a Russian investor under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") and pursuant to the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the promotion and reciprocal protection of investments (June 29, 1999, 2665 U.N.T.S. 75) (the "Russia-Lithuania BIT). *See ZF Auto.*, 142 S. Ct. at 2084-86. At issue was whether either arbitration proceeding constituted a "proceeding in a foreign or international tribunal" under 28 U.S.C. § 1782(a).

The Supreme Court began by explaining that while the term "tribunal" may broadly encompass any adjudicative body, the text and legislative history of § 1782 indicate that a "foreign" tribunal is best understood as an adjudicative body that exercises governmental authority conferred by another nation, while an "international" tribunal is one that exercises governmental authority conferred by multiple nations. *Id.* at 2086-87. The Supreme Court held that § 1782 discovery

could be obtained only in aid of foreign and international tribunals "imbued with governmental authority," whether by one or multiple nations. *Id.* at 2087.

The Supreme Court then evaluated the arbitrations at issue in the two cases before it—neither of which, again, involved proceedings under the ICSID Convention—and readily determined that a purely private commercial arbitration did not involve an adjudicative body "imbued with governmental authority," and thus was excluded from § 1782. *Id.* at 2089. Specifically, the Supreme Court emphasized that "[n]o government is involved in creating the [commercial arbitration] panel or prescribing its procedures." *Id.*

While the Supreme Court recognized that the *ad hoc* arbitration conducted under the UNCITRAL Arbitration Rules posed a "harder question" than the commercial arbitration (*id.*), the Supreme Court ultimately reasoned that the *ad hoc* tribunal also did not qualify as a foreign or international tribunal for purposes of § 1782 because the sovereign states involved did not intend the tribunal to be imbued with governmental authority. *Id.* at 2089-91. Rather, the Supreme Court noted, the *ad hoc* tribunal was formed *solely* as a result of the parties' consent to arbitration in accordance with the UNCITRAL Arbitration Rules under the Russia-Lithuania BIT. *Id.* at 2090. The Supreme Court explained that

> [N]othing in the [Russia-Lithuania] treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. For instance, the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's

> formation and procedure if an investor chooses that forum. In addition, the ad hoc panel 'functions independently' of and is not affiliated with either Lithuania or Russia. It consists of individuals chosen by the parties and lacking any 'official affiliation with Lithuania, Russia, or any other governmental or intergovernmental body.'

Id.

The Supreme Court further observed that the *ad hoc* tribunal lacked other "indicia of a governmental nature" that exist in other bodies widely recognized as international tribunals. *Id.* For example, the Supreme Court noted the "panel receives zero government funding," "the proceedings . . . maintain confidentiality," and the "award may be made public only with the consent of the parties." *Id.* Notably, however, the Supreme Court underscored that its decision did not "foreclose[] the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority." *Id.* at 2091. Instead, it merely emphasized that "a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it." *Id.*

Although the Supreme Court did not "attempt to prescribe" how sovereigns might imbue an arbitral panel with governmental authority, it offered several examples. *Id.* The Supreme Court explained, for example, that the treaty establishing the United States-Germany Claims Commission—a tribunal undisputedly "qualify[ing] as intergovernmental"—"specified where the commission would initially meet, the method of funding, and that the

commissioners could appoint other officers to assist in the proceedings," which indicated governmental involvement in the formation of the Commission. *Id.*

The Supreme Court similarly distinguished *ad hoc* arbitrations from state-to-state arbitrations. *Id.* at 2090 n.4. According to the Supreme Court, state-to-state arbitrations "reflect[] a higher level of government involvement" because "[e]ach country is involved in forming that arbitral body and funds its operations," and because, in some circumstances, officials from the International Court of Justice ("ICJ"), as opposed to parties in the arbitration, could have a role in appointing members of the tribunal. *Id.*

Notably, the *ZF Automotive* decision does not mention the ICSID Convention at all, or tribunals formed under its auspices. Nor did the Supreme Court have a full procedural or evidentiary record before it addressing the applicability of § 1782 to ICSID arbitrations. Indeed, the Supreme Court restricted its decision to the facts and circumstances before it and expressly did "not attempt to prescribe" a rule to govern all governmental and intergovernmental bodies, acknowledging that tribunals "may take many forms." *Id*. at 2091.

Significantly, the Supreme Court refused to adopt the broad test advocated by the United States in its amicus curiae brief, which proposed that *any* arbitration before a non-governmental adjudicator to which the parties consented, whether in contract or treaty, should not be deemed a foreign or international proceeding

within the meaning of § 1782. *See* Brief for the United States as Amicus Curiae 23-32, *ZF Auto.*, No. 21-401 (U.S. Jan. 31, 2022). Instead, as outlined above, the Supreme Court adopted a narrower approach calling for the consideration of multiple factors in considering whether a tribunal is imbued with governmental authority to adjudicate disputes by one or multiple nations.

B. The Features of ICSID Tribunals Demonstrate That They Are "Imbued with Governmental Authority"

The unique features of ICSID tribunals demonstrate that they are intended to function as international tribunals imbued with governmental authority within the meaning of *ZF Automotive* and § 1782. As described below, these features materially distinguish ICSID tribunals from *ad hoc* arbitral tribunals like the tribunal formed pursuant to the Russia-Lithuania BIT analyzed in *ZF Automotive*.

The district court, however, erred by overlooking these fundamental differences between ICSID tribunals and *ad hoc* tribunals, and by failing to address several core "indicia of [ICSID tribunals'] governmental nature." *ZF Auto.*, 142 S. Ct. at 2090. Notably, the district court erroneously rejected the second expert opinion of Professor Christoph Schreuer further addressing these features of ICSID. *See* Second Expert Report of Christoph Schreuer (A-777-96); A-797-99 (court order striking Professor Schreuer's second opinion from the record). Perhaps most tellingly, though, the district court began its purported application of the *ZF Automotive* factors by incorrectly referring to the *Webuild* tribunal as an "*ad*

hoc arbitration panel." SPA-2. Then, rather than examine the structure, nature, and authority of ICSID tribunals starting with the ICSID Convention itself, the district court looked primarily to the Panama-Italy BIT to assess the features of the *Webuild* tribunal and draw similarities to *ad hoc* tribunals. SPA-3-6. This unnecessarily narrow approach allowed the district court to analogize to the tribunals in *ZF Automotive* without addressing key distinguishing features of ICSID arbitration.

