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US Supreme Court Rules Section 1782 Discovery is Unavailable for Use in Private Foreign Commercial Arbitrations and Certain Investment Arbitrations

On June 13, 2022, in a unanimous consolidated decision authored by Justice Amy Coney Barrett, the U.S. Supreme Court ruled that the scope of 28 U.S.C. § 1782(a) (Section 1782), which authorizes federal courts to order discovery "for use in a proceeding in a foreign or international tribunal" does not extend to proceedings before "private adjudicatory bodies." [1] Under the Supreme Court's decision, arbitral panels deciding a private commercial dispute and at least certain *ad hoc* panels in investor-state treaty arbitrations do not qualify as "foreign or international" tribunals under Section 1782. Rather, only a "governmental or intergovernmental" adjudicative body constitutes a "foreign or international tribunal" under Section 1782. The decision by the Supreme Court resolves the long-standing circuit split over whether Section 1782 discovery is available for foreign private commercial arbitrations. [2]

Section 1782 focuses on governmental and intergovernmental tribunals

The Court found that the words "foreign" or "international" contextually modify the phrase "foreign or international tribunal" to mean an adjudicative body that exercises governmental authority. More specifically, the Court interpreted "foreign" to mean "belonging to another national or country," [3] and the test is whether the tribunal "possess[es] sovereign authority conferred by that nation." [4] The Court interpreted the modifier "international" to mean "involving or of two or more nations," requiring that the nations must have "imbued the tribunal with official power to adjudicate disputes." [5] Thus, in order to qualify as a "tribunal" under Section 1782, the adjudicative body must be "imbued" with governmental authority by single or multiple nations. [6]

In support of its holding, the Court pointed to Section 1782's legislative history and animating statutory purpose. Section 1782 was historically intended to improve the process of judicial "assistance and cooperation" between the United States and foreign countries. [7] The Court

reasoned that expanding Section 1782 to private bodies would not serve the purpose of comity through promoting respect for foreign governments and encouraging reciprocal assistance. The Court also found that extending Section 1782 to include private bodies would create a "notable mismatch" between foreign and domestic arbitrations under the Federal Arbitration Act (FAA).

Private commercial disputes and some investor-state treaty arbitrations do not qualify for Section 1782 discovery

The Court then applied its holding to two consolidated disputes (*ZF Automotive US, Inc. et al. v. Luxshare, Ltd.* and *AlixPartners, LLP et al. v. Fund for Protection of Investors' Rights in Foreign States*). The *ZF v. Luxshare* case concerned a party seeking discovery in aid of a commercial dispute proceeding under the Arbitration Rules of the German Institution of Arbitration e.V. (DIS).[8] The Court concluded that private commercial arbitral panels, like the DIS panel, are not "governmental bod[ies]" merely because laws govern them and courts enforce their contracts. It reasoned that "[n]o government is involved in creating the DIS panel or prescribing its procedures," and such panels "are formed by the parties" that chose to "forgo the legal process and submit their disputes to private dispute resolution."[9] Accordingly, the Court ruled that the DIS panel, and other private commercial arbitration panels like it, do not qualify as "tribunal[s]" under Section 1782.

The *AlixPartners* case concerned a party seeking discovery in aid of *ad hoc* arbitration constituted under the Lithuania-Russia Bilateral Investment Treaty and administered under the UNCITRAL rules.[10] The Court first noted that neither the presence of Lithuania (as a sovereign state) as a party in the dispute, nor the fact that an investment treaty existed, is dispositive in determining whether an "ad hoc panel is intergovernmental."[11] Instead, what matters is whether "two nations intend[ed] to confer governmental authority on an ad hoc panel formed pursuant to the treaty."[12] According to the Court, Russia and Lithuania intended to give investors "the choice of bringing their disputes before a pre-existing governmental body."[13] In contrast, the Contracting Parties' inclusion of *ad hoc* arbitration as a potential dispute resolution mechanism "reflects the countries' choice to offer investors the potentially appealing option of bringing their disputes to a *private arbitration panel that operates like commercial arbitration panels do*."[14] The Court accordingly ruled that this *ad hoc* panel also did not qualify as a "tribunal" under Section 1782.

A narrowed scope, but some questions remain

Following the Supreme Court's ruling, parties to private commercial disputes and at least certain *ad hoc* investment treaty arbitrations, such as the UNCITRAL-administered dispute in the *AlixPartners* case, can no longer rely on Section 1782 to seek discovery in the United States. This will impact parties' ability to gather and develop evidence through American courts, but it is also likely to streamline arbitral proceedings for U.S.-affiliated parties, and avoid scenarios in which U.S.-based parties may be subject to unilateral discovery not available in other jurisdictions. Notwithstanding the Court's opinion on "private adjudicatory bodies," ambiguity remains as to whether tribunals in other types of investor-state disputes, such as ICSID arbitrations and multilateral investment courts,[15] would qualify as a "foreign or international tribunal" under Section 1782. Since the Court did not prescribe how governmental and intergovernmental bodies should be structured, the opinion leaves open the ways in which sovereigns might "imbue an *ad hoc* arbitration panel with official authority."[16] This leaves room for the possibility that other investor-state tribunals, such as ICSID tribunals or multilateral courts which rely on treaties to create arbitral panels with "official" affiliations, for example, would qualify for Section 1782 discovery, if a district court finds that such tribunal exercises "governmental authority."

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[1] 28 U.S.C § 1782(a).
[2] The U.S. Courts of Appeals for the Fourth and Sixth Circuits had held that Section 1782 encompasses foreign private commercial arbitral tribunals, and the U.S. Courts of Appeals for the Second, Fifth, and Seventh Circuits had held that they do not.
[3] *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401; and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518 (U.S. June 13, 2022).
[4] *Id.* at 7-8.
[5] *Id.* at 9.
[6] *Id.* at 7.
[7] *Id.* at 10.
[8] *Id.* at 2-3.
[9] *Id.* at 12.
[10] *Id.* at 3-4.
[11] *Id.* at 13.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 14-15 (emphasis added).
[15] *See e.g.*, Article 8.29 of Comprehensive Economic and Trade Agreement between Canada and the European Union, Article 3.41 of the EU-Vietnam Investment Protection Agreement, and Article 3.12 of the EU-Singapore Investment Protection Agreement).
[16] *Id.*