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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JOHN B. PINNEY
Counsel of Record
ROULA ALLOUCH
JOHN C. GREINER
GRAYDON HEAD & RITCHEY LLP
312 Walnut Street, Ste. 1800
Cincinnati, OH 45202
(513) 629-2730
jpinney@graydon.law

Counsel for Amicus Curiae

November 5, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE BRIEF OF THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The International Institute for Conflict Prevention & Resolution, Inc. ("CPR") moves for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari filed herein by AlixPartners, LLP, and Mr. Simon Freakley (hereinafter collectively "AlixPartners.").

Although petitioner's counsel of record has consented to this filing of this amicus brief, respondent's counsel has not.[1] Respondent's counsel asserted that his client did not believe that CPR had sufficient interest in the question of the applicability of Section 1782 to investor-state arbitrations to warrant submission of an amicus brief by CPR.

INTEREST OF AMICUS CURIAE

As stated in its proposed amicus brief, CPR is an independent, 501(c)(3) not-for-profit organization formed in 1977, among other things, to identify alternatives to litigation and resolve legal conflicts more effectively and efficiently. The mission of CPR is to manage conflict to enable purpose. CPR does this by

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[1] In accordance with Rule 37(2)(a), the undersigned counsel of record for CPR notified counsel for both petitioner and respondent of CPR's intent to file an amicus brief in support of petitioner's petition for a writ of certiorari more than ten days prior to the due date of this brief.

spearheading innovation and promoting excellence in dispute prevention and resolution through two arms: the CPR Institute and CPR Dispute Resolution.

The CPR Institute is a think tank whose members include arbitrators, mediators, companies, law firms, government practitioners, and academics, and who share best practices and develop innovative tools and resources for dispute prevention and resolution.

CPR Dispute Resolution provides neutrals for and administers ADR proceedings, such as arbitration, mediation, early neutral evaluation, dispute review boards and minitrials. CPR's arbitrators and mediators conduct arbitrations and mediations pursuant to the rules, procedures and protocols generated by the CPR Institute.

As both a global thought leader in conflict management and as an administrator of international arbitrations, CPR has a strong interest in ensuring the continued use, efficiency and effectiveness of international arbitration. Specifically, the CPR Institute has members who engage in arbitration throughout the world. CPR Dispute Resolution itself is an administrator of international arbitrations, with about one-quarter of the 600-plus members of its Panel of Distinguished Neutrals being located outside of the United States. Consequently, the question of whether U.S. district courts may entertain applications for judicial assistance in obtaining evidence for presentation in arbitral proceedings before international tribunals is one of great relevance to CPR and its constituents.

CPR has great concern that the current circuit split regarding the availability of 28 U.S.C. § 1782(a) for discovery before international arbitral tribunals undermines CPR's goal of fostering efficient and effective resolution of cross-border business disputes through international commercial arbitration. The uncertainty whether Section 1782 discovery for use in an international arbitration is or is not available under United States law itself leads to extensive, time-consuming and tremendously expensive litigation over the threshold issue of simply whether district courts can entertain an application to obtain evidence from a United States party.

As shown by this case, the issue is not just limited to private international arbitration cases (as was *Servotronics*[2]), but also has equal importance to international investment treaty cases. The mere existence of the uncertainty regarding the district court's jurisdiction over Section 1782 applications inevitably imposes unacceptably high costs for resolving the dispute, frequently embroiling not only the adversaries in the underlying arbitration but also the third-parties from which the evidence is sought.

CPR therefore submits that it has a keen interest in urging the Court to grant certiorari in this case to resolve not only the applicability of Section 1782 for investor-state arbitrations but also for all private international arbitrations.

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[2] *Servotronics, Inc. v. Rolls-Royce, PLC*, cert. granted, No. 20-794, 141 S.Ct. 1684; dismissed under Rule 42 on September 29, 2021.

POSITION OF CPR AND REASONS FOR GRANTING LEAVE

CPR takes no position on the merits of the question presented by the petition of AlixPartners, LLP for a writ of certiorari. Rather, CPR submits this amicus brief solely to support the petitioner's request that the Court take up the case and grant certiorari to resolve definitively and promptly the interpretation of the phrase "foreign or international tribunal" in Section 1782.

As set forth in the petitioner's Question Presented, this Court was set to resolve that issue and the circuit split on the interpretation of Section 1782 in *Servotronics*. With consent of all parties in *Servotronics,* CPR submitted its amicus brief in support of certiorari in that case. However, because the underlying international arbitration case for which the discovery was sought was resolved shortly before the scheduled October 5, 2021, argument, the *Servotronics* case was dismissed and that important issue remains and will remain unresolved unless this Court grants certiorari in this case.

