

23-73

Webuild v. WSP USA Inc.

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

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4 August Term, 2023

5 (Argued: November 21, 2023

Decided: July 19, 2024)

6 Docket No. 23-73

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8 WEBUILD S.P.A.,

9 *Applicant-Appellant,*

10 SACYR S.A.,

11 *Applicant,*

12 - v. -

13 WSP USA Inc.,

14 *Respondent-Appellee,*

15 REPUBLIC OF PANAMA,

16 *Intervenor-Appellee.**

17 _____

* The Clerk of Court is instructed to amend the official caption to conform with the above.

1 Before: KEARSE, CALABRESI, and NATHAN, *Circuit Judges*.

2 Appeal from a December 19, 2022 order of the United States District Court
3 for the Southern District of New York, Lewis A. Kaplan, *Judge*, (1) vacating a May 19,
4 2022 order that granted the *ex parte* application of applicant-appellant Webuild S.P.A.
5 for an order under 28 U.S.C. § 1782 allowing it to obtain discovery from respondent
6 WSP USA for use in an international arbitration proceeding conducted under the
7 auspices of the International Centre for the Settlement of Investment Disputes ("ICSID"),
8 and (2) quashing the subpoena served by Webuild on WSP. The December 19, 2022
9 order granted motions by WSP USA and intervenor Republic of Panama to vacate the
10 May 2022 order and quash Webuild's subpoena in light of (A) the Supreme Court's June
11 2022 ruling in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022), that § 1782
12 authorizes discovery only for proceedings before entities that exercise governmental or
13 intergovernmental authority, and (B) the district court's conclusion that an ICSID
14 arbitration tribunal is not such an entity. *See In re WEBUILD S.P.A.*, No. 22-mc-140, 2022
15 WL 17807321 (S.D.N.Y. Dec. 19, 2022). On appeal, Webuild contends that the district
16 court erred in failing to find that ICSID arbitration tribunals are sufficiently imbued with
17 governmental authority to be within the scope of § 1782. We find no error in the
18 December 19, 2022 Order.

19 Affirmed.

1 HANSEL PHAM, Washington, D.C. (Carolyn B. Lamm,
2 Kristen M. Young, Nicolle E. Kownacki, White & Case,
3 Washington, D.C., on the brief), *for Applicant-Appellant*.

4 SAMUEL LONERGAN, New York, New York (Mélida N.
5 Hodgson, Mitchell R. Stern, Nathan A. King, Arnold &
6 Porter Kaye Scholer, New York, New York; Eli Whitney
7 Debevoise II, Sally L. Pei, Arnold & Porter Kaye
8 Scholer, Washington, D.C., on the brief, *for Intervenor-*
9 *Appellee*; Raymond DeLuca, Jeffery Mullen, Cozen
10 O'Connor, Philadelphia, Pennsylvania; Rachel B.
11 Soloman, Cozen O'Connor, New York, New York, on
12 the brief, *for Respondent-Appellee*), *for Appellees*.

13 URJA MITTAL, Appellate Staff Attorney, Washington, D.C.
14 (Bryan M. Boynton, Principal Deputy Assistant
15 Attorney General, Sharon Swingle, Appellate Staff
16 Attorney, Civil Division, United States Department of
17 Justice, Washington, D.C., Damian Williams, United
18 States Attorney, on the brief) *for amicus curiae United*
19 *States of America in support of affirmance*.

