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The United States Supreme Court Eliminated a Powerful Tool to Obtain Discovery from American Companies and Citizens for Use in International Arbitrations

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I. Introduction

On June 13, 2022, the Supreme Court of the United States issued its decision in two consolidated cases, *ZF Automotive U.S., Inc., et al. v. Luxshare, Ltd.*, No. 21-401 (the "ZF Automotive Case") and *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518 (the "AlixPartners Case"). This consolidated matter was closely followed by international arbitration practitioners and international arbitral institutions around the world. Each case concerned the scope of the phrase "foreign or international tribunal" as used in 28 U.S.C. Section 1782 ("Section 1782"), a U.S. statute enacted in 1964. In at least two circuits in the United States, Section 1782 had been used as a powerful tool to compel disclosure of evidence from American companies and citizens for use in international arbitrations. Several interested parties submitted "*Amicus Curiae*" briefs [1] to express their respective views on the issue, including the U.S. Government, as well as the International Arbitration Center in Tokyo ("IACT").

In a unanimous decision authored by Justice Amy Coney Barrett, the Court reversed the lower court decisions, and rejected the views expressed by many academics and institutions including the IACT. The Court held that Section 1782 could not be used to obtain evidence in the United States for use in international arbitrations, except in the limited circumstance where the tribunal exercised "governmental authority conferred by one nation or multiple nations."[2] Thus, Section 1782 can no longer be used by parties in international private commercial arbitrations, or most investor-state arbitrations.

II. Background

A. Section 1782

Section 1782, in pertinent part, states:

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

[1] *Amicus Curiae* is Latin for "friend of the court." In complex cases before the Supreme Court of the United States, distinguished academics, institutions, and others often submit such briefs to assist the Court in deciding complex issues and provide the perspectives of those with specialized knowledge on "matters that affect far more people than the immediate record parties." Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 947 (1954) (statement of Black, J.).

[2] *ZF Automotive U.S., Inc., et al. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355 (U.S. June 13, 2022) at *8.

> accusation. The order may be made . . . upon the application of any interested person . . .[3]

The current version of Section 1782, as set forth above, was enacted by the U.S. Congress in 1964. It was enacted following an analysis by the Commission on International Rules of Judicial Procedure (the "Commission"). This Commission was established by the U.S. Congress in 1958, and charged with improving the process of international judicial assistance. Before this current version, Section 1782 and its antecedents provided judicial assistance only to "foreign courts." In 1964, Congress replaced the term "foreign courts" with the phrase "foreign or international tribunal[s]" to expand its scope. This new phrase expanded the scope of Section 1782 to include foreign governmental and quasi-governmental tribunals. However, a debate arose—which was not settled until the Supreme Court's ruling in the ZF Automotive and AlixPartners cases, whether "foreign or international tribunal" additionally included private arbitral tribunals.

B. The Circuit Split

As the table below shows, between 1999 and 2020, a "Circuit Split" developed in the United States.[4] The Second, Fifth, and Seventh Circuits each ruled that an arbitral tribunal in a private commercial dispute was not a "foreign or international tribunal" under Section 1782. In contrast, the Fourth and Sixth Circuits each ruled that it was.

Time	Cir.	Ruling
Jan. 1999	2nd	a "private arbitral panel" was not a "foreign or international tribunal"[5]
Mar. 1999	5th	a "private international arbitra[l]" tribunal was not a "foreign or international tribunal"[6]
Sep. 2019	6th	"privately contracted-for arbitral bodies" were "foreign or international tribunal[s]"[7]
Mar. 2020	4th	a "private arbitral panel" was a "foreign or international tribunal"[8]
Jul. 2020	2nd	a private international commercial arbitra[l] panel was not a "foreign or international tribunal"[9]
Sep. 2020	7th	a private arbitral panel was not a "foreign or international tribunal"[10]

III. The Underlying Cases

A. *ZF Automotive U.S., Inc., et al., v. Luxshare, Ltd.*

The ZF Automotive Case involved a business transaction between (1) ZF Automotive US, Inc., a U.S. automotive parts manufacturer based in

[3] 28 U.S.C.A. § 1782 (emphasis added).
[4] There are 13 "Circuit Courts" in the United States, which are the intermediate appellate courts of the United States federal judiciary: Eleven circuits, numbered First through Eleventh, cover different geographic areas of the United States and hear appeals from the U.S. District Courts within their jurisdictions; additionally, the District of Columbia Circuit covers Washington D.C., and the Federal Circuit hears appeals from across the United States in certain specialized areas of law such as patent law.
[5] *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (C.A.2 (N.Y.), 1999).
[6] *Republic of Kazakhstan v. Biedermann Intern.*, 168 F.3d 880 (C.A.5 (Tex.), 1999).
[7] *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (C.A.6 (Tenn.), 2019).
[8] *Servotronics, Inc. v. Boeing Company*, 954 F.3d 209 (C.A.4 (S.C.), 2020).
[9] *In Re Guo*, 965 F.3d 96 (C.A.2 (N.Y.), 2020).
[10] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (C.A.7 (Ill.), 2020)..

