Nos. 21-401, 21-518

IN THE

Supreme Court of the United States

ZF AUTOMOTIVE US, INC., ET AL.,
Petitioners,
v.
LUXSHARE, LTD.,
Respondent.

ALIXPARTNERS, LLP, ET AL.,
Petitioners,
v.
THE FUND FOR PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth and Second Circuit

BRIEF AMICI CURIAE OF GEORGE A. BERMANN, ROBERT H. SMIT, D. BRIAN KING, RUTH TEITELBAUM, AND LUCAS BENTO IN SUPPORT OF RESPONDENTS LUXSHARE, LTD. AND THE FUND FOR THE PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES

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INTEREST OF AMICI CURIAE[1]

These consolidated cases present important but unsettled issues of federal law affecting international arbitration: whether the phrase "foreign or international tribunal" in 28 U.S.C. § 1782(a) encompasses (*i*) international arbitration tribunals constituted pursuant to private contractual agreements and (*ii*) investor-State arbitration tribunals constituted pursuant to international treaties. Amici consider that Section 1782 is properly available in respect of both kinds of international arbitration tribunal. Scholars and practitioners of international arbitration, amici have an interest in ensuring that U.S. courts correctly and uniformly interpret Section 1782 in this context.

Amicus George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and Director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He is an affiliated faculty member of both the MIDS Masters Program in International Dispute Settlement in Geneva and the International Dispute Resolution LLM Program at the School of Law of Sciences Po in Paris, as well as the Chief Reporter of the American Law Institute's *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst., Proposed Final Draft 2019), a project that began in 2007 and was completed in 2019. He chairs the Global Advisory

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[1] All parties consent to the filing of this brief. Pursuant to Rule 37.6, counsel for amici authored this brief. No counsel for a party in this case authored this brief in whole or in part. No one other than amici or their counsel contributed monetarily to the preparation and submission of this brief.

Board of the New York International Arbitration Center, is co-editor-in-chief of the *American Review of International Arbitration*, and a founding member of the International Chamber of Commerce ("ICC") International Court of Arbitration's Governing Body.

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Amicus D. Brian King is an independent arbitrator. With nearly 30 years of experience in the field, he serves as presiding, party-nominated, sole, or emergency arbitrator in commercial and investor-State disputes. Until December 2018, Mr. King was a senior partner in the international arbitration group at Freshfields Bruckhaus Deringer in New York. Mr. King has acted in more than 100 cases, including two of the largest investment arbitrations to date. Since 2013, he has taught investment arbitration law as an Adjunct Professor at the New York University School

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Amicus Ruth Teitelbaum practices in the field of international law and international dispute resolution. She is a fellow of the Chartered Institute of Arbitrators, a Deputy General Editor of *Arbitration International* and serves on the Executive Committee of the Institute for Transnational Arbitration. Ms. Teitelbaum served as Co-Chair of the District of Columbia Bar International Law Section Steering Committee (2005-2006). She was an assistant counsel at ICSID (1999-2001), and an Associate Legal Officer at the International Court of Justice (2006-2008). Her academic work on international law and arbitration has been cited by ICSID tribunals and the Supreme Court of Colombia.

Amicus Lucas Bento is the author of *The Globalization of Discovery: The Law and Practice under 28 U.S.C. § 1782* (Kluwer, 2019). He is Of Counsel at Quinn Emanuel Urquhart & Sullivan LLP where he heads the firm's Section 1782 Practice. Mr. Bento is a Fellow of the Chartered Institute of Arbitrators and President of the Brazilian American Lawyers Association. He is also a Solicitor Advocate with rights of audience in England & Wales. Mr. Bento has taught courses on international arbitration at New York University and INSPER in São Paulo, Brazil.

SUMMARY OF ARGUMENT

Section 1782 permits, but does not require, U.S. federal district courts to order discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). The district courts in the consolidated cases below respectively ruled that an international arbitration tribunal constituted pursuant to a private contractual agreement to arbitrate and under the terms of a bilateral investment treaty, each qualified as "a foreign or international tribunal" for purposes of Section 1782. The Sixth and Second Circuits affirmed those results and they should be affirmed by the Court here as well.[2] The Sixth Circuit below correctly interpreted Section 1782's statutory language and relied on its earlier decision in *Abdul Latif Jameel Transportation Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710 (6th Cir. 2019). That said, while the Second Circuit correctly affirmed the district court's authorization of Section 1782 discovery in support of a treaty-based investor-state arbitration, it did so on the basis of a distinction between international commercial arbitration and treaty-based investor-state arbitration. *See* Pet. App. at 12a–22a and 52a-53a, *Alix Partners*, No. 21-518. That distinction, as amici further explain below, is unjustified. Section 1782 is properly interpreted to permit, but not require, district courts to authorize discovery in support of international arbitrations founded on contractual agreements and treaties alike.

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[2] Amici take no position on the merits of the disputes underlying either arbitration or on the district courts' exercise of their discretion under Section 1782.

I. The plain meaning of Section 1782 compels the conclusion that the statute applies to proceedings before international arbitral tribunals.