20 PER CURIAM:

21 Applicant-appellant Webuild S.P.A. ("Webuild") appeals from a December
22 19, 2022 order ("December 2022 Order") of the United States District Court for the
23 Southern District of New York, Lewis A. Kaplan, *Judge*, (1) vacating a May 19, 2022 order
24 ("May 2022 Order") that granted the *ex parte* application of Webuild for an order under
25 28 U.S.C. § 1782 allowing it to obtain discovery from respondent WSP USA ("WSP") for
26 use in an international arbitration proceeding conducted under the auspices of the

1 International Centre for the Settlement of Investment Disputes ("ICSID" or the "Centre"),
2 and (2) quashing the subpoena served by Webuild on WSP. The December 2022 Order
3 granted motions by WSP and intervenor Republic of Panama ("Panama") to vacate the
4 May 2022 order and quash the subpoena in light of (A) the Supreme Court's June 2022
5 ruling in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022) ("*ZF Automotive*"),
6 that § 1782 authorizes discovery orders only for use in proceedings before foreign or
7 international tribunals that exercise governmental or intergovernmental authority, and
8 (B) the district court's conclusion that an ICSID arbitration tribunal is not such an entity.
9 On appeal, Webuild contends that ICSID tribunals are sufficiently imbued with
10 governmental authority to be within the scope of § 1782. Finding no error in the district
11 court's December 2022 Order, we affirm.

12 I. BACKGROUND

13 As did the district court in its December 2022 Order, we assume familiarity
14 with the parties' "pleadings and the undisputed facts therein," *In re WEBUILD S.P.A.*,
15 No. 22-mc-140, 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022), which we summarize
16 below. For purposes of clarity, we note that in the ICSID rules governing arbitrations,
17 "Panel of Arbitrators" refers to the roster of qualified persons designated by ICSID

1 Member States (up to four per Member State, from any state), plus 10 such persons
2 (from 10 States) designated by the ICSID Chairman, who are willing to serve as
3 arbitrators (*see* ICSID Convention, Regulations & Rules ("ICSID Rules") Ch. I, sec. 4).
4 The ICSID panel of arbitrators chosen or appointed to decide a dispute is called the
5 "Arbitral Tribunal" or "Tribunal." (*Id.* Ch. IV, sec. 2.)

6 *A. The Present Proceeding and the District Court's May 2022 Order*

7 Webuild, formerly known as Salini Impregilo S.p.A., is an Italian
8 investment company that specializes in infrastructure projects. Webuild and three other
9 companies, including the Spanish company Sacyr Vallehermoso S.A. ("Sacyr"), formed
10 the consortium Grupos Unidos por el Canal S.A. ("GUPC")--a Panamanian project
11 company--to facilitate investment in a proposed expansion of the Panama Canal, the
12 "Third Set of Locks Project" (or the "Project"). The Project contract was awarded to
13 GUPC by the Panama Canal Authority (Autoridad del Canal de Panamá, or "ACP") in
14 2009. Construction was completed in 2016.

15 In 2020, Webuild initiated an ICSID arbitration against Panama, as allowed
16 by a bilateral investment treaty (or "BIT") between Panama and Italy, the Agreement
17 Between the Republic of Panama and the Italian Republic on the Promotion and
18 Protection of Investments ("Panama-Italy BIT"). Webuild alleged that Panama breached

1 its obligations under the Panama-Italy BIT, international law, and Panamanian law,
2 principally by ACP's failure to provide the consortium with complete and accurate
3 information during the bidding and procurement processes for the Third Set of Locks
4 Project, and by ACP's unfair demands that Webuild make contributions (without
5 reimbursement) to finance and pay for the Project. For use in its ICSID arbitration
6 against Panama, Webuild's *ex parte* application in the present proceeding sought
7 authorization for discovery from WSP as to information provided to ACP during the
8 Project by ACP's engineering consultant Parsons Brinkerhoff, a firm that, during the
9 course of the Project, was acquired by WSP. Sacyr, originally a co-applicant in the
10 present proceeding for § 1782 discovery from WSP, had made similar allegations in its
11 own international arbitration proceeding against Panama, commenced in 2018 pursuant
12 to a bilateral investment treaty between Panama and Spain.