Michigan, which was a subsidiary of a German corporation ("ZF"), and (2) Luxshare, Ltd., a Hong Kong-based company ("Luxshare"). ZF sold Luxshare two business units for almost a billion U.S. dollars. After the deal was concluded, Luxshare claimed that it had discovered that ZF allegedly concealed negative information about the business units. As a result of ZF's alleged concealment, Luxshare alleged it overpaid by hundreds of millions of U.S. dollars.

The parties had contractually agreed that all disputes would be "exclusively and finally settled by three arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS)."[11] Before initiating a DIS arbitration, Luxshare filed an ex parte application under Section 1782 in the U.S. District Court for the Eastern District of Michigan, seeking discovery from ZF and two of its senior officers, for use in the DIS arbitration.

The District Court granted the ex parte request. Luxshare then served subpoenas on ZF and its officers. ZF moved to quash the subpoenas, arguing, *inter alia*, that the DIS panel was not a "foreign or international tribunal" under Section 1782. ZF acknowledged, however, that the 6th Circuit had previously ruled otherwise. [12] Accordingly, the District Court rejected ZF's arguments, and ordered the requested discovery. On appeal, the Sixth Circuit denied ZF's request for a stay. ZF then filed a writ of certiorari, seeking to have the case heard by Supreme Court of the United States, which was granted.[13]

B. *AlixPartners, LLP, et al., v. The Fund for Protection of Investors' Rights in Foreign States*

The AlixPartners Case involved a dispute between Lithuania and a Russian investor in AB Bankas SNORAS ("Snoras"), a Lithuanian bank. After Snoras became unable to meet its obligations, Lithuania's central bank nationalized Snoras and appointed Simon Freakley, then the CEO of AlixPartners, LLP, a U.S. consulting firm based in New York, as a temporary administrator. Lithuanian authorities commenced bankruptcy proceedings and declared Snoras insolvent. The Fund for Protection of Investors' Rights in Foreign States (the "Fund"), a Russian corporation and the assignee of the Russian investor, claimed that Lithuania expropriated certain investments from Snoras in the bankruptcy proceedings.

A bilateral investment treaty between Lithuania and Russia provided that any dispute between Lithuania and a Russian investor, regarding an investment in Lithuania, shall be submitted to one of four specified dispute-resolution forums. The Fund chose "an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."[14]

After initiating arbitration, but before the selection of arbitrators, the Fund filed a Section 1782 application in the U.S. District Court for the Southern District of New York, seeking discovery from Mr. Freakley and AlixPartners, LLP about Mr. Freakley's role as temporary administrator of Snoras. The District Court granted the Fund's discovery request.

[11] *ZF Automotive U.S., Inc., et al. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355 (U.S. June 13, 2022) at *3.
[12] *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (C.A.6 2019).
[13] Parties do not have automatic rights to be heard by the Supreme Court of the United States. Instead, they must file a petition—known as a "writ of certiorari"—to request that the Supreme Court does so. Typically, such requests are not granted unless the case if found to have national significance, or might harmonize conflicting decisions in the federal Circuit courts. The Supreme Court accepts approximately 100-150 of the more than 7,000 cases that it is asked to review each year.
[14] *ZF Automotive U.S., Inc., et al. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355 (U.S. June 13, 2022) at *4.

AlixPartners, LLP then appealed to the Second Circuit.

Notably, unlike the Sixth Circuit in the ZF Automotive Case, the Second Circuit had previously held that a privately contracted-for arbitral panel was not a "foreign or international tribunal" under Section 1782.[15] In the AlixPartners Case, however, the Second Circuit applied a multifactor test to determine whether the arbitral panel at issue had any affiliation with foreign states. The Second Circuit highlighted the bilateral treaty between Lithuania and Russia that "expressly contemplated" the ad hoc arbitration format, and held that it had a public affiliation. As a result, the Second Circuit found that the arbitral panel at issue qualified as a "foreign or international tribunal" under Section 1782, and affirmed the lower court's order to compel discovery. AlixPartners then filed a writ of certiorari. The Supreme Court granted the writ and consolidated both cases to be heard together.