In its Petition before this Court, AlixPartners argues that the nature of the arbitral tribunal in a private international case between private parties is not significantly different from the tribunal in an investment treaty case. In both instances, the tribunal itself – the arbitrators – are private persons with no direct office or credential from any government.

Whether or not there is a significant distinction between private international arbitration tribunals and

investment treaty arbitral tribunals, this case provides the perfect vehicle for the Court to address the definition of the word "tribunal" in both situations.

For the foregoing reasons, CPR respectfully moves for leave to file its attached amicus brief in support of petitioner's petition for writ of certiorari in this case.

Dated: November 5, 2021

Respectfully submitted,

John B. Pinney
Counsel of Record
Roula Allouch
John C. Greiner
GRAYDON HEAD & RITCHEY LLP
312 Walnut Street, Ste. 1800
Cincinnati, OH 45202
(513) 629-2730
jpinney@graydon.law

Counsel for Amicus Curiae

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The International Institute for Conflict Prevention & Resolution, Inc. ("CPR") respectfully submits this amicus curiae brief in support of the petition for writ of certiorari filed herein by AlixPartners, LLP, and Mr. Simon Freakley (hereinafter collectively "AlixPartners.").[1]

INTEREST OF AMICUS CURIAE

CPR is an independent, 501(c)(3) not-for-profit organization formed in 1977, among other things, to identify alternatives to litigation and resolve legal conflicts more effectively and efficiently. The mission of CPR is to manage conflict to enable purpose. CPR does this by spearheading innovation and promoting excellence in dispute prevention and resolution through two arms: the CPR Institute and CPR Dispute Resolution.

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel has made a monetary contribution intended to fund the preparation and submission of this brief, and no person or entity, other than the amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. Amicus curiae notified the parties of its intention to file this brief more than ten days before the due date. Petitioners have given written consent to the filing of this brief. Respondent did not give consent.

The CPR Institute is a think tank whose members include arbitrators, mediators, companies, law firms, government practitioners, and academics, and who share best practices and develop innovative tools and resources for dispute prevention and resolution. Among its efforts, CPR and its Arbitration Committee, which comprises former judges, in-house counsel, law firm attorneys, arbitrators, and academics, have developed administered and non-administered arbitration rules for both international and domestic disputes, model clauses, best practice guides and tools focused on ensuring the efficiency, fairness and cost-effectiveness of arbitrations, with the objective of fostering resolution. Among the many tools are:

- CPR Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration;
- CPR Corporate Counsel Manual for Cross-Border Dispute Resolution;
- 2019 CPR Rules for Administered Arbitration of International Disputes;
- 2018 CPR International Non-Administered Arbitration Rules; and
- CPR Fast Track Rules For Administered Arbitration of International Disputes.

CPR Dispute Resolution provides neutrals for and administers ADR proceedings, such as arbitration, mediation, early neutral evaluation, dispute review boards and minitrials. CPR's arbitrators and mediators conduct arbitrations and mediations pursuant to the rules, procedures and protocols generated by the CPR Institute.

A complete overview of the CPR Institute's initiatives and conflict resolution tools, and CPR Dispute Resolution's services, can be found at www.cpradr.org.

As both a global thought leader in conflict management and as an administrator of international arbitrations, CPR has a strong interest in ensuring the continued use, efficiency and effectiveness of international arbitration.

Specifically, the CPR Institute has members who engage in arbitration throughout the world. CPR Dispute Resolution itself is an administrator of international arbitrations, with about one-quarter of the 600-plus members of its Panel of Distinguished Neutrals being located outside of the United States. Consequently, the question of whether U.S. district courts may entertain applications for judicial assistance in obtaining evidence for presentation in arbitral proceedings before international tribunals is one of great relevance to CPR and its constituents. More specifically, when the district court's jurisdiction is unclear in the district where the party in possession of the sought-after evidence is located, forum shopping and extended costly litigation over that issue can unnecessarily delay the arbitration's merits hearing and increase costs significantly. This disruption is contrary to the effective and efficient resolution arbitration is intended to provide.

CPR and its members have great concern that the current circuit split regarding the availability of 28 U.S.C. § 1782(a) for discovery before international arbitral tribunals undermines CPR's goal of fostering

efficient and effective resolution of cross-border business disputes through international commercial arbitration.

In particular, the uncertainty whether Section 1782 discovery for use in an international arbitration is or is not available under United States law itself leads to extensive, time-consuming and tremendously expensive litigation over the threshold issue of simply whether district courts can entertain an application to obtain evidence from a United States party. As shown by this case, the issue is not just limited to private international arbitration cases (as was *Servotronic*s[2]), but also has equal importance to international investment treaty cases. The mere existence of the uncertainty regarding the district court's jurisdiction over Section 1782 applications inevitably imposes unacceptably high costs for resolving the dispute, frequently embroiling not only the adversaries in the underlying arbitration but also the third-parties from which the evidence is sought. All of this involves disputes separate and apart from and collateral to the merits of the underlying controversy that is the subject of the arbitration upon which the Section 1782 litigation is grounded.