13 The district court initially, in its May 2022 Order, granted the *ex parte*
14 applications of Webuild and Sacyr. Thereafter, Panama moved to intervene, to vacate
15 the May 2022 Order, and to quash the subpoena served on WSP; the Supreme Court
16 issued its decision in *ZF Automotive* (see Part II.A. below); WSP moved to have the May
17 2022 Order vacated and the subpoena quashed; and Sacyr voluntarily withdrew its
18 request for § 1782 discovery, see December 2022 Order, 2022 WL 17807321, at *1 n.1.

1 B. *The District Court's Post-ZF Automotive December 2022 Order*

2 In *ZF Automotive*, the Supreme Court considered the authorization in § 1782
3 for a district court to order discovery from a person within its district for use in a
4 "foreign or international tribunal," 28 U.S.C. § 1782(a). As discussed more fully in Part
5 II.A. below, the Court considered several factors, such as a tribunal's creation, funding,
6 operations, and transparency, and concluded that § 1782's authorization for discovery
7 orders applies only to proceedings before foreign or international adjudicative entities
8 that exercise governmental authority.

9 In light of that ruling and the factors considered by the *ZF Automotive*
10 Court, the district court granted the motions of Panama and WSP to vacate the May 2022
11 Order and quash Webuild's subpoena to WSP. The district court found principally that
12 the ICSID "arbitration panel at issue here"--"the 'Wbuild Tribunal,'" December 2022
13 Order, 2022 WL 17807321, at *1--is neither a pre-existing entity nor one created by the
14 Panama-Italy BIT, but rather is a Tribunal specially formed following Webuild's request
15 for arbitration, *id.* at *1-*2; that the Webuild Tribunal members were chosen by the
16 parties and had no official affiliation with Italy, Panama, or any other governmental or
17 intergovernmental entity, *id.* at *2; and that the Webuild Tribunal does not receive any
18 "government funding" but instead, in accordance with "the ICSID arbitration rules," is

1 "funded jointly by the parties," *id.* (internal quotation marks omitted). The court
2 concluded that

3 Italy and Panama did not intend to imbue the [Webuild Tribunal]
4 with governmental authority, and therefore the Webuild Tribunal
5 does not constitute a "foreign or international tribunal" within the
6 meaning of Section 1782.

7 *Id.* at *3.

8 II. DISCUSSION

9 On appeal, Webuild contends that ICSID Arbitral Tribunals are
10 "quintessential 'international tribunals'" with "numerous features" that make "clear that
11 [they] are imbued with governmental authority." (Webuild brief on appeal at 1.) As
12 discussed in Part II.B. below, Webuild points out that ICSID itself is a permanent
13 institution, having been established by the International Convention on the Settlement
14 of Investment Disputes between States and Nationals of Other States (the "ICSID
15 Convention" or "Convention"), and that the Convention regulates various aspects of
16 ICSID's operations with regard to arbitrations.

17 Reviewing *de novo* the district court's ruling that, in light of the Supreme
18 Court's decision and reasoning in *ZF Automotive*, the Webuild Tribunal does not qualify

1 as a "foreign or international tribunal" as that term is used in § 1782, we conclude that
2 Webuild's contentions are without merit.

3 A. *The Supreme Court's Decision in ZF Automotive*

4 Section 1782(a) of Title 28 provides, in pertinent part, as follows:

5 The district court of the district in which a person resides or is found
6 may order him to give his testimony or statement or to produce a
7 document or other thing for use in a proceeding in a foreign or
8 international tribunal, including criminal investigations conducted
9 before formal accusation.

10 28 U.S.C. 1782(a). In *ZF Automotive*, in which the Supreme Court considered two cases
11 involving applications for § 1782 discovery to be used in foreign arbitration proceedings,
12 the Court began by exploring whether Congress intended "foreign or international
13 tribunal" to include foreign private--*i.e.*, non-governmental--adjudicative bodies.