But the Panama-Italy BIT paints only part of the picture of the *Webuild* tribunal, as that instrument offers merely the states' consent to arbitrate a specific dispute, and does not address the terms that Panama and Italy also have agreed to as Member States to the ICSID Convention. The fundamental features of ICSID tribunals discussed below—starting with the ICSID Convention—show that *many* countries, including Panama and Italy, intended to imbue ICSID tribunals like the *Webuild* tribunal with "official power to adjudicate disputes" (*ZF Auto*., 142 S. Ct. at 2087).

1. The ICSID Convention Establishes a Permanent International Institution for the Administration of ICSID Tribunals

In *ZF Automotive*, the Supreme Court suggested that a relevant (but not necessary) feature of a tribunal imbued with governmental authority is that it is a "pre-existing body" rather than one "formed for the purpose of adjudicating" a

particular dispute. *Id.* at 2090. As explained below, ICSID tribunals are administered by ICSID, a permanent international institution established pursuant to the ICSID Convention. This framework is materially distinguishable from *ad hoc* arbitration, and is evidence of the governmental authority imbued into ICSID tribunals.

The ICSID Convention is a multilateral treaty drafted under the auspices of the World Bank and ratified by 158 sovereign states, including Panama and Italy ("ICSID Member States"). *See* Database of ICSID Member States, *available at* https://icsid.worldbank.org/about/member-states/database-of-member-states; *see also* Expert Report of Christoph Schreuer ("Schreuer Report") 4 (A-645). International experts and representatives appointed by over 80 sovereign states, including Panama and Italy, participated in discussing and revising the drafts of the Convention. *See* Rep. of the Exec. Dir. on the Convention on the Settlement of Inv. Disp. Between States and Nationals of Other States, Int'l Bank for Reconstruction and Dev. at 39-40 (Mar. 18, 1965) ("Executive Directors Report"), *available at* https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf; Antonio Parra, The History of ICSID 59 (2d ed. 2017); *see also* Schreuer Report 4-5 (A-645-46). After deliberation, the final draft was approved by the World Bank Executive Directors, who represented the World Bank member governments. Parra, The History of ICSID, at 85; Schreuer Report 4 (A-645).

As described by its drafters, the purpose of the Convention was to create a permanent institutional scheme to resolve disputes between investors and sovereign states. *See* Note by A. Broches, General Counsel to Exec. Dir. of the World Bank, Aug. 28, 1961, *reprinted in* History of the ICSID Convention, vol. II-1 at 1-2, *available at* https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention (hereinafter "History of the ICSID Convention") (expressing the desire to create an "international arbitration and/or conciliation machinery" through "inter-governmental action"); *Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, reprinted in* History of the ICSID Convention, vol. I, at 2 (noting that international organizations considered several schemes that would "remove some of the uncertainties and obstacles that faced investors in any foreign country"); Executive Directors Report at 39-40 (noting that "it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-governmental agreement").

In service of that purpose, the ICSID Convention established the Centre as a permanent intergovernmental institution. *See* ICSID Convention, arts. 1-3 (A-86). As explained by Professor Schreuer, "ICSID was created by a treaty under public international law as a permanent institution that serves a public purpose common to the States participating in it." A-646. To ensure the "proper functioning of

proceedings under the auspices of the Cent[re]," the drafters of the Convention imbued ICSID with full international legal personality and broad immunities from legal process. *Preliminary Draft of the ICSID Convention (Working Paper for Consultative Meetings of Legal Experts Designated by Governments)*, Oct. 15, 1963, *reprinted in* History of the ICSID Convention, vol. II-1, at 200; ICSID Convention, arts. 18-20 (A-90).

ICSID is comprised of two main organs: the ICSID Secretariat, led by the Secretary-General, and the ICSID Administrative Council, which is the governing body of ICSID. *See* ICSID Convention, arts. 4-8, 9-10 (A-86-88); Schreuer Report 5-6 (A-646-47). Each ICSID Member State, including Panama and Italy, has one seat and one vote in the Administrative Council, which meets annually. *See* ICSID Convention, art. 4 (A-86); Schreuer Report 5 (A-646). The Administrative Council is chaired by the President of the World Bank, who is elected by the World Bank member states through appointed representatives. ICSID Convention, art. 5 (A-86-87); IBRD Articles of Agreement (2012), art. V §§ 2(a), 4(b), 5(a), *available at* https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement. The Secretary-General, who is the legal representative and principal administrative officer of the Centre, is elected by the Administrative Council. ICSID Convention, art. 11 (A-88-89).

Under the ICSID Convention, all ICSID arbitrations operate under the jurisdiction of the Centre. *See* ICSID Convention, art. 25(1) (A-92). In practice, this means not only that ICSID provides administrative support to all ICSID tribunals, but also that all ICSID tribunals must operate within rules enacted by ICSID's Administrative Council, and that officers of the international institution directly influence the operation of the tribunals.

For example, ICSID's Administrative Council enacts and amends the procedural rules that govern all ICSID tribunals (the "ICSID Arbitration Rules"). ICSID Convention, art. 6 (A-87). The ICSID Arbitration Rules contain particular requirements for the formation of ICSID tribunals, such as the requirement that the majority of arbitrators on an ICSID tribunal not have the same nationality as either of the parties, unless each individual arbitrator is appointed by agreement of the parties. ICSID Arbitration Rule 13 (A-183). As another example, further discussed below, ICSID's Secretary-General, elected by the Administrative Council, reviews every request for ICSID arbitration to ensure compliance with the basic jurisdictional requirements of the Centre, which are set forth in the ICSID Convention. ICSID Convention, arts. 25(1), 36(3) (A-92, A-96). If the Secretary-General determines that the dispute is manifestly outside the Centre's jurisdiction, she has the authority to refuse registration of a request for arbitration, effectively preventing the formation of the tribunal. *Id.*, art. 36(3) (A-96).

In this respect, the relationship between the permanent ICSID Centre and the ICSID tribunals bears resemblance to the relationship between some national courts and the panels of judges that operate within them. The appellate panel hearing this dispute, for instance, will be convened solely to resolve this particular dispute, but operates within the permanent framework and rules of the Second Circuit Court of Appeals. ICSID tribunals likewise are formed to resolve particular disputes, but operate within the permanent framework established by the ICSID Convention and are administered by ICSID. *See* ICSID Convention, art. 1 (A-86).

