No. 21-518

In the Supreme Court of the United States

ALIXPARTNERS, LLP ET AL.,

Petitioners,

v.

THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent concedes that "[t]here is a decided split in the circuits" (Opp. at 8) regarding the meaning of the phrase "foreign or international tribunal" in 28 U.S.C. § 1782 as applied to foreign arbitral proceedings. And respondent does not dispute that the issue continues to warrant this Court's review following the dismissal of *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794. Respondent nonetheless contends that the petition should be denied because one of the parties to the foreign arbitration at issue here is a sovereign state, which consented to appear before an ad hoc arbitral forum via a bilateral investment treaty.

When it comes to explaining *why* "the facts of this case do not relate to the subject causing the split among the lower courts" (Opp. at 6), respondent offers precious little reasoning. The bulk of respondent's argument reduces to repeated conclusory assertions that, when a foreign state agrees in a treaty to submit a commercial dispute with a private party to ad hoc arbitration, that "inextricably infuses" (Opp. at 21) the arbitral panel with unspecified qualities that render it a "foreign or international tribunal." The lack of analysis in the brief in opposition mirrors the decision below and illustrates the urgent need for this Court's guidance on the meaning of Section 1782—particularly in the context of investor-state arbitration. At the very least, this Court should grant the petition alongside *ZF Automotive US, Inc. v. Luxshare, Ltd.* No. 21-401.

A. This Case Squarely Implicates The Acknowledged Circuit Conflict

Respondent repeatedly observes that *Servotronics* and several conflicting lower-court cases involved arbitration between two private parties, rather than, as here, between a private individual and a foreign state. *See, e.g.,* Opp. at 1, 5–6, 8–12, 17–19. That is hardly a revelation. The petition acknowledged as much and explained why "[t]he fact that this case arises in the context of an investor-state arbitration . . . presents the conflict in a particularly compelling posture." Pet. at 18; *see also id.* at 18–21.

Respondent fails to confront the petition's reasoning on that crucial point. Respondent does not dispute that "[t]he Fifth and Seventh Circuits have held that an arbitral body is not a 'foreign or international tribunal' unless it actually *wields* governmental or quasi-governmental authority." Pet. at 11–12 (emphasis in original). Nor does respondent deny that the Fourth Circuit reached the contrary result by refusing to "analyze the functional attributes of the arbitral tribunal, such as whether it possessed governmental authority akin to judicial, quasi-judicial, or other public bodies." *Id.* at 14. And respondent does not dispute that the Sixth Circuit has taken "an even more permissive view," holding that Section 1782 reaches "'*all* arbitral panels that are 'established pursuant to contract' and have 'the authority to issue decisions that bind the parties.'" *Id.* (emphasis in original); *see* Opp. at 10 (quoting same). Respondent offers the *ipse dixit* that the "Tribunal in this case was not constituted pursuant to a private law contract," but makes no attempt to explain why that distinction matters. *Id.*

Nor, significantly, does respondent dispute that the Second Circuit's decision below "afforded dispositive significance to the arbitral panel's governmental origins but no weight to its actual operation." Pet. at 15. As the petition explained (*id.* at 15–16), despite applying a nominally "multi-factor" balancing test, the decision below dismissed the undisputed facts that the arbitral panel "functions independently" from any government; that the arbitrators "(two arbitration lawyers and a law professor)" have zero "affiliation with . . . any . . . governmental or intergovernmental entity"; that "the panel receives zero government funding"; and that the ability of a foreign state to "influence or control" the outcome of the proceeding is "non-existent." Pet. App. at 17a–18a. All that mattered was the fact that Lithuania provided its consent to ad hoc arbitration via a treaty. Indeed, respondent fully *embraces* that conclusion, repeatedly asserting that the arbitral body was "*constituted* pursuant to treaties pursuant to treaties signed by two or more sovereign nations." Opp. at 6 (emphasis added); *see also, e.g., id.* at 1, 2, 6, 8, 9, 11, 12, 13, 14, 16, 17, 22 (repeating mantra that ad hoc arbitration was "constituted" by treaty).