14 In fathoming the meaning of "foreign or international tribunal" in that
15 section, the Court noted, *inter alia*, that "the animating purpose of § 1782 is comity," and
16 that "[p]ermitting federal courts to assist foreign and international governmental bodies
17 promotes respect for foreign governments and encourages reciprocal assistance." *ZF*
18 *Automotive*, 596 U.S. at 632. The Court found it "difficult to see how enlisting district
19 courts to help private bodies would serve" the interests of comity and respect. *Id.*

1 The Court also noted that in the United States, "[a]rbitrators derive their
2 authority to resolve disputes only because the parties have agreed in advance to submit
3 such grievances to arbitration," *id.* at 636 (internal quotation marks omitted), and that
4 under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, the discovery allowed in domestic
5 arbitrations is more circumscribed than what can be authorized under § 1782 for foreign
6 or international proceedings, *see ZF Automotive*, 596 U.S. at 632. Thus, construing § 1782
7 to authorize discovery in proceedings before private foreign or international bodies
8 would be incongruous. *See id.* at 633 ("[i]t's hard to conjure a rationale for giving parties
9 to private foreign arbitrations such broad access to federal-court discovery assistance in
10 the United States while precluding such discovery assistance for litigants in domestic
11 arbitrations" (internal quotation marks omitted)).

12 The Supreme Court concluded that "§ 1782 requires a 'foreign or
13 international tribunal' to be governmental or intergovernmental." *Id.* "[O]nly a
14 governmental or intergovernmental adjudicative body constitutes a 'foreign or
15 international tribunal' under § 1782. Such bodies are those that exercise governmental
16 authority conferred by one nation or multiple nations." *Id.* at 638.

17 Of the two cases at issue in *ZF Automotive*, the one more similar to the
18 present case involved a § 1782 application for discovery to be used in an *ad hoc*
19 arbitration between Lithuania and a Russian investor's assignee (the "Investor") with

1 respect to a failed Lithuanian bank. The arbitration was initiated by the Investor as
2 permitted by a bilateral investment treaty between Lithuania and Russia, and was to be
3 conducted in accordance with the Arbitration Rules of the United Nations Commission
4 on International Trade Law ("UNCITRAL Rules"). *Id.* at 625-26. In determining whether
5 the UNCITRAL panel qualified as a foreign or international tribunal within the meaning
6 of § 1782, the Court considered a number of factors.

7 The Court noted that the mere fact that a BIT allows an investor to opt for
8 an *ad hoc* arbitration against a sovereign state does not mean that the ensuing arbitration
9 panel has any governmental authority. "[A] body does not possess governmental
10 authority just because nations agree in a treaty to submit to arbitration before it. The
11 relevant question is whether the nations intended that the ad hoc panel exercise
12 governmental authority." *Id.* at 637. The Court found no such intent indicated in the
13 Russia-Lithuania BIT.

14 It found that the BIT itself did not create the UNCITRAL panel. In the
15 treaty, each of the two states agreed to submit to an *ad hoc* arbitration "*if* an investor
16 chose it." *Id.* at 636 (emphasis added). Further, the options that the BIT offered to
17 disappointed investors included "[a] competent court or court of arbitration of the
18 Contracting Party," thereby giving them "the choice of bringing their disputes before a
19 pre-existing governmental body." *Id.* at 634-35 (internal quotation marks omitted).

1 Thus, the *ad hoc* UNCITRAL arbitration panel came into existence--and had authority
2 to resolve the dispute before it--"because Lithuania and the [Investor] consented to the
3 arbitration, not because Russia and Lithuania clothed the panel with governmental
4 authority." *Id.* at 636.

5 In addition, the Court found the *ad hoc* UNCITRAL panel distinguishable
6 from governmental adjudicative bodies by the UNCITRAL rules allowing the parties to
7 choose the arbitrators for their arbitration, and by the facts that the arbitration panel
8 members had no official affiliation with any governmental or intergovernmental entity,
9 that the panel received no funding from a government, and that the panel could make
10 its award "public only with the consent of both parties," *id.* at 635 (internal quotation
11 marks omitted).