Although the instant case arises from an international investment treaty arbitration, the same statutory language in Section 1782 ("foreign or international tribunal") governs in both. By granting certiorari in *Servotronics*, this Court concluded that the

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[2] *Servotronics, Inc. v. Rolls-Royce, PLC*, cert. granted, No. 20-794, 141 S.Ct. 1684; dismissed under Rule 42 on September 29, 2021.

circuit split between the Second, Fifth and Seventh Circuits, deciding that Section 1782 does not apply, and the Fourth and Sixth Circuits, holding that Section 1782 does apply, warranted review. By accepting this case, which arises from an arbitration being conducted pursuant to an investment treaty, the Court can definitively decide the scope and extent of whether both a private international arbitration tribunal and an investment treaty arbitration tribunal may properly be deemed to be a "foreign or international tribunal" within the meaning of that phrase used in Section 1782. This petition thus provides the Court the opportunity to complete the task it intended to undertake in the *Servotronics* case.

CPR therefore urges the Court to establish clarity on the applicability of Section 1782 to international arbitration and further urges the Court to hear the case this term in order to ensure the case does not become moot.

INTRODUCTION AND SUMMARY OF ARGUMENT

CPR takes no position on the merits of the question presented by the petition of AlixPartners, LLP for a writ of certiorari. Rather, CPR submits this amicus brief solely to support the petitioner's request that the Court take up the case and grant certiorari to resolve definitively and promptly the interpretation of the phrase "foreign or international tribunal" in Section 1782.

As set forth in the petitioner's Question Presented, this Court was set to resolve that issue and the circuit

split on the interpretation of Section 1782 in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794. However, because the underlying international arbitration case for which the discovery was sought was resolved, the *Servotronics* case was dismissed shortly before the scheduled October 5, 2021, argument. Consequently, that important issue remains and will remain unresolved unless this Court grants certiorari in this case.

As recognized by the grant of certiorari in *Servotronics*, the Second, Fifth and Seventh Circuits have decided the question whether Section 1782 includes private arbitral tribunals in the negative while the Fourth and Sixth Circuits have decided it in the affirmative. What is especially significant about this case is the fact that the Second Circuit in its opinion drew a distinction between a "tribunal" in a private international arbitration case, as presented in *Servotronics*, and a "tribunal" in an investment treaty arbitration case, as presented here.

Only a year prior to its decision in this case, the Second Circuit in *In re Guo (Guo, v. Deutsche Bank Securities, Inc.*), 965 F.3d 96 (2d Cir. 2020), reaffirmed its longstanding opinion from *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), that Section 1782 did not apply with respect to private international commercial arbitrations. But in its *AlixPartners* decision, the Second Circuit analyzed the extent of governmental involvement in the arbitral process and concluded that the arbitration qualified as a "foreign or international tribunal" within the meaning of that phrase used in Section 1782. See *Fund*

for Protection of Investor Rights v. AlixPartners, LLP, 5 F.4th 216, 228. The primary basis for that decision was that the proceedings before that tribunal were convened pursuant to a bilateral investment treaty. *Id.*

In its Petition before this Court, AlixPartners argues that the nature of the arbitral tribunal in an international case between private parties is not significantly different from the tribunal in an investment treaty case. In both instances, the tribunal itself – the arbitrators – are private persons with no direct office or credential from any government. Their charge in both cases is simply to resolve the parties' dispute, with the only distinction being that one of the parties in an investment case is a state or state-related party – a fact that has nothing to do with the composition of the tribunal itself.[3]

The United States submitted an amicus brief in support of the respondents in the *Servotronics* case, arguing forcefully that there is no distinction between private international arbitral tribunal and investment treaty arbitral tribunals. The United States' key point in *Servotronics* was that the same logic invoked in support of the applicability of Section 1782 to private international arbitrations would almost certainly apply in investment arbitration cases. Consequently, "Congress could not have envisioned the application of Section 1782 to treaty-based investor-state arbitration when it enacted the provision's relevant language in

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[3] For example, the tribunal in the *AlixPartners'* case consisted of two arbitration lawyers and one law professor. See, *Fund v. AlixPartners LLC*, 5 F.4th at 226.

the 1964 Act, because that type of arbitration did not exist in 1964." Amicus Brief of the United States, at 15-16.

Whether or not there is a significant distinction between private international arbitration tribunals and investment treaty arbitral tribunals, this case provides the perfect vehicle for the Court to address the definition of the word "tribunal" in both situations.

