

ICSID panel is not an international tribunal, New York District Court rules

Background

Persons who reside in the United States can be ordered to provide documents or other information to be used in “foreign or international tribunal” proceedings under 28 U.S.C. § 1782. In In re Webuild S.P.A., 2022 WL 17807321 (S.D.N.Y. Dec. 19, 2022), the US District Court for the Southern District of New York examined whether an ICSID panel convened under the Italy-Panama BIT qualifies as a “foreign or international tribunal” in line with § 1782.

Webuild S.P.A., applied for a discovery order against a third-party, WSP USA Inc, that had assisted Panama with the infrastructure project of the Panama Canal at the centre of the ICSID dispute. WSP USA resisted the discovery order subpoena issued. The SDNY applied recent Supreme Court decision *ZF Auto US Inc v. Luxshare Ltd.* (142 S. Ct. 2078, 2087, 2091 (2022)) in its analysis.

Key elements of *ZF Automotive*

The decision in *ZF Automotive* establishes six conditions tribunals must fulfil to qualify as a “foreign or international tribunal” within the meaning of § 1782:

1. The tribunal should be a pre-existing body. In *ZF Automotive*, the relevant tribunals were a German Institute of Arbitrations (DS) panel established via contract for sale and an UNCITRAL panel created by the Russia-Lithuania BIT. In both cases, the tribunals arose would be created ad-hoc and were not permanent bodies.
2. The relevant tribunal panels should be created by the respective treaty or contract. It is not sufficient if the signatories simply consent to the use of a forum or a set of governing rules.
3. A “foreign or international tribunal” must have official affiliation with the relevant nations or be able to access some form of governmental or intergovernmental authority. The arbitrations stipulated in both cases in *ZF Automotive* are independent from the states involved.
4. Tribunals should receive government funding rather than being funded by the parties to the specific disputes.
5. The proceedings stipulated maintain confidentiality throughout. This includes the award. This does not align with the approach expected.
6. Neither panel in question was given an official power to adjudicate the dispute. Rather, the consent of the parties following the arbitration request established the authority of the *ad hoc panel* over those parties.

Application to *Webuild*

Taking the above and applying it to *Webuild*, the SDNY found that:

1. ICSID panels are not pre-existing and are constituted only following a request for arbitration.
2. The Panama-Italy BIT draws reference to a set of rules regarding the ICSID panel’s formation. The treaty itself does not create the panel. Much like the Russia-Lithuania BIT, it stipulates the rules both parties’ consent should the investor or state choose that forum.
3. ICSID arbitrators appointed in *Webuild* were not affiliated with either state signatory or other governmental entities. They, therefore, do not exercise the authority required under

ZF Automotive. affiliation” with Italy or Panama, or “any other governmental or intergovernmental entity.

4. The SDNY compared the funding and composition of the UNCITRAL panel in *ZF Automotive* when assessing the ICSID panel from *Webuild*. In both cases, the parties consenting to the arbitration, not necessarily the signatory states, fund the panel and the arbitration itself.
5. Though ICSID rules allow for the publication of award excerpts without parties’ consent, the overall approach to confidentiality was found to be more akin to private arbitration than a court or governmental tribunal.
6. The Italy-Panama BIT establishes several avenues for dispute resolution, The panel, therefore, derives its authority from the parties’ consent. In addition, the court notes that another option was to bring the dispute before a local court, evidencing intention to differentiate between the two kinds of tribunals.

Due to the above, the ICSID panel in question was found not to be a “foreign or international tribunal” within the meaning of § 1782. *Webuild* request for disclosure was denied.

Implications

Webuild further narrows the list of tribunals and panels available for parties under § 1782. The implication is that parties in arbitrations beyond ICSID or UNCITRAL, will most likely struggle to find US judicial assistance or third-party disclosure.