Therein lies the crux of why—contrary to respondent's assertions—this case directly implicates the conflict as to what the term "foreign or international tribunal" means in Section 1782. As respondent, the decision below, and as the Fourth and Sixth Circuits would have it, any consideration of how an arbitral panel functions or the nature of the authority it wields is categorically *irrelevant*. The Fifth and Seventh Circuits, by contrast, reject the notion that the mere "imprimatur of a foreign government" is sufficient, *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d

880, 882 (5th Cir. 1999), and instead require that the tribunal "exercise governmental or quasi-governmental authority," *Servotronics, Inc. v. Rolls-Royce, PLC*, 975 F.3d 689, 693 n.2 (7th Cir. 2020).

Indeed, despite insisting that application of Section 1782 to investor-state cases "has nothing to do with the circuit split," (Opp. at 1) respondent tacitly concedes that the Fifth Circuit's decision in *Biedermann* involved arbitration contemplated by a bilateral investment treaty. Respondent claims that *Biedermann* "failed to engage in any analysis of the difference between private contract-based arbitrations and those rooted in treaties," (*id.* at 12 n.4) **but that *is* the conflict**: The Fifth and Seventh Circuits consider the nature of the arbitral forum's authority and actions, not merely the method of one party's consent or a government's "imprimatur" on arbitration generally. Accordingly, respondent's contention that "[c]ourts have uniformly agreed" that investor-state arbitration cases fall within Section 1782 is incorrect.

Similarly, respondent cites a string of lower court decisions (Opp. at 7 & n.2) that illustrate exactly why the Section 1782 analytical conflict matters enormously in the context of investor-state arbitration. Most notably, respondent lumps "arbitrations conducted . . . by the ICSID" together with ad hoc arbitrations of various other stripes. *Id.* ICSID—*i.e.*, the International Centre for Settlement of Investment Disputes—is an intergovernmental organization established by a treaty ratified by 154 member states that wield significant influence over the body generally as well as the outcomes of particular disputes. For example, each ICSID member state is

entitled to appoint four individuals to serve on ICSID's Panel of Arbitrators.[1] If a party seeks to annul an ICSID award, the ICSID Chairman is required to appoint a new three-person panel from the Panel of Arbitrators, and that panel has "authority to annul the award or any part thereof."[2] Under the rationale adopted below, however, any analysis of whether ICSID arbitral proceedings fall within Section 1782 would begin and end with the fact that member states have signed a treaty. Thus, to the extent lower courts have read Section 1782 to reach investor-state arbitrations, they have painted with the same overbroad brush that courts have used in applying the statute to arbitration between two private parties.

As the petition explained (Pet. at 17–18), the United States has recognized that investor-state arbitration is inextricably bound up in the Section 1782 conflict because "[t]he analytical approaches to Section 1782 followed by some lower courts would likewise appear to encompass investor-state arbitration." *Servotronics*, Brief for the United States as *Amicus Curiae* Supporting Respondents ("U.S. Br.") at 28. Moreover, the United States has expressed "particular concern" with such a result, and singled

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[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), arts. 12–14.

[2] *See* ICSID Arb. Rule 51 ("Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention."); ICSID Convention Art. 52(3) ("The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).").

out the quixotic multi-factor test applied by the Second Circuit for criticism. U.S. Br. at 15; Pet. at 17.

Respondent nonetheless dismisses the position of the United States with a single sentence: "[T]he United States did not identify any circuit court decisions that agreed with its conclusion and did not explain why its concern vitiated the plain language of a duly enacted statute." Opp. at 14. Tellingly, however, respondent does not dispute that, as the United States explained, the reading of Section 1782 urged by petitioner and its amici in *Servotronics* would have compelled application of the statute to investor-state arbitrations. Notwithstanding respondent's blithe disregard for the avowed position of the United States, application of Section 1782 to investor-state arbitration is not "tangential" to the acknowledged and widespread conflict; it is part and parcel of it.

