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Federal Court Further Narrows 28 U.S.C. § 1782 Application Following Landmark SCOTUS Decision

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Since the U.S. Supreme Court (SCOTUS) issued its June 2022 critical decision in *AlixParters, LLP v. Fund for Prot. of Investors' Rights in Foreign States*, private parties have been foreclosed from petitioning federal courts for discovery rulings in aid of private, commercial international arbitration. Now, the Eastern District of New York has put a finer point on the Supreme Court's ruling, declaring that the International Centre for Settlement of Investment Disputes (ICSID), which operates under the auspices of the World Bank, may also be beyond the reach of U.S.C. § 1782(a).

Settling a decades-old circuit split, SCOTUS determined that Section 1782, which allows federal courts to issue subpoenas for use in arbitration, applies only to governmental or intergovernmental adjudicative bodies imbued with governmental authority to settle disputes. Thus, the Court held that neither an ad hoc UNCITRAL tribunal created by a Russian-Lithuanian bilateral investment treaty nor an arbitration governed by the German Institution of Arbitration (DIS) constituted a "foreign and international tribunal" within the meaning of Section 1782, precluding both from seeking discovery enforcement.[1]

In October 2022, Magistrate Judge Robert M. Levy of the Eastern District of New York ruled *In re Alpene, Ltd.* that an international arbitration arising out of a bilateral investment treaty between China and the Republic of Malta before the ICSID, although a dispute between nations, nevertheless failed to qualify as a proceeding before a "foreign and international tribunal" imbued with governmental authority under Section 1782.[2] Alpene, a Hong-Kong based corporation, commenced its treaty arbitration claim against Malta on August 30, 2021, seeking an order authorizing its subpoenas for documents and testimony from a New York resident. The court granted Alpene's request, but the New York citizen filed a motion to quash in light of the *AlixPartners* appeal. On reconsideration of the order to issue the subpoena in light of the *AlixPartners* decision, Judge Levy found "insufficient support for the argument that Malta and China intended to imbue the ICSID arbitration panel with governmental authority," thereby rendering the panel ineligible for discovery aid under Section 1782.[3] In arriving at this decision, Judge Levy applied factors gleaned from *AlixPartners*, including (1) whether the treaty reflected intent from either nation to empower the panel to exercise governmental authority; (2) the extent of the panel's affiliation with either nation; (3) the panel composition; (4) whether the chosen arbitrators had any official affiliation and government funding; and (5) the confidentiality of the proceedings.[4]

The *Alpene* treaty between China and Malta provided investors with three possible dispute resolution venues: a court of the appropriate party country, an ICSID panel, or an UNCITRAL panel. Applying SCOTUS' reasoning

in *AlixPartners*, Judge Levy concluded that the inclusion of the domestic court option undercut the contention that the other two panels possessed governmental authority.[5] The court also found instructive ICSID's status as an independent and self-contained system, its provision for arbitrator immunity, and its required fee payments that altogether served to demonstrate it lacked governmental authority.[6] Cutting the other way, the court did consider that members states could designate individuals to serve on the ICSID Panels of Arbitrators and Conciliators, ICSID's status as a permanent institution, and the fact that ICSID rulings are met with full faith and credit in party courts, but ultimately found those factors outweighed.

Indeed, deference to comity prevailed as Judge Levy concluded that granting the discovery requests by parties in arbitration before the ICSID would "promote assistance and cooperation between the United States and foreign countries." [7] Particularly when, as the court reasoned, the ICSID and investor-state arbitration generally did not yet exist when Section 1782 was amended to include "foreign or international tribunals" in 1964. This, coupled with the need to interpret Section 1782 in harmony with the Federal Arbitration Act (which forecloses parties in U.S. arbitrations from utilizing courts to compel discovery except in exceedingly narrow circumstances), led the court to conclude that the ICSID tribunal was not, in fact, imbued with sufficient governmental authority.

The final legacy of *AlixPartners* is far from solidified; few courts have yet to apply the decision. However, the *Alpene* decision may be an early indicator that Section 1782's application will be particularly limited as parties arbitrating under the auspices of ICSID — a direct body of the World Bank — could be foreclosed from availing themselves of Section 1782.

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[1] *AlixPartners, LLP v. Fund for Prot. of Investors' Rights in Foreign States,* 142 S. Ct. 638 (2021).

[2] *In re Alpene, Ltd.,* No. 21 MC 2547 (MKB)(RML), 2022 U.S. Dist. LEXIS 196061, at *4 (E.D.N.Y. Oct. 27, 2022).

[3] *Id.* at *11.

[4]*Id.* at *5 (*citing AlixPartners, LLP* at 2090).

[5] *Id.* at *6.

[6] *Id.* at *7-**8.

[7] *Id.* at *10-*11 (citations omitted).

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