

Second Circuit Holds Section 1782 Discovery Is Not Available In An ICSID Arbitration

July 24, 2024

On July 19, 2024, the U.S. Court of Appeals for the Second Circuit held that an arbitral tribunal constituted under the International Centre for Settlement of Investment Disputes (“ICSID”) was not a “foreign or international tribunal” within the meaning of the Section 1782 discovery statute, because the specific ICSID tribunal at issue did not possess the attributes that evidence an intent to imbue the panel with the requisite governmental authority.¹

In the first Court of Appeals decision to apply the U.S. Supreme Court’s 2022 decision in *ZF Automotive US, Inc. v. Luxshare Ltd.* and *AlixPartners, LLC v. Fund for Protection of Investors’ Rights in Foreign States*² to other forms of arbitration, the Second Circuit weighed in on the question left open by the Supreme Court’s ruling regarding the potential applicability of Section 1782 to tribunals constituted in investor-state cases. As a consequence of the Second Circuit’s decision, Section 1782 will likely be unavailable in most, if not all, ICSID arbitrations if other Circuits follow the same reasoning.

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¹ See generally *Webuild S.P.A. v. WSP USA Inc.*, No. 23-73, 2024 WL 3463380 (2d Cir. July 19, 2024).

² See generally *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022).

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Background

28 U.S.C. § 1782 (“Section 1782”) allows U.S. federal courts the discretion to compel witness testimony and document production from any person or entity who “resides” or is “found” in the judicial district where the federal court sits for “use in a proceeding in a foreign or international tribunal.”³

In 2022, the U.S. Supreme Court resolved a split among multiple U.S. Courts of Appeals regarding the applicability of Section 1782 to international arbitration. In two consolidated cases, *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLC v. Fund for Protection of Investors’ Rights in Foreign States*, the Supreme Court held that Section 1782 does not permit U.S. courts to order discovery for use in commercial arbitrations abroad, but seemingly left open the possibility that Section 1782 could apply to some types of public international law arbitration.⁴ The Supreme Court declined to adopt a bright-line rule as to when tribunals in public international law arbitrations may constitute a “foreign or international tribunal” under Section 1782, and instead established that “the inquiry is whether those [governmental] features and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority.”⁵ The Supreme Court ultimately concluded that the specific *ad hoc* UNCITRAL tribunal at issue in the *ZF Automotive* case was not a “foreign or international tribunal” within the meaning of the statute because, among other reasons, it was “not a pre-existing body but one formed for the purpose of adjudicating investor-state disputes,” “consist[ed] of individuals chosen by the

parties,” and “lack[ed] other possible indicia of a governmental nature.”⁶

Following the Supreme Court’s ruling, two U.S. district courts in New York grappled with the question of whether arbitral tribunals constituted under the auspices of ICSID are within the ambit of Section 1782, with both courts finding that an ICSID tribunal is not a “foreign or international tribunal” within the meaning of Section 1782.

In *In re Alpine*, the U.S. District Court for the Eastern District of New York denied an application under Section 1782 seeking discovery for use in an ICSID arbitration brought by a Hong Kong corporation against the Republic of Malta pursuant to the China-Malta Bilateral Investment Treaty (“BIT”).⁷ The district court noted that the ICSID tribunal “was created by a treaty among sovereign nations and derives its power from the consent of the parties,” and was “one of several options” for the parties to litigate their dispute under the applicable China-Malta BIT.⁸ “Applying the Supreme Court’s definitions and logic,” the district court therefore concluded that this evidenced the states’ intention not to imbue the panel with governmental authority under Section 1782.⁹

In *In re Webuild S.P.A.*, the U.S. District Court for the Southern District of New York quashed a subpoena for documents and testimony from a non-party located in New York that had been issued under Section 1782 for use in an ICSID arbitration that was brought against Panama pursuant to the Panama-Italy BIT.¹⁰ Noting that the Supreme Court’s decision “did not provide a test for lower courts to apply in making th[e] determination” as to whether an ICSID tribunal was imbued with governmental authority, the district court

³ 28 U.S.C. § 1782.

⁴ See *ZF Automotive*, 596 U.S. at 637 (“None of this forecloses the possibility that sovereigns might imbue an *ad hoc* arbitration panel with official authority.”). See also Cleary Gottlieb, “U.S. Supreme Court Denies Applicability of Section 1782 Discovery Statute With Respect to Private Commercial and Treaty Arbitrations” (June 14, 2022), available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/us-supreme-court-denies->

[applicability-of-section-1782-discovery-statute-with-respect-to-private-commercial-and-treaty-arbitrations#_ftn1](#).

⁵ *ZF Automotive*, 596 U.S. at 637.

⁶ *Id.* at 635.

⁷ See generally *In re Alpine Ltd.*, No. 21-MC-2547 (MKB) (RML), 2023 WL 5237336 (E.D.N.Y. Aug. 15, 2023).

⁸ *Id.* at *5.

⁹ *Id.*

¹⁰ See generally *In re Webuild S.P.A.*, No. 22-mc-140 (LAK), 2022 WL 17807321 (S.D.N.Y. Dec. 19, 2022).

nevertheless found that the Supreme Court “did set forth several factors that it considered in determining that such an intent did not exist with respect to the UNCITRAL arbitration panel” at issue in *ZF Automotive*.¹¹ The district court went on to consider six characteristics regarding whether the functional attributes of the tribunal indicated an intent to be provided with governmental authority, including whether the tribunal: (1) was a “pre-existing body;” (2) was itself created by the BIT at issue; (3) “functions independently of and is not affiliated with either of the relevant BIT nations;” (4) receives government funding; (5) “maintain[s] confidentiality” of the award; and (6) “derives its authority from the parties to consent to arbitrate.”¹² The district court concluded that the ICSID tribunal was “materially indistinguishable” from the UNCITRAL tribunal in the case before the Supreme Court,¹³ and found 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.”¹⁴ Webuild S.P.A. (“Webuild”) appealed.