The current confusion under Section 1782 creates both the opportunity for blatant forum shopping and the likelihood of protracted litigation on the threshold jurisdictional question in each of the seven remaining regional circuits that have not decided the question.[4]

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[4] There are four appeals involving Section 1782 currently pending in the Third, Sixth, Ninth and Eleventh Circuits, two of which are fully argued and awaiting issuance of a decision on the question presented herein. Third Circuit: *EWE Gasspeicher GmbH v. Halliburton Co.*, No. 20-1830; (argued on December 9, 2020); Ninth Circuit: *In re HRC-Hainan Holding Co., LLC*, No. 20-15371 (argued on September 14, 2020). Sixth Circuit: *Luxshare, Ltd. v. ZF Automotive US, Inc.*, No. 21-2736 (appeal filed on July 21, 2021; pet. for cert. before judgment filed on September 14, 2021, No. 21-401); Eleventh Circuit: *Rendon v. Abbott Laboratories* (Appellant's brief due November 29, 2021). Although the *EWE Gasspeicher* and *HRC-Hainan Holding Co.* cases could be decided at any time, it appears highly likely that both cases are either now moot or are likely to become moot very soon. And in the *HRC-Hainan Holding Co.* case, counsel for the appellee informed the court by letter on October 7, 2021, that that an award had "recently been issued" on in the second (and last) arbitration with respect to which the Section 1782 petition had been filed. Consequently, neither is likely to remain at issue such that the loser will bring the case before this Court. Moreover, the *Rendon* case in the Eleventh Circuit appears to be many months away

This is an especially compelling reason for this Court to grant certiorari on this important question of federal law that has significant implications both for United States parties and for foreign parties involved in commercial disputes with United States parties.

There is, however, another important factor favoring the current certiorari petition. The reason why it took more than twenty years for the question presented here to make it to the Supreme Court is that the delays resulting from protracted litigation over the district court's jurisdiction for Section 1782 applications can and often do result in the underlying arbitral case proceeding to hearing and final award before the Section 1782 court proceedings are complete, frequently precluding any appeal. Obviously, once an award in the underlying arbitral proceeding has been issued, any unresolved Section 1782 proceeding becomes moot. This is especially significant when the discovery issue is litigated for six or more months before the district court and then appealed to a circuit court of appeals, which typically takes another six or more months for a decision. Of the eleven Section 1782 cases involving an international arbitration decided by circuit courts of appeal or still pending before them, the average length from the initial filing of the Section

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from argument and a decision, which again suggests it also will not remain viable to allow review by this Court. According to counsel in the *EWE Gasspeicher*, the hearing in underlying arbitration case has concluded and an award is expected soon. The key point is that, except for the current *AlixPartners* case and possibly the *ZF Automotive* case, there are no cases in the "pipeline" that are likely to stay viable long enough to make it to this Court's docket.

1782 application until issuance of a merits decision (or to date if still pending) was 20.25 months.[5]

The recently dismissed *Servotronics* case demonstrates that there are major procedural hurdles that mostly preclude review of Section 1782 cases by this Court. When certiorari was granted in *Servotronics* on March 22, 2021, all argument dates in the October 2020 term had been filled, meaning that argument could not be scheduled before October 2021, even though the final arbitration hearing was set to begin on May 10, 2021. Unsurprisingly, the arbitral tribunal

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[5] *See,* Second Circuit: *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.,* 165 F.3d 184 (2d Cir. 1999) (18 months), and *In re Guo v. Deutsche Bank Securities Inc.*, 965 F.3d 96 (2d Cir. 2020) (19 months); Third Circuit: *EWE Gasspeicher GmbH, supra.* (filed April 26, 2019, and ongoing – 18 months to date), and *In re Storag Etzel GmbH,* No. 20-1833 (filed: August 29, 2019, and dismissed on May 20, 2021 - 21months); Fourth Circuit: *In re Servotronics Inc.*, 954 F.3d 209 (4th Cir. 2020) (filed October 26, 2018 – 35 months); Fifth Circuit: *Republic of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880 (5th Cir. 1999) (5 months), and *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009) (13 months); Sixth Circuit: *Abdul Latif Jameel Trans. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019) (16 months) and *ZF Automotive*, filed October 16, 2020, and ongoing – 12 months); Seventh Circuit: *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020) (filed: October 26, 2018, and dismissed on September 29, 2021 – 35 months); Ninth Circuit: *HRC-Hainan Holding Co., LLC v. Hu, supra.,* (filed November 13, 2019 and ongoing – 24 months); and Eleventh Circuit: *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012), (filed: July 14, 2010, and finally dismissed by 747 F.3d 1262 (11th Cir. 2014) (43 months), and *Rendon v. Abbott Laboratories*, filed March 16, 2020, and ongoing – 19 months).

issued its merits award in August 2021, which led directly to the dismissal of the matter prior to argument.