In contrast, in the Russia-Lithuania *ad hoc* arbitration at issue in *ZF Automotive*, the Russia-Lithuania BIT did not establish a permanent intergovernmental institution to administer the arbitration or to enact rules that would govern the arbitration's procedure. The fact that the sovereign states that drafted the ICSID Convention—including Panama, Italy, and dozens of other foreign sovereigns—intended to create a permanent, publicly funded institution to administer ICSID tribunals within the framework of the Convention reflects a "higher level of government involvement" in the functioning of ICSID tribunals. *ZF Auto.*, 142 S. Ct. at 2090 n.4; *see also* History of the ICSID Convention, vol. II-1, at 236-38, 298-300, 367-69, 458-60; *id.* vol. II-2, at 778-81 (listing experts and

representatives appointed by sovereign states to participate in the drafting of the Convention).

The district court erred in disregarding this material difference between ICSID and *ad hoc* tribunals, instead summarily concluding that neither is a "pre-existing body[.]" SPA-3 ("ICSID does not have standing or pre-existing arbitration panels."). In so concluding, however, the district court failed to address the framework within which ICSID tribunals operate under the ICSID Convention, and the influence that the Centre has on ICSID arbitrations within that framework. As explained above, this constitutes a material difference between ICSID and *ad hoc* tribunals demonstrating that the former are imbued with "official power to adjudicate disputes" (*ZF Auto.*, 142 S. Ct. at 2087).

2. The ICSID Convention Regulates the Formation and Operation of ICSID Tribunals

Another key indication of the governmental authority of ICSID tribunals is that the ICSID Convention, an international treaty drafted by representatives of sovereign states, prescribes mandatory requirements for the formation and operation of ICSID tribunals. As the Supreme Court observed in *ZF Automotive*, the fact that an international treaty governs a tribunal's formation and procedure—and thus restricts the parties' "free[dom]" to "structure" the arbitration "as they see fit"—is evidence that the tribunal is imbued with governmental authority. 142 S. Ct. at 2089.

The ICSID Convention contains several provisions regulating the formation and functioning of ICSID tribunals. For instance, under a section governing the "Constitution of the Tribunal," the Convention sets forth specific requirements for the appointment of arbitrators. ICSID Convention, arts. 37-40 (A-96-97). This includes the aforementioned requirement that a majority of the arbitrators cannot share the nationality of either party, unless the parties consent to each arbitrator appointment. *Id.* art. 39 (A-97). To facilitate ICSID arbitrations, the ICSID Convention also confers on arbitrators sitting on ICSID tribunals absolute immunity from legal process. ICSID Convention, art. 21 (A-91); Schreuer Report 8 (A-649). These immunities are comparable to the broad grant of immunity conferred on judges of established intergovernmental courts, such as the ICJ, the International Criminal Court, and the International Tribunal for the Law of the Sea. *See* Statute of the Int'l Ct. of Justice art. 19, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; Rome Statute of the Int'l Crim. Ct. art. 48, July 17, 1998, 2187 U.N.T.S. 90; U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Annex VI art. 10. The ICSID Convention further establishes a unique system for annulling and enforcing decisions rendered by ICSID tribunals, as further detailed below (*infra* § I.B.5).

Importantly, the ICSID Convention also sets forth jurisdictional requirements for ICSID tribunals. In particular, Article 25 of the Convention

provides that an ICSID tribunal can only adjudicate disputes between ICSID Member States and investors who are nationals of ICSID Member States. A-92. In other words, an ICSID tribunal can only be formed to hear a dispute if the states involved in that dispute (directly or through their nationals) have ratified the ICSID Convention and thereby agreed to participate in its framework as ICSID Member States. As Leonard Meeker, the Legal Advisor to the U.S. Department of State, explained to the Senate when ratifying the ICSID Convention, "[t]he purpose of the [Centre] would be to provide facilities both for conciliation and arbitration in the case of investment disputes between nations that are parties to the convention and nationals of other parties." S. Exec. Rep. No. 2 at 28 (1966).

Contrary to the district court's assertion (SPA-5), therefore, an ICSID tribunal cannot be formed solely through the parties' consent in a bilateral investment treaty, contract, or other instrument. Schreuer Report 12 (A-653). Rather, fundamental to the formation of ICSID tribunals is the consent to the ICSID Convention by *both* the host state of the investment and the home state of the investor. Only then may a Member State offer to arbitrate a specific legal dispute arising out of an investment by way of its investment treaties or contracts. As relevant here, then, the *Webuild* tribunal could not have been formed solely through the parties' consent in the Panama-Italy BIT; it also needed to "derive its authority" from Panama and Italy's consent to the Convention as contracting

states. *ZF Auto.*, 142 S. Ct. at 2090; *see also* Jagusch & Sullivan, *A comparison of ICSID and UNCITRAL Arbitration*, *in* The Backlash Against Investment Arbitration (2010) (explaining that the ICSID Convention contains "jurisdictional requirements, which simply do not come into play under the UNCITRAL Rules").

The requirements of the ICSID Convention materially distinguish ICSID tribunals from *ad hoc* tribunals. As the Supreme Court highlighted in *ZF Automotive*, the Russia-Lithuania BIT did not "itself create the [*ad hoc*] panel; instead, it simply reference[d] the set of rules that govern the panel's formation and procedure if an investor chooses that forum." 142 S. Ct. at 2090. The only provision in the Russia-Lithuania BIT concerning *ad hoc* arbitration (Article 10) contains no more than a reference to a separate set of procedural rules, the UNCITRAL Arbitration Rules. *See* Russia-Lithuania BIT, art. 10. The Russia-Lithuania BIT does not prescribe rules governing the jurisdiction of the *ad hoc* tribunals or the appointment of arbitrators, does not confer immunities on arbitrators, and does not establish a system for enforcing and annulling *ad hoc* awards, for instance. The ICSID Convention, in contrast, *itself* imposes rules for the formation and functioning of ICSID tribunals, as detailed above. And this notably includes the Convention's ratification requirement, which means that every ICSID dispute will involve a sovereign state as a party, which is not the case for *ad hoc* arbitrations.

In this respect, ICSID tribunals are closer to the state-to-state arbitration tribunals that could be formed under Article 11 of the Russia-Lithuania BIT, and which the Supreme Court found displayed a "higher level of governmental involvement" than *ad hoc* tribunals. *ZF Auto.*, 142 S. Ct. at 2090, n.4. According to the Supreme Court, one of the features demonstrating the governmental authority of state-to-state tribunals is that "[e]ach country is involved in forming that arbitral body[.]" *Id.* In this case, Panama and Italy are likewise involved in forming the *Webuild* tribunal, not only as parties to the particular dispute, but also through their participation among many sovereign states in the drafting of the ICSID Convention's provisions.