12 B. *Comparisons between UNCITRAL and ICSID*

13 As indicated in Part I.B. above, the district court found that the ICSID rules
14 governing Arbitral Tribunals were not significantly different from those of UNCITRAL
15 that were discussed by the Supreme Court in *ZF Automotive*. Webuild contends that this
16 was error, arguing that ICSID Tribunals have features showing that they are "imbued
17 with governmental authority." (Webuild brief on appeal at 1, 2, 13.) Webuild points out,
18 *inter alia*, that ICSID itself is a permanent institution, established by the ICSID

1 Convention; that the ICSID Convention regulates the formation of the Panel of
2 Arbitrators and the formation and operations of Arbitral Tribunals; that states that have
3 ratified the Convention (*i.e.*, the "Member States") make and amend ICSID rules that
4 govern arbitrations; and that the Convention requires ICSID to maintain an official Panel
5 of Arbitrators comprising persons designated by ICSID Member States, a roster from
6 which arbitrators will be appointed by ICSID if the parties who have chosen an ICSID
7 arbitration fail to select their arbitrators. (*See id.* at 23-37.) We are not persuaded.

8 These arguments by Webuild focus principally on ICSID in general or on
9 its overall roster of persons who could become members of a given Arbitral Tribunal if
10 the parties to the arbitration fail to make their own selections. Webuild argues, for
11 example, that because sovereign states help to fund the ICSID Centre, there is a higher
12 level of governmental involvement in ICSID tribunals. (*See Webuild brief on appeal 37.*)
13 This argument conflates the Centre with the Webuild Tribunal. But funding for ICSID
14 does not fund the Tribunal, directly or indirectly: the Webuild Tribunal is instead
15 funded through advances on arbitrator fees and expenses paid by the parties.

16 Finally, Webuild argues that the ICSID Convention's unique post-award
17 procedures (both through annulment and enforcement mechanisms) distinguish the
18 Webuild Tribunal as an international tribunal. (*See Webuild brief on appeal 40.*) For
19 example, Webuild claims that the heightened finality accorded to tribunal awards under

1 the Convention renders ICSID tribunals analogous to national courts of Member States.
2 We are not persuaded, however, that the intent to imbue tribunals with governmental
3 authority follows from Convention procedures that accord awards with finality. Rather,
4 these procedures merely facilitate the enforcement of ICSID awards. Nor do we find
5 relevant the Convention's annulment procedures, which grant ICSID "Annulment
6 Committees" the authority to annul ICSID awards upon a party's request. Here again,
7 Webuild has shown neither that annulment is an exercise of governmental authority nor
8 that the existence of this post-award ICSID procedure is proof that the Webuild Tribunal
9 is itself imbued with governmental authority.

10 Along similar lines, Webuild argues that because the ICSID Chairman may
11 appoint arbitrators from an ICSID-maintained Panel of Arbitrators to an Arbitral
12 Tribunal when parties to an arbitration cannot agree on panel members or a presiding
13 arbitrator, ICSID plays a more significant role in the composition of panels than did the
14 panels considered in *ZF Automotive*. (See Webuild brief on appeal 35-36.) But that
15 possibility has no relevance to this case, as the parties agreed on the arbitrators and the
16 Chairman did not appoint any member of the Webuild Tribunal.

17 As described above, the characteristics of UNCITRAL that the
18 *ZF Automotive* Court found insufficient to give the *ad hoc* arbitration panel at issue there
19 a governmental character are virtually the same as those of Webuild's ICSID Tribunal.

1 Seeing no principled basis for distinguishing this case from *ZF Automotive*, we conclude
2 that § 1782 discovery is not authorized for Webuild's ICSID arbitration substantially for
3 the reasons stated by the district court in its December 2022 Order.

4

5

CONCLUSION

6 We have considered all of Webuild's arguments on this appeal and have
7 found them to be without merit. The December 2022 Order is affirmed.