In amending Section 1782 in 1964, Congress deliberately used a term—"foreign or international tribunal"—of great generality. The term "foreign" signified a location outside the United States. The term "international" denoted a situation involving multiple nations or nationalities. And "tribunal" meant a court or other body authorized to resolve disputes authoritatively by adjudicatory means. An international arbitral tribunal fully satisfies all the required elements of a "foreign or international tribunal" within the meaning of Section 1782. Congress drew no distinctions among, and created no carve-outs from, foreign or international tribunals. That international arbitral tribunals are included in that category was, and is, unambiguous.

It is telling that Congress did not limit assistance under Section 1782 to "foreign or international *courts*" or "foreign or international *judicial bodies*," as it easily could have. "Tribunal" is indisputably the term used to identify the bodies that conduct international arbitral proceedings. Indeed, when the term "foreign or international tribunal" is mentioned, international arbitration tribunals come immediately to mind. Thus, both before and after 1964, this Court has repeatedly used the term "tribunal" to identify such bodies. In keeping with accepted canons of statutory construction, a statute is to be interpreted in accordance with its plain meaning. Inquiry into the meaning of Section 1782 should stop there. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020).

Despite Section 1782's plain meaning, some courts have grafted onto the provision a requirement that the "foreign or international tribunal" be state-sponsored. On that basis they have drawn a sharp distinction for Section 1782 purposes between two sets of international arbitral tribunals: those adjudicating treaty-based investment disputes between a private party and a State, on the one hand, and those adjudicating contract-based and contract-related disputes, on the other. Those courts have made recourse to Section 1782 available in connection with proceedings before the former, but not before the latter.

Neither the text nor the history of Section 1782 supports this distinction. The text shows that Congress chose the capacious term "tribunal," which unambiguously encompasses adjudicatory bodies. The history shows that Congress removed a previous statutory requirement that a tribunal be established by a government when it amended Section 1782 in 1964. Nor have those courts that distinguish between international commercial arbitral tribunals and international investor-State tribunals advanced any principled policy justification for doing so.

Congress's use of the phrase "foreign or international tribunal" in other parts of Title 28 does not support a reading of Section 1782 that excludes international commercial arbitral tribunals. To the contrary, 28 U.S.C. §§ 1696 and 1781, both of which also use the phrase "foreign or international tribunal," are equally applicable to international commercial arbitral tribunals. They provide no reason to doubt the plain meaning of the words that Congress chose to use.

The question whether Section 1782 applies to international commercial arbitral tribunals was the

subject of extended discussion and deliberation during the drafting of the *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst., Proposed Final Draft 2019) ("*Restatement*"). As approved in 2019, the *Restatement* takes the position that Section 1782 unqualifiedly applies to international arbitral tribunals, commercial and investor-State alike.

II. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), this Court's only decision on Section 1782's scope, the Court stated that the term "foreign or international tribunal" was to be interpreted broadly. Under *Intel*, a Section 1782 request may be granted even if (i) no adjudication is yet requested and the proceeding is at a purely investigatory stage, so long as the proceeding may culminate in an adjudication; (ii) the applicant is not a party to the foreign or international proceeding; and (iii) the documents sought to be discovered under Section 1782 would not be discoverable either in that proceeding or in an analogous U.S. proceeding. To be sure, *Intel* involved a proceeding before a governmental body, the Commission of the European Union. But *Intel* nowhere suggested that Section 1782 applies only to proceedings pending before governmental bodies.

Instead, the overriding theme that emerges from *Intel* is that Section 1782's applicability is subject to no per se conditions or restrictions. Categorically excluding commercial arbitral tribunals from Section 1782's scope would thus both contravene the plain meaning of the text and deviate from *Intel*'s basic teaching.

III. There is no reason to suppose that abiding by Section 1782's clear statutory language will produce

the results feared by those who oppose applying Section 1782 to international commercial arbitration. In *Intel*, this Court emphasized that a decision on a Section 1782 request is discretionary. Not only does a federal court have discretion to grant or deny a Section 1782 application as it considers best, but even in granting such a request, it has ample latitude to narrow, limit, or condition discovery. Accordingly, appropriate safeguards are already present.

A common objection to making Section 1782 available to parties in international arbitration is an alleged risk of interfering with arbitral tribunals' procedural prerogatives, while injecting the cost, delay, and formalism that arbitration is meant to avert. Yet the Court in *Intel* considered and addressed that generalized risk. The *Intel* Court counseled lower courts to ensure that the assistance they offer not unduly burden the targets of Section 1782 discovery and instructed them, in assessing Section 1782 requests, to take into account the foreign or international tribunal's receptivity to the requested discovery. Those instructions apply to Section 1782 requests in aid of international arbitrations. And while this Court's further guidance on how lower courts should apply the *Intel* discretionary factors may be desirable, the Court can provide it without rewriting Section 1782's statutory language.

IV. Finally, contrary to the concerns of several lower courts, there is no conflict between Section 1782 and Section 7 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 7. Section 7 addresses the authority of a district court to assist arbitral proceedings seated within that district in the gathering of evidence. Section 1782, by contrast, applies to foreign or international proceedings.