Critically, the district court erred by considering the Panama-Italy BIT as the principal international treaty relevant to the formation and operation of the *Webuild* tribunal, and, in effect, overlooking the crucial role played by the ICSID Convention. SPA-3-4. The district court found that, "like the Lithuania-Russia BIT in *ZF Automotive*, *the Panama-Italy BIT* did not 'itself create the [ICSID Panel]'" and instead "simply reference[d] the set of rules that govern the panel's formation and procedure if an investor chooses that forum." SPA-3-4 (emphasis added). The district court's failure to evaluate the ICSID Convention's central role in the formation of the *Webuild* tribunal is particularly puzzling given that, in the same paragraph, the district court did acknowledge that the ICSID Convention and

the ICSID Arbitration Rules promulgated under it "govern the panel's formation and procedure." SPA-4.

3. The ICSID Member States Influence the Operation of ICSID Tribunals Through Their Governance of ICSID

In addition to participating in the drafting the ICSID Convention, sovereign states, including Panama and Italy, influence the operation of ICSID tribunals in several important ways through their governance of ICSID as ICSID Member States. In this respect, the district court's conclusion that ICSID tribunals "function[] independently of'" the ICSID Member States misses the mark. SPA-4.

First, as noted above, ICSID's Secretary-General—an individual elected by the ICSID Administrative Council—reviews every request for arbitration and has the authority to dismiss a request if she finds that it does not comply with the basic jurisdictional requirements of the ICSID Convention. ICSID Convention, art. 36(3) (A-96); Schreuer Report 11 (A-652). In the Russia-Lithuania *ad hoc* arbitration, there was no such jurisdictional screening, much less one conducted by an individual appointed by sovereign states.

Second, the ICSID Member States, through their membership in the Administrative Council, enact and amend the ICSID Arbitration Rules—the procedural rules that govern every ICSID tribunal. ICSID Convention, art. 6 (A-87). Unlike in *ad hoc* arbitrations, where the parties are free to choose the procedural rules they want to apply to their dispute, parties to ICSID arbitrations

must abide by the ICSID Arbitration Rules enacted by the ICSID Member States, much like this Court must abide by the Second Circuit's Local Rules. *Id.*, art. 36(2) (A-96); *cf. ZF Auto.*, 142 S. Ct. at 2089 (stating that a private commercial arbitration tribunal was not imbued with governmental authority because, among other reasons, "[n]o government [was] involved in creating the [] panel or prescribing its procedures").

Third, although the parties to an ICSID dispute may select their own arbitrators, the ICSID Member States play a significant role in the composition of ICSID tribunals—a further indication the tribunals are imbued with "official power to adjudicate disputes" (*ZF Auto.*, 142 S. Ct. at 2087). As noted, the ICSID Convention restricts the parties' choice of arbitrators, such as by imposing restrictions on the arbitrators' nationalities. *See supra* at § I.B.1. Even more significantly, the Convention also requires ICSID to maintain an official Panel of Arbitrators comprised of persons designated by the ICSID Member States and by the Chairman of the Administrative Council (the President of the Work Bank) to serve for a renewable period of six years. ICSID Convention, arts. 12-15 (A-89); *see also, e.g.*, 22 U.S.C. § 1650 (authorizing the President of the United States to make appointments to the ICSID Panel of Arbitrators). Each Member State appoints four individuals to the Panel. If the parties to an ICSID dispute fail to select their arbitrators, or cannot agree on an arbitrator to preside over the

arbitration, the Convention *requires* the Chairman to appoint the arbitrators from the Panel of Arbitrators. ICSID Convention, art. 38 (A-96-97); Schreuer Report 9-10 (A-650-51). In addition, as further discussed below, *all* arbitrators with authority to review and annul ICSID awards must be appointed by the Chairman from the Panel of Arbitrators. ICSID Convention, art. 52(3) (A-100-01); Schreuer Report 10 (A-651).

The fact that arbitrators sitting on ICSID tribunals must be selected under certain circumstances by ICSID's Chairman from the Panel of Arbitrators reflects a higher level of governmental involvement in the composition of ICSID tribunals than in *ad hoc* tribunals. The Supreme Court made a similar observation in *ZF Automotive* with respect to state-to-state tribunals under Article 11 of the Russia-Lithuania BIT, stating that the fact that "under some circumstances" the countries could "invite officials of the International Court of Justice to appoint the body's members" reflected a "higher level of governmental involvement" indicative of an international tribunal. 142 S. Ct. at 2090 n.4. In fact, the level of governmental involvement in the composition of ICSID tribunals is even higher than in the state-to-state tribunals in this respect. While Article 11 gives the parties the *option* to invite ICJ officials to make appointments in case they failed to make "the necessary appointments" (or to agree on an alternative appointment procedure), the ICSID Convention *requires* appointments to be made from the ICSID Panel of

Arbitrators in those circumstances. *Compare* Russia-Lithuania BIT art. 11(4) (1999), *with* ICSID Convention, art. 38 (A-96-97).

Fourth, under the ICSID Convention, ICSID's funding depends on contributions from the ICSID Member States and from the World Bank. As the Supreme Court observed in *ZF Automotive*, the fact that sovereign states "fund[] [the] operations" of a tribunal indicates a "higher level of governmental involvement" for purposes of § 1782. 142 S. Ct. at 2090 n.4.

In particular, the ICSID Member States adopt the annual budget of ICSID. ICSID Convention, art. 6(1)(f) (A-87). If the Centre's expenditures exceed its receipts, the ICSID Member States are responsible for bearing the excess costs directly. *Id.*, art. 17 (A-90); Schreuer Report 7 (A-648). While the parties to ICSID arbitrations must pay a filing fee to ICSID, only twice in the past two decades, in 2021 and 2022, have the parties' fees fully covered ICSID's expenses. For every other year, ICSID has depended upon income from its publications, investments, and in-kind contributions from the World Bank. *See generally* ICSID Annual Reports 2002-2022, *available at* https://icsid.worldbank.org/resources/publications/icsid-annual-report. The World Bank is moreover responsible for bearing the cost of ICSID's staff, as well as its administrative costs. *See* Mem. of Admin. Arrangements Agreed between the IBRD and ICSID (Feb. 13, 1967), *in* ICSID First Annual Report 1966/1967(Aug. 1967) at 15-16. Thus, as Professor

Schreuer explains, "despite charges to the users of ICSID's facilities," ICSID is "a publicly financed institution." A-648.

The Member States' funding of ICSID directly impacts the operation of ICSID tribunals. As explained above, ICSID tribunals cannot function outside of ICSID's administration, and ICSID officials exert influence over the formation and operation of ICSID tribunals. The district court's conclusion that "the Webuild Tribunal does not receive any 'government funding'" incorrectly overlooks the relationship between ICSID and ICSID tribunals under this framework. SPA-4. It further overlooks the material difference between the funding of this framework and that of *ad hoc* arbitration, where the entire arbitration proceeding is funded solely by the parties to the dispute.