Among the other reasons noted, this case is an ideal vehicle for the Court to resolve the circuit split regarding the interpretation of Section 1782 because it comes before the Court in sufficient time to be heard and decided this term and because the arbitral proceeding remains at an early stage.[6]

ARGUMENT

I. This case presents an ideal vehicle for the Court to interpret definitively the phrase "foreign or international tribunal" in Section 1782 and resolve the current circuit split with respect thereto.

This Court has already concluded that the question presented in this petition requires its review. See *Servotronics*, *Id.* A review of the jurisprudence leading up to that grant of certiorari confirms that this Court should grant this petition as well.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), this Court addressed the question of whether the Directorate-General for Competition of the Commission of the European Communities was a "tribunal" within the meaning of the phrase "foreign or international tribunal" in Section 1782(a). Citing to the

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[6] As reflected in AlixPartners' petition (fn. 6, p. 10), the parties have also stipulated and the district court has ordered that compliance with the Respondent's discovery requests is to be deferred until after disposition of this case by the Court.

law review article by the reporter to the Congressionally established Commission on International Rules of Judicial Procedure that had drafted the 1964 amendments to Section 1782(a), Justice Ginsburg's opinion included the following quotation from Prof. Smit's article that stated "[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[7] 542 U.S. at 258. The *Intel* Court went on to hold that the Directorate-General, which is not a court, would nonetheless properly be considered to be a "tribunal" within the meaning of Section 1782(a).

Notwithstanding the earlier decisions in *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), and *Republic of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880 (5th Cir. 1999), which cases had held that Section 1782's reference to "tribunal" did not include private international tribunals, some lower federal courts began interpreting *Intel* as indicating that private international tribunals should be considered to be "tribunals" within the meaning of that term in Section 1782(a). *See, e.g.*, *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); and *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007).[8]

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[7] *International Litigation under the United States Code*, 65 Columbia L. Rev. 1015, 1026-27, n. 71 (1965), Prof. Hans Smit.

[8] In 2012, the issue of whether Section 1782 applied for proceedings before a private international arbitral tribunal

It was not until 2019 that another case involving a private international arbitration tribunal reached a circuit court of appeals. In May 2018, a Saudi party to a private arbitration pending in Dubai filed an application under Section 1782(a) in the Western District of Tennessee in Memphis seeking discovery from FedEx Corp. Upon denial of the application by the district court, the Saudi party, Abdul Latif Jameel Transportation Company, Limited ("ALJ"), appealed to the Sixth Circuit, which reversed. *Abdul Latif Jameel Trans. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019). The Sixth Circuit's detailed analysis of the meaning of the term "tribunal" encouraged more applications in arbitration cases under Section 1782, albeit with mixed results.[9] In addition, the international arbitration

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reached the Eleventh Circuit in *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012). In its original opinion, the Eleventh Circuit affirmed the Southern District of Florida's order allowing discovery to obtain evidence for private arbitral tribunals. However, that decision was short lived because the court *sua sponte* (and without explanation) withdrew its 2012 opinion 18 months later and entered a new decision that completely changed the substance of its original opinion. 747 F.3d 1262 (11th Cir. 2014). In its new opinion, the Eleventh Circuit still affirmed the district court but did so based on the alternative ground of there being the expectation that formal civil and criminal proceedings in Ecuador were "reasonably contemplated," saying nothing about the existence of the private international arbitration upon which its earlier decision was based. Consequently, what had been a circuit split with the Second and Fifth Circuits disappeared.

[9] A Westlaw search for district court decisions brought under Section 1782 for discovery in cases based on an underlying private international arbitration shows that there were at least 14 new

community was flooded with scores of comments in articles, legal blogs and law firm "alerts" commenting on the new circuit split and the need for Supreme Court review.[10] Two articles were published by the undersigned in CPR's *Alternatives to the High Cost of Litigation* newsletter.[11]

The Fourth Circuit soon followed the Sixth Circuit's decision in the first *Servotronics* case, decided on March 30, 2020, *Servotronics, Inc. v. Boeing Co.*, 954

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cases filed after the Sixth Circuit's decision. This is in comparison to a total of some 65 cases decided in district courts prior to September 19, 2019, the date the Sixth Circuit issued its decision in the *ALJ* case.