B. This Case Should Be Granted Instead Of, Or In Addition To, *ZF Automotive*

Respondent denies that this case represents a superior vehicle to *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401. The bulk of respondent's attention is directed at whether *ZF Automotive* is likely to become moot before this Court could render a decision. That concern appears to have been obviated by Justice Kavanaugh's October 27 order granting a stay, coupled with certain representations by petitioners in that case. *See* Reply Br. for Petitioner at 8–10, *ZF Automotive US, Inc. v. Luxshare, Ltd.* No. 21-401 (Oct. 22, 2021). Accordingly, it is not necessary to address respondent's speculation as to whether that case could fall within the "'capable of repetition, yet evading review'" exception to mootness. Opp. at 18

(citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016)).

Respondent also claims that *ZF Automotive* is "a proper case already seeking review from the Court" (Opp. at 18), but fails to mention that petitioners there seek the extraordinary relief of certiorari before judgment. Nor does respondent acknowledge that, on November 4 (four days before respondent filed its brief in opposition), the Sixth Circuit denied the *ZF Automotive* petitioners' motion for summary affirmance.

Respondent's omission may reflect a desire to avoid acknowledging *why* the Sixth Circuit denied the motion. The Sixth Circuit explained that, in addition to its general aversion to summary disposition, "there is already another petition for certiorari pending in the Supreme Court raising this issue that has been fully exhausted in the lower courts. *See AlixPartners, LLP v. Fund for Prot. of Inv. Rights in Foreign States*, No. 21-518." *Luxshare, Ltd. v. ZF Automotive US, Inc.* No. 21-2736, Dkt. 39-2, at 1–2 (6th Cir. Nov. 4, 2021). This acknowledgement—by a court of appeals that *agrees* with petitioner's expansive view of Section 1782, no less—eviscerates whatever is left of respondent's assertion that this case does not implicate the Section 1782 conflict.

At the very least, the Court should grant this petition alongside *ZF Automotive*. Respondent does not dispute that, as the petition explained (Pet. at 20), whether Section 1782 reaches investor-state arbitrations is a particularly important issue. And respondent acknowledges that the United States in *Servotronics* argued that extending Section 1782 "'into

streamlined investor-state arbitrations could undermine the efficiency and cost-effectiveness of those mechanisms.'" Opp. at 13–14 (quoting U.S. Br. at 32). Respondent offers no response to this concern, nor does respondent otherwise contest the importance of the question presented as applied to investor-state arbitrations.

This Court should have the benefit of full briefing on that application of the statute, rather than compressed side-arguments on such an important issue. Indeed, as a leading arbitration think tank argues as *amicus*, granting certiorari in both cases would "eliminate any speculation as to how the ruling in one case impacts the facts presented in the other case." Int'l Inst. for Conflict Prevention & Resolution Mot. for Leave & Br. 18. The petitioners in *ZF Automotive* appear to agree. In their supplemental brief to this Court, petitioners acknowledged the Sixth Circuit's statement that *this* petition presents a proper vehicle in which to address the Section 1782 issue. After restating their view that this petition "would not necessarily resolve the issue in [*ZF Automotive*]," petitioners suggested that "if the Court wants to clarify the meaning of Section 1782 in the context of investor-state relationships, it should grant the *AlixPartners* petition in addition to—not instead of—[*ZF Automotive*]." Supp. Br. for Petitioner at 2 n.1, *ZF Automotive US, Inc. v. Luxshare, Ltd.* No. 21-401 (Nov. 8, 2021). Thus, while there is not a consensus as to which vehicle is superior, petitioners in both cases recognize that granting both petitions would make sense. The United States presumably agrees, given its

decision in *Servotronics* to brief Section 1782's application in both contexts at length.[3]