4. ICSID Tribunals Are Subject to Transparency Rules

The fact that ICSID tribunals are subject to rules intended to promote the transparency of their decisions is further evidence of an intent to imbue them with governmental authority. *See ZF Auto.*, 142 S. Ct. at 2090 (suggesting that the confidentiality of a tribunal's proceedings indicates a lack of governmental authority).[2]

[2] It should be noted, however, that the complete openness of legal proceedings to the public is not a requirement for a court or tribunal to be imbued with governmental authority. There are numerous examples of governmental courts—which would plainly fall within the meaning of a foreign or international tribunal

Under the 2006 version of the ICSID Arbitration Rules, which apply to the *Webuild* tribunal, ICSID is required to publish excerpts of the legal reasoning of all ICSID awards. *See* ICSID Arbitration Rules (2006), Rule 48(4) (A-196). This requirement includes publishing the "key legal holdings" of the award. *See Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, OECD Working Papers on International Investment 2005/01, ¶ 10, *available at* https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf. The published excerpts also generally include a summary of the tribunal's reasoning, the facts, and the parties' claims. *See, e.g.*, Note on *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petroleos Del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), ICSID Rev. FILJ 215. Contrary to the district court's understanding (SPA-5), the parties to the *Webuild* arbitration may *not* object to the publication of those excerpts. *See* ICSID Arbitration Rules (2006), Rule 48(4) (A-196) ("The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."). *Ad hoc* tribunals, in contrast, are not required to publish any

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under § 1782—that do not make their proceedings public by default. *See, e.g.*, El Ameir Noor et al., Legal Systems in the United Arab Emirates: Overview, Thomson Reuters Practical Law (2021) ("[R]ecords and judgments are restricted only to the parties in dispute."); German Code of Civil Procedure (ZPO), §§ 299(1), 299(2) (providing that the parties' submissions are not available to third parties unless they can establish a legal interest).

part of their decisions unless the parties agree to a particular set of transparency rules in their arbitration agreement. *See, e.g.*, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

The new version of the ICSID Arbitration Rules, effective as of July 1, 2022, presumes the parties' consent to the publication of awards unless the parties timely object. *See* ICSID Arbitration Rules (2022), Rule 62(3). Separately, the 2022 Arbitration Rules also require the publication of all interim orders and decisions by ICSID tribunals. *See* ICSID Arbitration Rules (2022), Rule 63. The parties may agree on redactions to the interim orders and decisions, but may not prevent their publication entirely. *Id.* Accordingly, to the extent that transparency of decisions indicates the intent of sovereign states to imbue the tribunals with governmental authority, ICSID is in fact quite unlike *ad hoc* arbitral tribunals in this respect.

5. ICSID's Annulment and Enforcement Mechanisms Confer Governmental Authority on ICSID Tribunals

Above all, the intent of sovereign states to imbue ICSID tribunals with "official power to adjudicate disputes" (*ZF Auto.*, 142 S. Ct. at 2087) is evident in the unique mechanisms for enforcing and annulling ICSID awards.

Enforcement. Under the ICSID Convention, once an ICSID tribunal renders an award, the ICSID Member States are obligated to recognize the award as binding and to enforce its pecuniary obligations "as if it were a final judgment

of a court in that State." ICSID Convention, art. 54(1) (A-101); Schreuer Report 18-21 (A-659-62). In the United States, for example, the legislation implementing the ICSID Convention provides that ICSID awards "create a right arising under a treaty of the United States" and that "[t]he pecuniary obligations imposed by such an award shall be enforced" by the federal courts and "shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a). Commenting on § 1650a(a), this Court has held that ICSID awards must be enforced by U.S. courts following the same "procedures for enforcing state court judgments in federal court." *Mobil Cerro Negro*, *Ltd. v. Bolivarian Republic of Venez.*, 863 F3d 96, 121-22 (2d Cir. 2017).

Like final state court judgments, the enforceability of ICSID awards may not be challenged in federal courts on substantive grounds. *Id.* at 101-102, 117-18 (*citing* Christoph Schreuer, et al., *The ICSID Convention: A Commentary* 1139-41 (2d ed. 2009)). The award debtor may challenge only the federal court's jurisdiction to enforce the award—for instance, on venue or sovereign immunity grounds—but not the validity of the award itself. *Id.* As this Court observed, the ICSID Convention's command for ICSID Member States to "treat the award as if it were a final judgment of [their] courts" reflects "an expectation that the courts of a member nation will treat the award as final" and do "no more than examine the

judgment's authenticity and enforce the obligations imposed by the award." *Id.* at 101-02, 120-21; *see also Teco Guat. Holdings, LLC v. Republic of Guat.*, 414 F. Supp. 3d 94, 100-101 (D.D.C. 2019) (describing the "exceptionally limited" role of national courts in enforcing ICSID awards); *OI European Grp. B.V. v. Bolivarian Republic of Venez.*, No. 16-1533 (ABJ), 2019 WL 2185040, at *2 (D.D.C. May 21, 2019) (recognizing the expectation that ICSID awards will be treated as final domestic judgments).

In contrast, the mechanism for enforcing *ad hoc* awards allows for significant substantive review by national courts. To enforce an award rendered by an *ad hoc* tribunal, the prevailing party must petition a national court for an order enforcing the award under a convention or treaty governing the recognition and enforcement of such awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), June 10, 1958, 21 U.S.T. 2517; *see also CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 846 F.3d 35, 49-51 (2d Cir. 2017) (describing process for recognizing and enforcing awards under the New York Convention). In an enforcement action, the *ad hoc* award will not be entitled to nearly the same deference as an ICSID award. Instead, the court adjudicating the enforcement action may deny enforcement under one of the several substantive grounds provided in the applicable convention, such as those listed in Article V of the New York Convention. *CBF*

Indústria de Gusa S/A, 846 F.3d at 49-51; *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) ("'Article V . . . enumerates specific grounds on which the court may refuse enforcement[.]") (emphasis omitted). The court may deny enforcement, for example, if it finds that a party in the arbitration was unable to present its case, or that enforcing the award would be contrary to U.S. public policy. *See* New York Convention, art. V. Such review is simply not available for awards issued by ICSID tribunals.