[10] *See, e.g.*, *Using the U.S. Courts to Obtain Discovery Here and Abroad for Foreign and International Proceedings*, Frederick Acomb, 99 Mich. B.J. 32 (Sept. 2020); *Practicalities and Commercial Realities: § 1782 and its Application to Private Commercial Arbitration*, Jennifer Sandlin, 44 J. Legal Prof. 223 (Spring 2020); *Compelling U.S. Discovery in International Franchise Arbitrations: The (F)utility of Section 1782 Applications,* Matthew J. Soroky, 39 Franchise L. J. 185 (Fall 2019); *Circuit Split on 28 U.S.C. § 1782: Are U.S. Courts Trending Against Discovery for Foreign Private Arbitrations?,* Dana MacGrath, Nilufar Hossain, Kluwer Arbitration Blog, Oct. 4, 2020; and *Second Circuit Rules in* Hanwei Guo *that Section 1782 Does Not Apply to Private Commercial Arbitrations*, Dana C. MacGrath, ICC Dispute Resolution Bulletin, 2020, Issue 3, Global Developments.

[11] *Will the Supreme Court Take Up Allowing Discovery under Section 1782 for Private International Arbitrations?* 38 Alternatives to the High Cost of Litigation 103, July-Aug. 2020; and *Update: The Section 1782 Conflict Intensifies as the International Arbitration Issues Goes to the Supreme Court*, 38 Alternatives to High Cost Litigation 125, Sept. 2020, John B. Pinney.

F.3d 209 (4th Cir. 2020). The Fourth Circuit's decision agreed with the Sixth Circuit, widening the circuit split with the Second and Fifth Circuits' respective 1999 decisions in the *NBC* and *Biedermann* cases.

There was commentary suggesting that the *Guo* case, which was then before the Second Circuit and had been argued on February 28, 2020, might follow two Southern District of New York decisions finding that *Intel* had implicitly overruled *NBC*, leading the Second Circuit to fall in line with the Fourth and Sixth Circuits.[12] However, that thought ended when the Second Circuit issued its decision reaffirming *NBC* on July 9, 2020. *In re Guo v. Deutsche Bank Securities Inc.*, 965 F.3d 96 (2d Cir. 2020). The *Guo* decision also ended speculation that a consensus might be reached regarding the applicability of Section 1782(a) to private international arbitration without Supreme Court review.[13]

Last term, the Court granted certiorari in the second *Servotronics* case, decided by the Seventh Circuit on September 22, 2020.[14] 975 F.3d 589 (7th Cir.

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[12] *In re Children's Invest. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370-71 (S.D.N.Y. 2019); and *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521-22 (S.D.N.Y. 2016).

[13] Neither losing party in either the Fourth Circuit's *Servotronics* decision or the Second Circuit's *Guo* case filed for certiorari in this Court.

[14] Servotronics had filed parallel Section 1782 applications in Charleston, South Carolina, the place where the aircraft engine fire giving rise to the London arbitration by Rolls-Royce occurred, and in Chicago, Boeing's headquarters.

2020). In contrast to the Fourth Circuit's decision in what essentially was the same case, the Seventh Circuit, following the Second and Fifth Circuits' decisions in *NBC* and *Biedermann* and rejecting the Fourth and Sixth Circuits' decisions in the first *Servotronics* case and *FedEx*, held that Section 1782 did not apply for private international arbitration cases. This Court was poised to resolve the circuit split in *Servotronics* but for the dismissal on the eve of the date set for argument.

The latest case is *ZF Automotive US, Inc. v. Luxshare, Ltd.,*[15] in which the respondents in the district court both appealed to the Sixth Circuit and soon thereafter filed a petition for writ of certiorari before judgment in this Court. The Section 1782 applicant in *ZF Automotive*, Luxshare, Ltd., obtained an order allowing discovery prior to commencement of a private international arbitration in Germany. In that the Sixth Circuit has decided that Section 1782 authorizes such discovery, the subpoenaed party, ZF Automotive, sought this Court's immediate review, no doubt believing any appeal to the Sixth Circuit would be futile. While the *ZF Automotive* case presents another opportunity for this Court to consider the

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[15] *An appeal to the Sixth Circuit was filed, sub nom, Luxshare, Ltd. v. ZF Automotive US, Inc.,* No. 21-2736, on July 21, 2021. On October 13, 2021, the court of appeals denied ZF Automotive's motion to stay discovery. Immediately thereafter, ZF Automotive applied for a stay to Justice Kavanaugh, which was referred by him to the Court. On October 27, 2021, the Court entered an order granting a stay of the district court's discovery order pending disposition of the applicant's certiorari petition which remains pending.