IV. The Supreme Court Appeal

A. The Petitioners

Petitioners ZF Automotive and Alix Partners each made similar arguments in support of their respective positions that the arbitral tribunals in their respective cases were not "foreign or international tribunal[s]" under Section 1782.

First, the Petitioners made textual arguments. They argued that the ordinary meaning of the phrase "foreign or international tribunal" as used in Section 1782 has governmental connotations. Thus, they argued that such tribunals included only governmental or quasi-governmental adjudicative bodies, and not private arbitral tribunals or non-governmental arbitration panels.[16] For example, ZF Automotive argued that "a 'foreign tribunal' is the tribunal of a foreign government, just as a 'foreign leader' is the leader of a foreign government."[17] By contrast, while "the captain of the Manchester United football team is foreign and is a leader," he is "not a foreign leader" as that term is ordinarily used in America.[18]

Second, the Petitioners made legislative history arguments. The U.S. Congress enacted Section 1782 to promote international comity by providing discovery assistance to foreign governments, as stated in congressional documents that preceded the statute. This goal, Petitioners argued, would not be obtained by providing discovery assistance to private and non-governmental arbitral tribunals. Moreover, as Alix Partners argued, bilateral investment treaties—like the one at issue in its case—"did not even exist" when Section 1782 was enacted in 1964.[19]

Third, the Petitioners made various policy arguments. For example, ZF Automotive argued that interpreting Section 1782 broadly to include private arbitral tribunals would "undermine[] the goals of arbitration" because U.S. discovery often leads to a burdensome and time-consuming process contrary to the objectives of arbitration to provide an efficient dispute resolution forum.[20] ZF Automotive further argued that applying Section 1782 to private arbitration would "asymmetrically disadvantage[] American citizens and American businesses" who would be subject to broader discovery obligations than their foreign counterparts.[21] Alix Partners emphasized that applying Section 1782 to non-governmental arbitrations would create tension

[15] *See National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* 165 F.3d 184 (2d Cir. 1999); *In Re Guo*, 965 F.3d 96 (2d Cir. 2020).
[16] *See, e.g.*, Brief for Petitioners ZF Automotive, Jan. 24, 2022, at 14; Brief for Petitioners Alix Partners, Jan. 24, 2022, at 13-14.
[17] Brief for Petitioners, ZF Automotive, Jan. 24, 2022, at 20-21.
[18] Oral Argument, Mar. 23, 2022, at 8:6-11 (Martinez).
[19] *Id.*, at 14.
[20] Oral Argument, Mar. 23, 2022, at 20:8-14, 21:1-5, 22:16-23 (Martinez).
[21] *Id.*

with the Federal Arbitration Act ("FAA"), which it claimed provided a more limited document exchange procedure in U.S. domestic arbitration.[22]

B. The U.S. Government

The U.S. government, through the Solicitor General's Office, sought and was granted permission to participate in the appeal, including at oral argument, as an interested party. The U.S. government argued that it had a substantial interest in the resolution of this appeal because Section 1782 "plays an important role in encouraging international cooperation, facilitating the resolution of disputes in foreign governmental and intergovernmental tribunals, and fostering international comity."[23] The U.S. government supported the Petitioners' position and agreed with and reiterated their textual, legislative history, and policy arguments.[24]

At oral argument, Chief Justice John Roberts observed that the U.S. Government was supporting "two very different petitioners or at least [two petitioners] with quite distinct status," given that the ZF Automotive Case involved a purely private arbitration, whereas the AlixPartners Case involved a bilateral investment treaty among "sovereign nations."[25] Edwin Kneedler, Deputy Solicitor General, who argued on behalf of the U.S. Government, responded that he did not see any significant difference in the two cases. He explained that neither the private arbitral tribunal in the ZF Automotive Case nor the ad hoc tribunal in the AlixPartners Case should be considered a "foreign or international tribunal" because they were both "fundamentally" "the same" in that each was formed by arbitrators selected by the parties in proceedings initiated by the parties' agreement.[26]

The U.S. Government also emphasized that "Arbitration is something very different" than a proceeding before a governmental body," and that applying Section 1782 to the former did not comport with the underlying goal of Section 1782, *i.e.*, international comity.[27] According to Mr. Kneedler, "There's no comity relationship that is being served," and the United States is not "getting anything by way of comity in return," by allowing its District Courts to be used for discovery in foreign arbitrations established by the "agreement of two parties."[28]

C. The Respondents

Respondents Luxshare, Ltd. and The Fund made similar arguments in support of their respective positions that the arbitral tribunals in their respective cases were "foreign or international tribunal[s]" under Section 1782.