In providing that ICSID awards must be treated like state court judgments, the ICSID Member States imbue ICSID tribunals with the authority to render decisions that are equivalent to final judgments of national courts. In this sense, as Professor Schreuer observes, the ICSID Member States treat ICSID tribunals "as analogous to national courts of the Member States." A-660. And, in agreeing that ICSID awards are not subject to substantive review by national courts, the contracting states demonstrate a high level of deference to ICSID tribunals. *See* Nigel Blackaby, Constantine Partasides & Alan Redfern, *Recognition and Enforcement of Arbitral Awards*, *in* Redfern and Hunter on International Arbitration ¶ 11.133 (7th ed. 2023) ("It is an important feature of the ICSID Convention that it does not permit an award to be impugned or its enforcement to be resisted in national courts even in circumstances where a foreign judgment, or

even a domestic judgment, could be challenged."). It is thus difficult to see how ICSID Member States could have intended to grant such authority and deference to ICSID tribunals to adjudicate disputes, but not also expect the "respect" and "comity" that is the "animating purpose" of § 1782 assistance. *ZF Auto.*, 142 S. Ct. at 2088.

Annulment. ICSID's mechanism for annulling ICSID awards is similarly indicative of the Member States' intent to imbue ICSID tribunals with governmental authority to adjudicate disputes, and is fundamentally distinguishable from the system for annulling or setting aside *ad hoc* awards.

In *ad hoc* arbitrations, an award debtor seeking to annul an award may petition the national courts of the state where the tribunal was seated (*i.e.*, the primary jurisdiction) to annul the award pursuant to the grounds provided in the domestic arbitration law of the arbitral seat. *See, e.g.*, 9 U.S.C. § 10 (setting forth the grounds for setting aside an arbitral award seated in the United States); *see also BG Group plc v. Republic of Arg.*, 572 U.S. 25, 37 (2014)) ("'[T]he national courts and the law of the legal situs of arbitration control a losing party's attempt to set aside [an] award.'") (internal citation omitted). The courts of the primary jurisdiction thus have the authority to independently review and assess the validity of the *ad hoc* award under that jurisdiction's law. *See, e.g.*, *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("The [New

York] Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief."). Accordingly, the parties to an *ad hoc* arbitration have the freedom to define which national courts will have the authority to annul the *ad hoc* award, and the applicable legal grounds for review, by agreeing on the seat of arbitration. *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, No. 20-13039, 2023 WL 2922297, at *3 (11th Cir. Apr. 13, 2023) (*quoting* Restatement of the Law, U.S. Law of Int'l Com. Arbitration and Investor-State Arbitration § 1.3(a) (ALI Proposed Final Draft 2019)) ("'The choice of an arbitral seat ordinarily determines . . . the courts that have the exclusive authority to set aside the arbitral award.'").

In stark contrast, the ICSID Member States—through the ICSID Convention—fully cede the governmental authority of their courts to annul ICSID awards to an ICSID body known as an Annulment Committee. *See* ICSID Convention, art. 52 (A-100-01); Schreuer Report 17-18 (A-658-59). An Annulment Committee is convened when one of the parties to a concluded ICSID arbitration submits an application for annulment. *See* ICSID Convention, art. 52(1) (A-100). The Committees may grant annulment based only on the exclusive and limited grounds specified in the ICSID Convention. *Id.* Each Annulment

Committee is imbued with the *sole* authority to annul the ICSID award it is charged with reviewing; no national court or other governmental body has any role in this process at all.

Further, unlike in *ad hoc* arbitration, the parties may not "shop" for arbitral seats with favorable courts or legal standards to govern annulment—the ICSID Convention strictly defines the *only* avenue for challenging the decisions of an ICSID tribunal and cedes to the Annulment Committees that official power to adjudicate disputes with finality.

Significantly, all members of an ICSID Annulment Committee are selected by the Chairman of the ICSID Administrative Council (the President of the World Bank) from the ICSID Panel of Arbitration—all of whom are designated either by the Member States or the Chairman. *See* ICSID Convention, art. 52(3) (A-100-01). Because the Annulment Committee is the only body with the authority to annul an ICSID award, the ultimate "oversight over [ICSID] awards" is "exclusively in the hands of persons who have been designated by participating [Member] States or by the Chairman of the Administrative Council." *See* Schreuer Report 10 (A-651). While the parties to *ad hoc* arbitrations exercise some influence in selecting the jurisdiction that will have the authority to carry out annulment proceedings, the parties to ICSID arbitrations have no choice in the composition of an ICSID Annulment Committee.

Moreover, if an ICSID Annulment Committee annuls an award, the national courts of the ICSID Member States must defer to that decision, and do not have discretion to enforce the award. *See Sàrl v. Bolivarian Republic of Venez.*, 514 F. Supp. 3d 20, 45 (D.D.C. 2020) ("American courts cannot give an annulled ICSID award full faith and credit."); *Teco Guat. Holdings*, 414 F. Supp. 3d at 106-07 (holding that parts of an ICSID award annulled by an ICSID Annulment Committee could not be enforced). In that vein, the ICSID Convention grants the Annulment Committees the authority to stay enforcement of ICSID awards where an annulment proceeding is pending. ICSID Convention, art. 52(5) (A-101). U.S. courts likewise routinely stay ICSID enforcement cases while annulment proceedings are pending, in deference to the Annulment Committees. *See, e.g.*, *InfraRed Env't Infrastructure GP, Ltd. v. Kingdom of Spain*, No. 20-817 (JDB), 2021 WL 2665406, at *6-7 (D.D.C. Jun. 29, 2021); *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-cv-01618 (TSC), 2020 WL 5816238, at *2-3 (D.D.C. Sept. 30, 2020).

In contrast, while the contracting states to conventions for the enforcement of *ad hoc* awards are typically encouraged to defer to annulment decisions rendered by the courts of the primary jurisdiction, they are not required to afford such deference. *See, e.g.* New York Convention, art. V(1)(e) (providing that the courts of the contracting states "*may*" refuse recognition and enforcement of an

award that was set aside by the courts of the seat) (emphasis added). Rather, each contracting state to those conventions that are not the primary jurisdiction retains some of their own authority to determine the enforceability of an *ad hoc* award. U.S. courts, for example, on certain occasions have enforced awards that were set aside by courts at the primary jurisdiction. *See, e.g.*, *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 107 (2d Cir. 2016) (affirming district court's enforcement of arbitral award notwithstanding the annulment of the award by a national court at the seat of arbitration (Mexico)); *Chromalloy Aeroservices v. Arab Republic*, 939 F. Supp. 907, 914-15 (D.D.C. 1996) (enforcing arbitral award notwithstanding the annulment of the award by a national court in the primary jurisdiction (Egypt)). By contrast, no U.S. court appears to have recognized and enforced an ICSID award that was previously annulled, thereby underscoring the adjudicatory authority of ICSID tribunals in the context of the ICSID annulment system.