applicability of Section 1782 to international arbitration, CPR respectfully submits that only by granting certiorari in this case will the Court have the opportunity to definitively address Section 1782 in the context of both private international arbitrations and investor-state arbitrations.[16] Furthermore, whether or not the Court grants certiorari in the *ZF Automotive* case, there are at least three reasons that the *AlixPartners* case is an appropriate vehicle for this court to address the meaning of the term "tribunal" as used in Section 1782: (1) this case comes before the Court at a time when it can be heard and decided in the current term, greatly reducing the risk of mootness; (2) AlixPartners makes a strong case that there should be no distinction between the meaning of "tribunal" in Section 1782 for private international arbitrations and for investor-state arbitrations like that presented in the petitioner's case; and (3) the United States, in its amicus brief filed in *Servotronics*, effectively argued that a ruling regarding the applicability of Section 1782 for private international arbitrations would likely also as a practical matter be determinative regarding its applicability for investment cases.[17] By granting

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[16] Although ZF Automotive's certiorari petition is brought before consideration of its appeal by the court of appeals, it would be appropriate for the Court also to grant certiorari in that case as well so that both could be consolidated for argument. This would enable the Court to address definitively the applicability of Section 1782 for both private international arbitrations and investor-state arbitrations.

[17] The United States argued in its amicus brief filed in *Servotronics* (p.31) that neither a private commercial arbitration nor an investor-state arbitration can be "properly understood as a

certiorari in both the *ZF Automotive* case and in this case, the Court would eliminate any speculation as to how the ruling in one case impacts the facts presented in the other case.

The foregoing journey of jurisprudence through the various circuits not only reflects the need for clarity on the question but underscores the resources that are being invested, quite apart from the resolution of the underlying legal dispute, by parties in Section 1782 litigation. As noted above, over 20 months pass on average between filing an application for section 1782 discovery until the matter, where contested, is resolved. While it is hard to tell how much of this time is spent on the threshold question of whether courts might order discovery in aid of private arbitral tribunal processes at all – as opposed to on the question of what discovery may be allowed – no doubt a significant portion of the time is being invested litigating the jurisdictional issue. And this time could be invested far better in the dispute's resolution or in other productive matters.

That the legal community is eager for resolution of the threshold question is an understatement. There have been seven recent law review articles written addressing the topic, including Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. R. 2089

'proceeding in a foreign or international tribunal' within the meaning of Section 1782" and that "[i]nvestor-state arbitration resembles private commercial arbitration in the most salient respects." By accepting the AlixPartners case for review, the Court can determine whether that argument, advanced by the United States, is correct.

(Nov. 2020); Case Note; *Statutory Interpretation – Textualism – Sixth Circuit Holds That Private Commercial Arbitration is a Foreign or International Tribunal – In re: Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019), 133 Harv. L. Rev. 2627 (June 2020); Comment, *Authorization of Discovery in International Commercial Arbitration: Demystifying the Sixth Circuit's Statutory Construction of 28 U.S.C. § 1782(a)*, Jason Arendt, 9 Am. Univ. Bus. L. Rev. 417 (2020); and Alejandro A. Nava Cuenca, Note, *Debunking the Myths: International Commercial Arbitration and Section 1782(a)*, 45 Yale J. Int'l. L. 155 (Winter 2021); Case Note, *Are Private Arbitral Panels Tribunals under §1782?: Analysis of Case Law and Interpretive Approaches*, 32 Fla.J. Int'l. L. 271 (Winter 2020); Note, *The Power of Two Words to Split Circuits*, 75 U. Miami L. Rev. 1241 (Summer 2021); and Note, *A Distinction Without a Difference: 28 U.S.C. §1782 and International Arbitration*, 66 Wayne L. Rev. 923 (Spring 2021). In addition, an entire chapter of a recently issued treatise on Section 1782 practice is devoted to the applicability of Section 1782 to private international arbitrations.[18]

Another indication of the international arbitration community's interest in this issue was the inclusion of a mock Supreme Court argument on Section 1782's applicability for private international arbitrations held

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[18] *Obtaining Evidence for Use in International Tribunals under 28 U.S.C. § 1782*, Edward M Mullins and Lawrence W. Newman, editors, JurisNet, LLC (2020), Chapter 8, Use of Section 1782 in Aid of Arbitration, David Zaslowsky and Kristina Fridman.

as part of last fall's "New York Arbitration Week." On November 20, 2020, there was a mock argument before "Supreme Court Justices" Paul D. Clement (former Solicitor General), Nicole A. Saharsky (former Assistant Solicitor General), and Fordham Prof. Pamela Bookman that was broadcast worldwide over the internet on a Zoom platform, followed by a panel discussion of the issue.[19]

The international arbitration community is anxiously awaiting the Supreme Court's definitive resolution of this critical issue of federal law that has significant implications globally for the resolution of disputes arising from cross-border business transactions, whether such disputes arise from private commercial transactions or from investments under investment treaties.