First, Respondents countered the Petitioners' textual arguments. For example, Luxshare, Ltd. argued that the operative phrase "foreign tribunal" should be interpreted to include arbitral tribunals based on the "ordinary" meaning of the words "foreign" and "tribunal." Relying on Black's Law Dictionary, among other sources, it argued that "foreign" means "of, relating to, or involving another country," and "tribunal" means "a court of justice or other adjudicatory body." Thus, Luxshare, Ltd. concluded that the phrase "foreign tribunal" should be interpreted to include foreign arbitral tribunals because nothing in the definitions of the two words, foreign and tribunal, precluded such a tribunal.

[22] Brief for Petitioner Alix Partners, Jan. 24, 2022, at 15.
[23] Motion of the United States as Amicus Curiae Supporting Petitioners for Leave to Participate, Feb. 4, 2022, at 4.
[24] Brief of United States, Jan. 31, 2022, at 12-14.
[25] Oral Argument, Mar. 23, 2022, at 52:22-54:4 (Kneedler).
[26] Oral Argument, Mar. 23, 2022, at 53: 5-17 (Kneedler).
[27] Oral Argument, Mar. 23, 2022, at 58:23-59:4 (Kneedler).
[28] Oral Argument, Mar. 23, 2022, at 6:10-18 (Martinez).

Second, Respondents countered the Petitioners' arguments based on legislative history. According to Luxshare, Ltd., U.S. Congress convened the Commission that led to the enactment of Section 1782 due to the "growth of international commerce," and "by the second half of the twentieth century," private international commercial arbitration was a popular, well-established part of disputes involving international commerce.[29] Likewise, the Fund argued that Section 1782 evidences an intent by U.S. Congress to expand, not limit, the application of the statute to various types of international tribunals, including arbitral tribunals.

Third, Respondents countered the Petitioners' various policy arguments. For example, Luxshare, Ltd. argued that permitting parties to use Section 1782 to obtain discovery in international arbitrations would promote international arbitration, which it argued is a favorable dispute resolution process. Luxshare, Ltd. also argued that its interpretation of Section 1782 would not overburden U.S. courts because discovery disputes are typically resolved quickly. And the Fund argued that the application of Section 1782 to arbitration would not disadvantage American companies and citizens, because they too could use Section 1782 to obtain discovery in international arbitration proceedings.[30]

D. The IACT

The IACT was organized in 2018 by the Japanese Patent Office to provide a forum for arbitrations and mediation of international disputes involving commerce and technology. It has particular expertise in legal areas that include intellectual property and the commercial aspects of research, development, trade, and innovation. The IACT submitted an amicus curiae brief that states that it supports "neither party." However, the IACT presented arguments most closely aligned with the positions of Luxshare, Ltd., including that Section 1782 should be applied to private international arbitration. In support, it presented two principle arguments.

First, the IACT argued that the application of Section 1782 should not depend on the nature of the tribunal. According to the IACT, such a standard will lead to inconsistent results because it is difficult to distinguish between tribunals that are private as opposed to quasi-governmental. Instead, the IACT argued that Section 1782 should be applied to all international arbitral proceedings. Indeed, the IACT noted that even private arbitral tribunals depend upon sovereign, *i.e.*, governmental, support and involvement.

Second, the IACT argued that applying Section 1782 to all international arbitral proceedings would not render Section 1782 without limits. This is because the statute provides U.S. District Courts with discretion to fashion appropriate relief. The IACT further argued that a U.S. District Court could, thus, be guided by the receptivity of the foreign tribunal to the request for discovery, including whether the materials requested would be used in the foreign proceeding.

Notably, at oral argument before the Supreme Court on March 23, 2022, Justice Stephen Breyer (one of the most senior justices on the Court) expressly referred to the IACT's amicus brief three times, more than any of the other six amicus briefs submitted.

In response to Petitioner's oral argument that parties might exploit Section 1782 if it was held to apply to private arbitration, Justice Breyer stated that the IACT had successfully rebutted this by arguing that District Courts could simply

[29] Brief of Respondent Luxshare, Ltd., Feb. 23, 2022, at 33 (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

[30] Oral Argument, Mar. 23, 2022, at 93:9-16 (Yanos).

permit discovery only if the foreign tribunal "says it wants it."[31] Justice Breyer later referred to the IACT as an "expert" on the issue of the burden that would be imposed by applying Section 1782 to private arbitrations.[32]

V. The Supreme Court's Decision

Justice Amy Coney Barrett delivered the unanimous opinion of the Court on June 13, 2022. It concluded that the phrase "foreign or international tribunal" as used in Section 1782 includes only governmental or intergovernmental bodies, and that neither of tribunals in the cases at issue qualified as such. In support, it presented four grounds.