In sum, under ICSID's annulment system, all ICSID Member States agree that their own courts will not have the authority independently to review the decisions of ICSID tribunals. *See Mobil Cerro Negro*, 863 F3d at 102 ("Member states' courts are [] not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award[.]"); *see also* Schreuer Report 16 (A-657). The Member States instead

confer that governmental authority, otherwise exercised by their own national courts, on ICSID Annulment Committees. The decision by the ICSID Member States—including Panama and Italy—to establish a mandatory and self-contained system for annulling ICSID awards highlights their intent to create through the ICSID Convention an overarching framework to govern ICSID tribunals. This is further evidence of the states' exercise of governmental authority over the formation and operation of ICSID tribunals, beyond their participation as parties to a dispute.

Notably, substantial parts of Appellant's briefing and of Professor Schreuer's expert report in the district court were devoted to detailing ICSID's annulment and enforcement framework, and explaining why it is one of the most important features distinguishing ICSID tribunals from *ad hoc* tribunals. *See, e.g.*, A-658-59. Yet, in its opinion, the district court failed to address this core feature of ICSID arbitration *in any respect*. The district court thus erred by applying a legal standard that relies on case-specific factors—*i.e.*, "possible indicia of [a tribunal's] governmental nature" (*ZF Auto.*, 142 S. Ct. at 2090)—without addressing one of the principal factors bearing on the decision.

C. The *Webuild* Tribunal, as an ICSID Tribunal, Is an International Tribunal Within the Meaning of § 1782

As an ICSID tribunal, the *Webuild* tribunal possesses all of the features described above which demonstrate that it is imbued with governmental authority

to adjudicate disputes and therefore meets the statutory requirements for § 1782 discovery.

To begin, the *Webuild* tribunal is formed pursuant to two international treaties, the Panama-Italy BIT *and* the ICSID Convention. Under the ICSID Convention, there were two requirements for the formation of the *Webuild* tribunal: (i) Panama and Italy needed to have ratified of the Convention, and (ii) the parties needed to have consented in writing to submit the dispute to ICSID arbitration. ICSID Convention, art. 25(1) (A-92); *see also supra* § I.B.2. Both requirements were met: Panama and Italy have ratified the ICSID Convention, and the parties (Panama and Webuild) consented in writing to the dispute through Webuild's acceptance of Panama's offer to arbitrate to Italian nationals investing in its territory in the Panama-Italy BIT. The *Webuild* tribunal thus is not a creature solely of the parties' consent in the Panama-Italy BIT, 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 ICSID Member States. *See supra* § I.B.2.

In the ICSID Convention, the sovereign states that participated in the drafting of the Convention prescribed rules which govern the *Webuild* tribunal's formation and operation. *See supra* § I.B.2. And sovereign states continue to participate in the formation and operation of the *Webuild* tribunal as ICSID

Member States, which compose the Administrative Council of ICSID. *See supra* § I.B.3.

The ICSID Member States also influenced the appointment of arbitrators to the *Webuild* tribunal. In the *Webuild* arbitration, when the parties could not agree on a tribunal president, the ICSID Secretary-General provided the parties with a list of ten potential nominees, from which the parties selected Lucy Reed. A-38. The Secretary-General's authority to assist in the appointment of the president was conferred by the ICSID Member States pursuant to the Convention. ICSID Convention, arts. 6, 11 (A-87-89). Moreover, if the parties had not agreed on this method for appointing the president, the Convention's default mechanism for appointments from the ICSID Panel of Arbitrators—designated by the ICSID Chairman and the ICSID Member States—would have applied. *Id.*, art. 28 (A-93); *see also supra* § I.B.3. Notably, Webuild's appointed arbitrator (Stanimir Alexandrov) was designated by the ICSID Chairman to the ICSID Panel of Arbitrators, and the tribunal president (Lucy Reed) had also been previously designated to the Panel by the Chairman. A-474; A-549.

Critically, any award issued by the *Webuild* tribunal will be subject to the enforcement mechanism established in the ICSID Convention, which requires the national courts of all ICSID Member States to treat the award as a final judgment of their own courts. *See* ICSID Convention, art. 54(1) (A-101); *see also supra*

§ I.B.5. And, if any party desires to seek annulment of an award issued by the *Webuild* tribunal, it may only do so through ICSID's self-contained mechanism for annulment before a committee of arbitrators designated by the ICSID Chairman and the Member States. The parties may not seek annulment in any national courts. *See* ICSID Convention, art. 52 (A-100-01); *see also supra* § I.B.5.

In view of these features, the drafters of the Convention and the ICSID Member States, including Panama and Italy, clearly intended to imbue the *Webuild* tribunal with governmental authority to adjudicate disputes, and the *Webuild* tribunal therefore meets the statutory requirements for § 1782 assistance.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court reverse the district court's order granting Appellees' motions to vacate the district court's May 19, 2022 Order and quashing the subpoena served on Appellee WSP (SPA-1-6).

Dated: May 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation.

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 32.1(a)(4) because this brief contains 11,764 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

May 2, 2023

s/ *Carolyn B. Lamm*
Carolyn B. Lamm

SPECIAL APPENDIX

SPECIAL APPENDIX
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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.,

22-mc-140 (LAK)

Applicants.

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MEMORANDUM OPINION

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LEWIS A. KAPLAN, *District Judge.*

This matter is before the Court on the motions of WSP USA Inc. ("Respondent")

(Dkt 22) and the Republic of Panama ("Intervenor" and, together with Respondent, the "Movants") (Dkt 13) to vacate the Court's order granting Webuild S.p.A.'s ("Webuild") *ex parte* application for discovery pursuant to 28 U.S.C. § 1782 (the "May 19, 2022 Order") and quash the subpoena served on Respondent.[1] The Court assumes familiarity with the pleadings and the undisputed facts therein. The key question is whether the *ad hoc* arbitration panel at issue here – an International Center for the Settlement of Investment Disputes panel ("ICSID Panel" or the "Webuild Tribunal") – is a "foreign or international tribunal" within the meaning of 28 U.S.C. § 1782. It is not. Accordingly, Webuild fails to satisfy the statutory requirements of Section 1782, and the motions to vacate the May 19, 2022 Order and quash the subpoena served on Respondent are granted.

