

IN THE  
**Supreme Court of the United States**

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**No. 21-401**

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ZF AUTOMOTIVE US, INC., GERALD DEKKER, AND CHRISTOPHE MARNAT,  
*Petitioners,*

v.

LUXSHARE, LTD.,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**No. 21-518**

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ALIXPARTNERS, LLP, AND MR. SIMON FREAKLEY,  
*Petitioners,*

v.

THE FUND FOR PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES,  
*Respondent.*

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

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**JOINT MOTION OF ALL PETITIONERS AND RESPONDENTS FOR  
DIVIDED ARGUMENT AND ENLARGEMENT OF ARGUMENT TIME**

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Pursuant to Rules 21 and 28.4 of the Rules of this Court, all petitioners and respondents in both *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401, and *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, jointly move for enlargement of argument time and divided argument in these consolidated cases. Although both cases implicate the meaning of 28 U.S.C.

§ 1782, they ultimately present different questions about how that statute applies to distinct circumstances. In *ZF*, the Court will need to decide whether Section 1782 authorizes district courts to grant discovery for use in a contract-based foreign commercial arbitration between two businesses. In *AlixPartners*, the Court will need to decide whether Section 1782 authorizes district courts to grant discovery for use in a treaty-based investor-state arbitration. Divided argument will promote the Court's understanding of the key issues in both cases, and will ensure that all parties have an opportunity to be heard on their distinct arguments.

The United States has filed an amicus brief supporting the *ZF* and *AlixPartners* petitioners, and we understand that it also intends to file a motion for leave to participate in oral argument, for enlargement of the time for oral argument, and for 15 minutes of argument time for the United States. The *ZF* and *AlixPartners* petitioners support this request, and the *ZF* respondent (Luxshare, Ltd.) and *AlixPartners* respondent (the Fund for Protection of Investors' Rights) do not oppose it. If the Court agrees to the United States' request, the parties respectfully ask for argument to be enlarged to 40 minutes per side, for divided argument, and for oral argument time be allocated as follows: *ZF* petitioners (15 minutes), *AlixPartners* petitioners (10 minutes), United States (15 minutes), Luxshare (20 minutes), the Fund (20 minutes). The United States has indicated that it supports this proposal.<sup>1</sup>

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<sup>1</sup> In the event that the United States does not seek to participate in oral argument (or this Court denies such a request), the *ZF* petitioners and *AlixPartners* petitioners each request 15 minutes of argument time, with counsel for the *ZF* petitioners to appear first and counsel for the *AlixPartners* petitioners to appear

1. The *ZF* and *AlixPartners* cases both implicate the meaning of 28 U.S.C. § 1782, which permits litigants to invoke the authority of U.S. district courts to render assistance in gathering evidence for use in “a proceeding in a foreign or international tribunal.”

In *ZF*, Luxshare seeks discovery for use in a commercial arbitration it plans to initiate before the German Institution of Arbitration e.V. (DIS). Luxshare has argued that the DIS arbitration panel constitutes a “foreign tribunal” for purposes of Section 1782, and the district court granted its discovery request. *See ZF* JA28-29; *ZF* Petitioners’ Br. 17; *ZF* Pet. App. 20a-21a. In this Court, the *ZF* petitioners have argued that a purely private arbitration does not qualify as a “foreign tribunal,” because that phrase encompasses only proceedings before governmental entities, and the DIS arbitration has no governmental involvement whatsoever. *See ZF* Petitioners’ Br. 17-50, 52-53.

In *AlixPartners*, the Fund seeks discovery for use in a treaty-based investor-state arbitration. The Fund has argued that the investor-state arbitration at issue constitutes an “international tribunal” for purposes of Section 1782, and the district court and Second Circuit granted its discovery request. *See AlixPartners* BIO 14; *AlixPartners* JA17a-19a; *AlixPartners* Pet. App. 33a, 41a. The Second Circuit has held that Section 1782 “does not encompass arbitral bodies established by private parties,” *Guo v. Deutsche Bank Sec. (In re Guo)*, 965 F.3d 96, 100 (2d Cir. 2020)

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second. Luxshare and the Fund each request 15 minutes of argument time, with counsel for Luxshare to appear first and counsel for the Fund to appear second.

(alterations, citation, and internal quotation marks omitted)), but has announced a multi-factor functional test for assessing whether an arbitral body that was “originally created through state action”—but has “subsequently evolved such that it arguably no longer qualifies [as a state entity]”—can trigger Section 1782 discovery, *id.* at 1076. Here, the Second Circuit applied its multi-factor test and held that the arbitration at issue triggers Section 1782 discovery because it “is between an investor and a foreign State party to a bilateral investment treaty.” *AlixPartners* Pet. App. 33a. In this Court, the *AlixPartners* petitioners have challenged the Second Circuit’s multi-factor test, and argue that the ad hoc arbitration panel is not a “foreign or international tribunal” as that term is used in Section 1782. *AlixPartners* Petitioners’ Br. 17-39. According to the *AlixPartners* petitioners, the fact that the state party consented to the arbitration by virtue of a treaty does not alter the non-governmental nature of the arbitral panel.