First, the Supreme Court analyzed the linguistic meaning of the phrase "foreign or international tribunal." The Court stated that the terms "tribunal" and "foreign" should be interpreted together (and not separately, as Respondents had argued), and found that the word "foreign" takes on a governmental meaning when used to modify a word with a potential governmental connation. The Court then found that "tribunal" is such a word. Thus, it found that the term "foreign tribunal" "more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation."[33] Further, the Court found that a tribunal is "international" "when it involves or is of two or more nations."[34] Taken together, the Supreme Court ruled that the terms "foreign tribunal" and "international tribunal" "complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations."[35]

Second, the Supreme Court reviewed the legislative history of Section 1782 and found that it confirmed that the phrase "foreign or international tribunal" means a governmental or intergovernmental tribunal. The Court emphasized that Section 1782 was created when the U.S. Congress adopted the Commission's proposed legislation, which had a focus on improving the process of foreign judicial assistance. Specifically, the Commission was charged with "improving the process of judicial assistance, specifying that the 'assistance and cooperation' was '*between the United States and foreign countries*' and that 'the rendering of assistance *to foreign courts and quasi-judicial agencies*' should be improved."[36]

Third, the Court addressed the purpose of Section 1782, which was comity, and concluded that enlisting District Courts to help private bodies would not serve that end. The Court stated that a broad reading of Section 1782 would allow any interested person to seek discovery before any private adjudicatory body, which may potentially include "everything," such as a university's student disciplinary tribunal."[37]

Finally, the Court compared Section 1782 to the FAA, which governs domestic arbitration in the United States, and found that excluding private bodies from the scope of Section 1782 would remove any "significant tension with the FAA."[38] The Court explained that the FAA and Section 1782 would be in conflict if Section 1782 allowed private bodies to have broader discovery than allowed by the FAA. Among other things, the Court noted that the FAA allows only the arbitration panel (and not parties) to request discovery, whereas Section 1782 permits any "interested person" to make the request. Moreover, the FAA does not permit pre-arbitration discovery, but Section 1782 does.[39]

[31] Oral Argument, Mar. 23, 2022, at38:6-9 (Breyer).
[32] Oral Argument, Mar. 23, 2022, at39:23-40:3 (Breyer).
[33] *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at *6 (U.S. June 13, 2022).
[34] *Id.*
[35] *Id.*, at *7.
[36] *Id.* (emphasis in original).
[37] *Id.*
[38] *Id.*
[39] *Id.*, at *7.

The Court then reviewed the nature of the arbitral tribunals in the two cases. With respect to the ZF Automotive Case, it concluded that the tribunal does not qualify as a governmental body. Indeed, in that case, private parties had agreed in a private contract that DIS, a private dispute resolution organization, would arbitrate any dispute between them. As for the AlixPartners Case, the Court stated that it presented a harder question because a sovereign, *i.e.*, Lithuania, was on one side of the dispute, and the option to arbitrate was contained in an international treaty rather than a private contract. According to the Court, however, neither Lithuania's presence nor the treaty's existence made the arbitral tribunal at issue a governmental body. The Court reviewed the intent of Russia and Lithuania in including in their treaty an option to have disputes resolved by private ad hoc arbitration. The Court found that this treaty reflected the two countries' intent to offer investors the "potentially appealing option of bringing their disputes to a private arbitration panel that operates like commercial arbitration panels do."[40]

Accordingly, the Court reversed the lower courts, finding that Section 1782 was not properly used in those cases to obtain discovery.

VI. Possible Implications for Japanese Parties

The Court's holding has various potential implications for Japanese parties in international arbitrations. For example, Japanese parties will no longer be able to use Section 1782 as a tool to obtain evidence from companies and citizens in the United States. By converse, Japanese parties no longer need to be concerned that its American affiliates and/or American executives and employees will be subject to discovery obligations pursuant to Section 1782. Additionally, Japanese parties involved in disputes of a public nature may be unsure whether Section 1782 applies. Indeed, the Court did not extensively define what constituted a "governmental or intergovernmental tribunal" for purposes of Section 1782. The Court left open the possibility that such adjudicatory bodies may be found in investor-state disputes, proceedings initiated by governmental authorities, and the like. Details of what would form a "foreign or international tribunal" will have to be addressed further when an actual dispute arises in the future.

[40] *Id*., at *9.