II. Unlike *Servotronics*, this case will almost certainly not become moot before this Court can definitively interpret the meaning of the term "tribunal" in Section 1782.

The petition by Servotronics was the first case involving Section 1782(a) for which this Court's review had been sought since *Intel* in 2003. The reason for this is quite simple. By definition, cases brought under Section 1782 are collateral to an underlying case, whether the underlying case is a litigation matter before a foreign court, a criminal matter before an investigating magistrate or an arbitration before a private international arbitral tribunal. The purpose for

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[19] *See*, https://nyarbitrationweek.com/fordham-conference-on-international-arbitration-and-mediation/

which any Section 1782(a) application is made is entirely to obtain evidence for use in the underlying case. That means, as a practical matter, there commonly is an established case schedule for gathering evidence constraining the amount of time available to obtain the desired evidence prior to commencement of the merits hearing or other final determination of the matter. Moreover, in almost every case, the applicant will have a limited budget that it can reasonably devote to both litigating over the United States court's jurisdiction for compelling production of the expected evidence and actually obtaining an order allowing the requested discovery, assuming it successfully wins on any jurisdictional challenge. Each of these factors make it the rare case that as a practical matter can be appealed beyond the district court to a circuit court of appeals, let alone seeking further review by this Court.

Consequently, it is not only important that this Court grant certiorari in this case, but also issue a definitive ruling that decides the meaning of the word "tribunal" and whether Section 1782 may be used to obtain evidence in United States courts for use before international arbitral tribunals. Only the *AlixPartners* case, where the proceedings have been stayed pending the resolution of this matter, can allow the Court to decide definitively the issue for both private international arbitration tribunals and international investment treaty arbitration tribunals.

Given the paucity of other Section 1782 cases that can even make it to an appellate court, much less the Supreme Court, it is not clear when this Court will soon have another occasion to resolve this issue.

Hence, the uncertainty resulting from the current circuit split could well remain unresolved for many years to come. To illustrate, of the five recent cases decided by the Second, Fourth, Sixth and Seventh Circuits, only the Seventh Circuit's *Servotronics* and the current *AlixPartners* case have been appealed to this Court after issuance of a decision by a court of appeals.[20] As also explained at note 4 above, there is no assurance that either of the two cases argued last year in the Third and Ninth Circuits[21] will ever be appealed to this Court. Moreover, for the reasons stated, both of those cases appear likely to become moot by the time the courts of appeals issue their respective decisions, or the losing party might simply decide not to seek certiorari for economic or timing reasons. In other words, it is uncertain whether any of the other cases in the current decisional pipeline will ever be appealed to the Supreme Court. And finally, even if one or more of these cases is appealed to this Court, there can be no assurance that the case will avoid becoming

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[20] Second Circuit: the CIETAC arbitration hearing commenced 13 days after issuance of the decision in the *Guo* case; Fourth Circuit: even though Boeing represented to both the Fourth Circuit and the South Carolina district court that it would be filing for certiorari, the time for filing expired on August 27, 2020; Sixth Circuit: the *ALJ v. FedEx* case was promptly settled on remand to the district court.

[21] As noted in footnote 5 above, the German arbitration underlying the *EWE* case pending before the Third Circuit will likely be resolved by issuance of an award this year, and a final award has been issued in the CIETAC arbitration in the Ninth Circuit's case, *HRC-Hainan Holding Co., LLC v. Hu*.

moot prior to this Court's decision on the merits as was the case in *Servotronics*.[22]

CONCLUSION

As a leading voice supporting effective and efficient methods for resolution of legal conflict for more than 40 years, CPR urges the Court to grant AlixPartners' petition for certiorari to resolve the current circuit split that can only be accomplished by this Court. Given the intensity of interest in the international arbitration community and the indisputable need for avoidance of unnecessary and costly litigation over the jurisdiction of district courts, this Court must put to rest the question presented by taking up this case and deciding this case on its merits.

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[22] It is important to note that cases based on Section 1782 do not appear to fall within the doctrine on the exception to mootness based on cases that repeat but evade review. Under *United States v. Sanchez-Gomez*, 138 S.Ct. 1532, 1540 (2018), that doctrine was most recently explained as follows: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there will be a reasonable expectation that the same complaining party will be subjected to the same action again." Even if this or a related exception to the mootness doctrine might apply here, the significant risk that the underlying arbitration case will be finally resolved prior to issuance of this Court's merits decision counsels in favor of resolution this term on this important issue of federal law.

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Respectfully submitted,

John B. Pinney
Counsel of Record
Roula Allouch
John C. Greiner
GRAYDON HEAD & RITCHEY LLP
312 Walnut Street, Ste. 1800
Cincinnati, OH 45202
(513) 629-2730
jpinney@graydon.law

Counsel for Amicus Curiae