The Second Circuit’s Decision

In a *per curiam* published opinion, the Second Circuit affirmed the district court’s decision and found that the “Webuild Tribunal does not qualify as a ‘foreign or international tribunal’ as that term is used in § 1782.”¹⁵

Rejecting Webuild’s argument that “ICSID Arbitral Tribunals are ‘quintessential international tribunals’ with ‘numerous features’ that make ‘clear that [they] are imbued with governmental authority,’”¹⁶ the Second Circuit instead focused on a comparison between the UNCITRAL tribunal that was at issue in the Supreme Court’s decision in *ZF Automotive*, and the ICSID tribunal that was at issue in *Webuild*.¹⁷ Although the Second Circuit did not address each of the six

characteristics that the district court reviewed in its decision, the Second Circuit concluded that the “characteristics of UNCITRAL that the *ZF Automotive* Court found insufficient to give the *ad hoc* arbitration panel at issue there a governmental character are virtually the same as those of Webuild’s ICSID Tribunal.”¹⁸ The Second Circuit was “not persuaded” by Webuild’s arguments that the nature of ICSID – as a “permanent institution” that is “established by the ICSID Convention,” “regulates the formation of the Panel of Arbitrators and the formation and operations of Arbitral Tribunals,” and has been ratified by Member States who can designate individuals to serve on the official Panel of Arbitrators – was sufficient to distinguish the ICSID tribunal at issue in this case from the UNCITRAL tribunal in *ZF Automotive*.¹⁹

The Second Circuit instead found that the fact that sovereign states help to fund the ICSID Centre did not create a “higher level of governmental involvement in ICSID Tribunals,” because the “funding for ICSID does not fund the Tribunal, directly or indirectly,” and “the Webuild Tribunal is instead funded through advances on arbitrator fees and expenses paid by the parties.”²⁰ The Second Circuit similarly rejected the argument that sovereign states “play[] a more significant role in the composition of panels” because arbitrators may be appointed from “an ICSID-maintained Panel of Arbitrators,” concluding that such a “possibility” of ICSID’s involvement in composing the Tribunal “has no relevance to this case, as the parties agreed on the arbitrators and the Chairman did not appoint any member of the Webuild Tribunal.”²¹ The Second Circuit also declined to credit Webuild’s contention that “the ICSID Convention’s unique post-award procedures (both through annulment and enforcement mechanisms) distinguish the Webuild Tribunal as an international tribunal,” reasoning that “these procedures merely facilitate the enforcement of

¹¹ *Id.* at *2.

¹² *Id.* at *2 (internal quotation omitted).

¹³ *Id.* at *3.

¹⁴ *Id.* at *2.

¹⁵ *Webuild S.P.A.*, 2024 WL 3463380, at *2.

¹⁶ *Id.*

¹⁷ *See id.* at *4-5.

¹⁸ *Id.* at *5.

¹⁹ *Id.*

²⁰ *Id.* at *4.

²¹ *Id.*

ICSID awards” and did not otherwise demonstrate an “exercise of governmental authority” or indicate that “the Webuild Tribunal is itself imbued with governmental authority.”²²

Based on the foregoing, the Second Circuit determined that there is “no principled basis for distinguishing this case from *ZF Automotive*,” and thus “conclude[d] that § 1782 discovery is not authorized for Webuild’s ICSID arbitration.”²³

Practical Impact

The Second Circuit’s decision in *Webuild v. S.P.A. v. WSP USA Inc.* is the first Court of Appeals ruling on the applicability of Section 1782 to an investor-state arbitration tribunal following the Supreme Court’s decision in *ZF Automotive*. While the Supreme Court’s decision left open the possibility that arbitral panels constituted in investor-state cases could qualify as a “foreign or international tribunal” within the meaning of Section 1782, the Second Circuit’s opinion in *Webuild* demonstrates that courts may be unwilling to find that ICSID tribunals or other arbitration panels convened pursuant to international investment agreements are imbued with the requisite governmental authority sufficient to permit discovery under Section 1782.

In *Webuild*, the Second Circuit did not adopt a multi-factor test for determining when an ICSID tribunal may be considered a “foreign or international tribunal” for purposes of Section 1782 discovery, and instead focused its analysis on a comparison of the characteristics of the UNCITRAL tribunal at issue in *ZF Automotive* and the specific attributes of the ICSID tribunal constituted in the *Webuild* case. As a result, the Second Circuit did not categorically hold that an ICSID arbitration tribunal can never qualify as a “foreign or international tribunal” within the meaning of Section 1782, and its decision is arguably limited to the ICSID tribunal that was specifically constituted in the *Webuild* case. While the decision left open the possibility that the outcome could be different if the tribunal chairperson or other arbitrators were

appointed from the ICSID-maintained Panel of Arbitrators, even that may be insufficient to show that the tribunal has and can exercise governmental authority. As a practical matter, therefore, the Second Circuit’s general unwillingness to find that certain attributes of ICSID necessarily imbue ICSID tribunals with the requisite governmental authority demonstrates that courts may be increasingly skeptical of arguments that an investor-state arbitration tribunal is a “foreign or international tribunal” under Section 1782.

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²² *Id.*

²³ *Id.* at *5.