

IN THE SUPREME COURT OF THE UNITED STATES

Nos. 21-401 and 21-518

ZF AUTOMOTIVE US, INC., ET AL., PETITIONERS

v.

LUXSHARE LTD.

ALIXPARTNERS, LLP, ET AL., PETITIONERS

v.

THE FUND FOR PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND SECOND CIRCUITS

MOTION OF THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS
FOR LEAVE TO PARTICIPATE IN, FOR ENLARGEMENT OF,
AND FOR DIVIDED ORAL ARGUMENT

Pursuant to Rules 21, 28.3, 28.4, and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in oral argument in these consolidated cases as amicus

curiae in support of petitioners, that the United States be allowed 15 minutes of argument time, and for enlargement of argument time. Petitioners consent to this request, and respondents do not oppose it. The parties have also jointly moved for divided argument and to enlarge the time for argument by ten minutes for each side, for a total of 80 minutes. The United States supports the parties' request for enlargement and requests that the time be allotted as follows: 25 minutes for petitioners, divided between them as they propose; 15 minutes for the United States; and 40 minutes for respondents, divided between them as they propose.

1. These cases concern 28 U.S.C. 1782, which is the culmination of "congressional efforts," dating back more than 165 years, "to provide federal-court assistance in gathering evidence for use in foreign tribunals." Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004). Prior to 1964, Section 1782 and its precursors authorized such assistance only in connection with proceedings in courts of foreign countries. E.g., 28 U.S.C. 1782 (1958); Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630.

In 1964, Congress amended Section 1782 to make such discovery assistance available "for use in a proceeding in a foreign or international tribunal." Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a) (1964)). Congress adopted that revision at the recommendation of a Commission on International Rules of Judicial Procedure that Congress had

created and charged with (inter alia) proposing legislation to “improve[]” “the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies.” Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743. “Congress understood that change to provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.” Intel, 542 U.S. at 258 (brackets, citation, and internal quotation marks omitted). The revision also brought within Section 1782’s scope proceedings before certain “intergovernmental tribunals,” such as state-to-state claims commissions, that previously had been addressed by separate statutes, which the 1964 legislation repealed. National Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2d Cir. 1999) (discussing 22 U.S.C. 270-270g (1958)); see id. at 189 n.5.

These cases concern whether Section 1782 authorizes a district court to order the production of testimony or other evidence for use in an ad hoc arbitration, before a nongovernmental arbitral panel, to which the parties have consented. In No. 21-401, the question arises in the context of a request for discovery for use in a private commercial arbitration. In No. 21-518, the question arises in the context of a request for discovery for use in an investor-state arbitration before a private, ad hoc arbitral panel, between an investor who elected that forum and a foreign host state that had consented in a treaty to such arbitration.

2. The United States has a substantial interest in the resolution of that question in each of the contexts these cases present. 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. The United States utilizes Section 1782 to facilitate the execution of letters rogatory and other requests for evidence. The application of Section 1782 to investor-state arbitrations is a matter of particular concern to the United States, which is a party to many international agreements that authorize investor-state arbitration.

The United States previously presented oral argument as amicus curiae in the only previous case this Court has decided addressing the scope of Section 1782, see Intel, supra (No. 02-572), and, as a party, has addressed the application of Section 1782 in another case pending before the Court, see U.S. Br. at 42-49, United States v. Husayn, No. 20-827 (argued Oct. 6, 2021); U.S. Reply Br. at 21-24, Husayn, supra. In addition, the United States was granted leave to participate in oral argument in a case scheduled for argument earlier this Term presenting the same question as these cases in the context of a private commercial arbitration, Servotronics, Inc. v. Rolls-Royce PLC, 141 S. Ct. 2886 (2021) (No. 20-794), and the Court sua sponte enlarged the argument time in that case and allotted 15 minutes to the United

States, Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794 (Aug. 23, 2021). Prior to oral argument in Servotronics, however, that case was dismissed pursuant to this Court's Rule 46. 142 S. Ct. 54 (2021).

In these cases, the United States has filed a brief as amicus curiae in this Court supporting petitioners, contending that Section 1782 authorizes discovery assistance only in aid of a proceeding before a governmental body, and the phrase "proceeding in a foreign or international tribunal," 28 U.S.C. 1782(a), does not encompass arbitration, before a nongovernmental panel, to which the parties have consented, whether that consent is manifested in a contract or in a treaty or other international agreement. In light of the substantial federal interest in the scope of Section 1782, the government's participation in oral argument could materially assist the Court in its consideration of these cases.

Respectfully submitted.

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