C. Respondent's "Plain Language" Argument Rests On Unsupported Assumptions

Respondent contends that the result reached below is "dictate[d]" by the "plain language of Section 1782." Opp. at 14. Respondent's textual argument, however, rests on at least two unsupported assumptions. First, respondent assumes that, if a sovereign consents to ad hoc arbitration via a treaty, then the arbitral panel becomes "a tribunal *constituted* pursuant to an intergovernmental agreement." *Id.* (emphasis added). But the ad hoc arbitral panel here was "constituted" just like any other ad hoc arbitral panel under the UNCITRAL rules—by the consent of both parties. Such panels routinely hear commercial disputes between two private parties under the same rules and conditions. The only difference here is the title of one party in the caption.

Second, and in any event, respondent assumes that no inquiry into the composition, nature, or powers of the arbitral panel is necessary—all that matters is that it was "constituted" by a treaty "for the resolution of disputes." *Id.* As explained in the

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[3] Respondent does not directly answer petitioners' alternative suggestion that, if this Court grants only *ZF Automotive*, this petition should be held pending a merits decision in that case. Pet. at 23 n.16. While respondent no doubt believes that investor-state arbitrations *should* fall within Section 1782 regardless of whether arbitrations between two private parties do, respondent does not contend that this Court's decision in *ZF Automotive* could not possibly require reexamination of the decision below. Nor could respondent credibly make such a claim, because this Court would be interpreting the very same statutory phrase.

petition, however, that view does not comport with the recognized understanding that Section 1782 was intended to reach "'a standing *governmental* body,'" not merely a body that acquires jurisdiction over a commercial dispute with a sovereign government. Pet. at 24 (quoting U.S. Br. at 19) (emphasis in original).

Respondent recounts (some of) Section 1782's legislative origins, concluding that the phrase "foreign or international tribunal" was based on a predecessor statute that "applied solely to *intergovernmental* agreements." Opp. at 16 (discussing 22 U.S.C. §§ 270-270g). Respondent then observes that "[b]ilateral investment treaties are, of course, intergovernmental agreements," and that it "[t]herefore" follows that "tribunals constituted pursuant to such intergovernmental agreements clearly fall within the definition of 'international tribunal.'" Opp. at 16. Yet again, respondent's singular focus on what it means to "constitute" a panel rests on the same erroneous and unsupported assumptions discussed above.

D. Respondent Embraces The Second Circuit's Idiosyncratic Focus On The Form Of Consent To Ad Hoc Arbitration

Respondent's defense of the Second Circuit's purportedly "multi-factor" approach merely rehashes that court's myopic analysis. As noted above, respondent does not dispute that the Second Circuit afforded dispositive significance to the fact that Lithuania's consent to arbitrate was granted in a treaty. *See also* Pet. at 2–3. Nor does respondent dispute that the Second Circuit's mode of analysis differs from that adopted by any other court of appeals interpreting Section 1782. Nonetheless, respondent doubles down on this idiosyncratic rationale,

asserting that "the Treaty inextricably infuses the States' authority into the arbitral tribunal." Opp. at 21. But respondent does not explain how that supposed "infus[ion]" transforms an ad hoc arbitral panel, which is composed of private arbitrators and operates completely freely of state oversight or control, into a "foreign or international tribunal" as that term was used in Section 1782.

Respondent acknowledges that "'private parties must likewise consent to binding arbitration.'" Opp. at 20 n.10 (quoting Pet. at 15–16 n.10). Respondent asserts, however, that a sovereign state's consent "hardly compares to a private individual's consent to arbitrate." Opp. at 20 n.10. Other than repeating its refrain that "[t]he former infuses sovereign authority of the State while the latter simply defines the rights of a single private individual," (*id.*) however, respondent's claim is unexplained and unsupported. If respondent's position is that *any* proceeding to which a sovereign consents is a "foreign or international tribunal" under Section 1782, such an expansive position is especially worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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