Section 1782 authorizes federal district courts to order discovery "for use in a proceeding in a foreign or international tribunal."[2] In *ZF Automotive US, Inc. v. Luxshare, Ltd*, the Supreme Court held that this language authorizes assistance to "governmental or intergovernmental adjudicative bodies" only and that the private arbitral panels there at issue did not qualify under the statute.[3] As relevant here, the Court held that an *ad hoc* investor-state arbitration panel, convened pursuant to a bilateral investment treaty ("BIT") between Lithuania and Russia and in accordance with the United Nations Commission on International Trade Law rules ("UNCITRAL Rules"), was not "exercising governmental authority" and therefore was outside the ambit of Section 1782.[4] The

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[1] On July 1, 2022, Sacyr S.A. gave notice of its voluntary dismissal of the instant action without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A). Dkt 28, at 1.

[2] 28 U.S.C. § 1782.

[3] 142 S. Ct. 2078, 2083 (2022).

[4] *Id.* at 2088–89.

central inquiry was whether the treaty parties, in that case Russia and Lithuania, had indicated an intent "to imbue the body in question with governmental authority."[5] Although the Court did not provide a test for lower courts to apply in making this determination, it did set forth several factors that it considered in determining that such an intent did not exist with respect to the UNCITRAL arbitration panel. Here, the ICSID Panel, which was convened pursuant to a BIT between Panama and Italy, is materially indistinguishable with respect to these factors. Accordingly, the ICSID Panel here at issue is not a "foreign or international tribunal" within the meaning of Section 1782.

First, as in *ZF Automotive*, the ICSID panel is "not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes."[6] ICSID does not have standing or pre-existing arbitration panels. Rather it "convenes arbitral tribunals in response to requests made by either a member state or a national of a member state."[7] Here, the ICSID Panel was formed upon Webuild's request for arbitration.[8]

Second, like the Lithuania-Russia BIT in *ZF Automotive*, the Panama-Italy BIT did not "itself create the [ICSID Panel]."[9] Instead, the Panama-Italy BIT "simply references the set of

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5 *Id.* at 2091.

6 *Id.* at 2090.

7 *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 101 (2d Cir. 2017) (citing ICSID Convention arts. 36–37).

8 *See* Dkt 42, at 12.

9 *ZF Auto.*, 142 S. Ct. at 2090.

rules that govern the panel's formation and procedure if an investor chooses that forum."[10] In this case, those rules are the ICSID arbitration rules (the "ICSID Rules") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

Third, like the UNCITRAL Panel in *ZF Automotive*, the Webuild Tribunal "'functions independently' of and is not affiliated with either" of the relevant BIT nations.[11] The Webuild Tribunal consists of "individuals chosen by the parties and lacking any 'official affiliation with [Italy], [Panama], or any other governmental or intergovernmental entity."[12] Indeed, none of the arbitrators on the Webuild Tribunal is a national of Panama or Italy.

Fourth, like the UNCITRAL Panel in *ZF Automotive*, the Webuild Tribunal does not receive any "government funding."[13] Rather, the Webuild Tribunal is funded jointly by the parties to the dispute – *i.e.*, Webuild and Panama – in accordance with the ICSID Rules.[14]

Fifth, like the UNCITRAL Panel in *ZF Automotive*, the Webuild Tribunal

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10 *Id.*

11 *Id.* at 2090 (quoting *Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP*, 5 F.4th 216, 226 (2d Cir.), *cert. granted sub nom. AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States*, 142 S. Ct. 638 (2021), and *rev'd sub nom. ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022) (hereinafter "*AlixPartners*")).

12 *Id.*

13 *Id.*

14 *See* Dkt 42, at 15 (quoting ICSID Procedural Order No. 1, art. 9.1 ("The parties shall cover the direct costs of the proceeding in equal parts.")).

"maintain[s] confidentiality," and the "award may be made public only with the consent of both parties."[15] Hearings are closed to the public absent agreement of the parties, and ICSID will not publish the arbitration award without the parties' consent.[16] Webuild argues that the ICSID Panel is distinguishable from the UNCITRAL Panel because the ICSID Rules require that "excerpts" of awards be published even without the parties' consent.[17] But even these excerpts are subject to objections by the parties and can be "protected from public disclosure . . . by agreement of the parties."[18] Hence, the confidentiality of the ICSID Panel is more akin to private commercial arbitration than adjudication by a governmental body.

Finally, like the UNCITRAL Panel in *ZF Automotive*, the Webuild Tribunal "derives its authority from the parties' consent to arbitrate."[19] The parties to the Panama-Italy BIT "each agreed in the treaty to submit to *ad hoc* arbitration if the investor chose it. [Webuild] took [Panama] up on that offer by initiating such an arbitration, thereby triggering the formation of an *ad hoc* panel with the authority to resolve the parties' dispute. That authority exists because [Panama] and [Webuild] consented to the arbitration, not because [Italy] and [Panama] clothed the panel with governmental authority."[20] Indeed, the ICSID Panel was only one of several options available to

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15 *ZF Auto.*, 142 S. Ct. at 2090 (quoting *AlixPartners*, 5 F.4th at 226).

16 Dkt 42, at 16.

17 Dkt 56, at 6.

18 *See* ICSID Rules (2022), Rules 62–63, 66.

19 *ZF Auto.*, 142 S. Ct. at 2090.

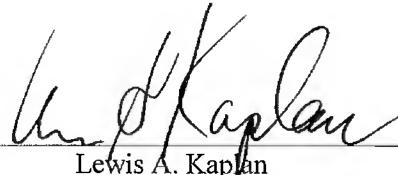
20 *Id.*

Webuild under the Panama-Italy BIT, which also permitted dispute resolution via a court of competent jurisdiction in Panama or an *ad hoc* arbitration pursuant to the UNCITRAL Rules.[21] As the Supreme Court reasoned in *ZF Automotive*, "[t]he inclusion of courts on the list reflects [Panama] and [Italy's] intent to give investors the choice of bringing their disputes before a pre-existing governmental body."[22]

The foregoing indicates that Italy and Panama did not intend to imbue the ICSID Panel with governmental authority, and therefore the Webuild Tribunal does not constitute a "foreign or international tribunal" within the meaning of Section 1782. I have considered all of Webuild's arguments to the contrary and find they are without merit. Because Webuild fails to satisfy this statutory requirement of Section 1782, I need not consider Movants' arguments regarding the other statutory and discretionary factors. For the foregoing reasons, Movants' motions to vacate the May 19, 2022 Order and quash the subpoena served on Respondent (Dkt 13; Dkt 22) are granted. The Clerk shall close the case.

SO ORDERED.

Dated: December 19, 2022



Lewis A. Kaplan
United States District Judge

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21 Dkt 42, at 16.

22 *ZF Auto.*, 142 S. Ct. at 2090.