As the discussion above shows, the issues presented in *ZF* and *AlixPartners* are distinct, and a victory (or loss) for either petitioner or either respondent may not necessarily imply a victory (or loss) for the similarly aligned party in the other case. Indeed, a number of lower courts—including the Second Circuit—have treated the issues distinctly, holding that Section 1782 provides a basis for granting discovery for use in certain treaty-based investor-state arbitrations but does not authorize discovery for use in contract-based commercial arbitrations between businesses. *See, e.g., Guo*, 965 F.3d at 107-09; Gary B. Born, *International Commercial Arbitration* 2587-90 & nn.485-86 (3d ed. 2021) (noting judicial decisions that distinguish between

commercial arbitrations and bilateral investment arbitrations). Several groups of amici here likewise have recognized that the two cases present different issues, with (1) the Chamber of Commerce of the United States and the Business Roundtable, (2) Halliburton Company, and (3) a coalition of China-based arbitrators each filing briefs supporting the *ZF* petitioners but declining to weigh in on the issue presented in *AlixPartners*. See U.S. Chamber et al. Amicus Br. 2 n.2; Halliburton Co. Amicus Br. 3 n.2; Guojian et al. Amicus Br. 5 n.2; see also United States Amicus Br. 23-32 (supporting petitioners in both cases, but making distinct arguments as to each). Moreover, the *ZF* petitioners have argued that they should prevail in this case even if the *AlixPartners* petitioners lose, see *ZF* Petitioners' Br. 50-53, and the Fund likewise plans to argue that it should prevail in *AlixPartners* even if Luxshare loses in *ZF*.

2. The distinctions between *ZF* and *AlixPartners* make it important for this Court to hear from the parties in both cases. Granting divided argument will ensure that both sides of each issue are fully aired. It will also ensure that the Court fully understands the factual nuances distinguishing contract-based commercial arbitration from treaty-based investor-state arbitration, and is equipped to resolve how the varying interpretations of Section 1782 bear on those differences.

Granting divided argument will also avoid potential conflicts of interests. If only a single petitioner and single respondent are allowed to argue, it will be difficult for that petitioner and respondent to fully and fairly communicate the arguments presented by the absent petitioner and respondent. Indeed, there may be strategic

reasons for each of the parties to distinguish their case from the other, in ways that could conceivably be at odds with the similarly aligned party in the other case. Allowing only a single party to present oral argument on each side of the two cases could also lead an unfair scenario in which only one party in each case is given an opportunity to present argument, without the counter-party in that same case having any chance to respond.

The parties respectfully submit that dividing the oral argument will not result in needless duplication. The *ZF* and *AlixPartners* petitioners expect that counsel for the *ZF* petitioners will focus the bulk of his argument on addressing the text, structure, history, and policy of Section 1782, to support the core proposition that Section 1782 authorizes discovery only for use in proceedings before governmental entities—but not purely private commercial arbitrations between private parties and pursuant to a private contract. They expect that counsel for the *AlixPartners* petitioners will focus the bulk of his argument on explaining why an investor-state arbitration adjudicated by a panel of private arbitrators does not trigger Section 1782 discovery under any test—including under the multi-factor approach endorsed by the Second Circuit. These differences in emphasis across the petitioners reflect the different approaches taken in each of their opening briefs. *See ZF* Petitioners’ Br. 17-50 (focusing on text, structure, history, policy of Section 1782); *AlixPartners* Petitioners’ Br. 27 n.15 (incorporating *ZF* petitioners’ arguments that the “meaning, legislative context, and policy underpinnings” limit Section 1782’s scope to “governmental bodies of one or more sovereign states”); *id.* at 29-39 (focusing in detail

on why the *AlixPartners* arbitral panel does not wield governmental authority). Similarly, Luxshare and the Fund expect that their counsel will focus their oral argument in countering the various points made by their respective counter-parties.

3. Given all this, all four sets of parties jointly request an equitable division of the oral argument time in these cases. If no amicus is permitted to argue, the time can fairly be allocated by giving each of the four parties 15 minutes of argument time, for a total of one hour of argument. If the United States' request for oral argument time is granted, the parties believe that the overall argument time should be expanded to 80 minutes, with each side receiving 40 minutes. In that scenario, the *ZF* and *AlixPartners* petitioners agree that *ZF* should receive 15 minutes of argument time, *AlixPartners* should receive 10 minutes of argument time, and the United States should receive 15 minutes of argument time. And the *ZF* and *AlixPartners* respondents agree that Luxshare and the Fund should each receive 20 minutes of argument time.<sup>2</sup>

This Court has previously granted similar divisions of argument time in other cases where good cause existed for doing so. *See, e.g., Sanchez-Llamas v. Oregon*, 546 U.S. 1074 (2005) (No. 04-10566) (divided argument among five parties); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1237 (2019) (No. 18-281) (divided argument among four parties); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 951 (2019) (No. 17-1717) (same); *Wittman v. Personhuballah*, 136 S. Ct. 1241 (2016) (No. 14-1504)

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<sup>2</sup> Alternatively, the parties would have no objection if the Court prefers to deconsolidate the cases and hold separate oral arguments in each.

(same); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 566 (2015) (No. 14-915) (same); *Rucho v. Common Cause*, 139 S. Ct. 1316 (2019) (No. 18-422) (divided argument among three parties); *NLRB v. Noel Canning*, 134 S. Ct. 811 (2013) (No. 12-1281) (same).

All four sets of parties to these cases—along with the United States—agree that the proposal for oral argument described above is fair and will best assist the Court in resolving the proper meaning and application of Section 1782. We respectfully ask the Court to grant the motion.



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