ARGUMENT

I. By its plain meaning, Section 1782 applies to international arbitral tribunals.

Section 1782 applies to documents or testimony to be used in "a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). Congress did not define "foreign or international tribunal," but the phrase's plain meaning—both when Congress used it in the statute in 1964 and today—includes privately constituted arbitral tribunals. That "ordinary public meaning" is decisive. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020).

A. In 1964, an international arbitral tribunal was a "foreign or international tribunal."

In 1964, the term "foreign or international tribunal" had a perfectly ordinary meaning that can be established from contemporaneous dictionaries.

"Foreign" meant "[s]ituated outside a place or country." *Application to Obtain Discovery*, 939 F.3d at 719 n.4 (citing *Webster's Third New International Dictionary* (1961)). "International" meant "[e]xisting between or among nations or their citizens." *Id.* (citing *Webster's Third*); *see also id.* (observing that "international" can also mean "[o]f, relating to, or involving two or more nations or nationalities" (citing *The American Heritage Dictionary of the English Language*

(1969))). As amended in 1964, Section 1782 encompassed proceedings taking place abroad and involving countries or parties of different nationalities.[3] *Id.*

At that time, the meaning of "tribunal" was similarly broad. According to contemporaneous dictionaries, "tribunal" meant "a court or forum of justice: a person or body of persons having authority to hear and decide disputes so as to bind the disputants." *Id.* at 720 (citing *Webster's New International Dictionary of the English Language* (2d ed. 1950)); *see also id.* (observing that the 1966 edition of *Webster's Third New International Dictionary* contained the same definition of "tribunal"). International arbitral tribunals unquestionably constituted "forum[s] of justice" for the resolution of disputes and issued rulings binding on the parties.

This conclusion is reinforced by this Court's contemporaneous usage. In 1956, the Court explained that "[t]he nature of the tribunal"—whether it be "a court of law" or "an arbitration panel"—"may make a radical difference in" a given case's "ultimate result." *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956). Four years later, the Court observed that commercial disputes may be resolved either in court or in "the more informal arbitration tribunal[s]." *United Steelworkers of Am. v. Warrior & Gulf Nav.*

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[3] As noted in *Intel*, the 1964 amendments to Section 1782 "deleted the words 'in any judicial proceeding pending in any court in a foreign country' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal'" such that "the word 'tribunal' [would] ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'" 542 U.S. at 248–49 (emphasis omitted).

Co., 363 U.S. 574, 578 (1960). The following year, the Court used the terms "union tribunals," "employer tribunals," and "joint tribunals" when describing bodies established "to arbitrate disputes." *National Lab. Rels. Bd. v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 580 (1961). And in 1964, the same year that Congress added the term "tribunal" to Section 1782, the Court decided that, in submitting a labor dispute to private arbitration rather than the National Labor Relations Board, the union was "resort[ing] to a *tribunal* other than the Board." *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) (emphasis added).

These sources show that, by 1964, the use of "tribunal" to refer to an arbitral panel was part of the common vernacular. Because Congress offered no "contrary direction" suggesting that it wished to depart from that common usage, it "presumably" meant to "adopt[] the cluster of ideas that were attached to" the term. *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see United States v. Detroit Med. Ctr.*, 833 F.3d 671, 674 (6th Cir. 2016) ("In the absence of any statutory definition to the contrary, courts assume that Congress adopts the customary meaning of the terms it uses.").

B. Today, an international arbitral tribunal is a "foreign or international tribunal."

Today, "tribunal" has the same plain meaning that it had in 1964. A leading legal dictionary tells us that a "tribunal" is quite simply a "court of justice or other adjudicatory body." *Black's Law Dictionary* (11th ed. 2019). Arbitral tribunals are "other adjudicatory bod[ies]." *Id.*; *see also id.* (noting in the definition of "arbitrator" that "[p]arties usu[ally] agree to

have their dispute resolved by either a sole arbitrator or three arbitrators (referred to as an arbitral panel in domestic arbitration or an arbitral tribunal in international arbitration)").

This Court too has remained consistent in its use of the term "tribunal." In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court explained that enforcing "the parties' [arbitration] agreement" showed "respect for the capacities of foreign and transnational tribunals"—like the Tokyo-seated commercial arbitral tribunal to which the parties had submitted their dispute. 473 U.S. 614, 629 (1985); *see also id.* at 627, 629–631, 634, 636–637, 638 (repeatedly using "tribunal" to refer to international commercial arbitral panels). And, in *Scherk v. Alberto-Culver Co.*, the Court stated that, by agreeing to submit their dispute to International Chamber of Commerce arbitration, the parties had "agree[d] to arbitrate before a specified tribunal." 417 U.S. 506, 519 (1974).

C. The distinction that some courts have drawn between international commercial arbitral tribunals and international investment arbitral tribunals is flawed.

Several lower courts have held that Congress intended Section 1782 to apply only to "[S]tate-sponsored" international investment arbitral tribunals, but not to "private" international commercial arbitral tribunals. *See, e.g.*, *National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188–90 (2d Cir. 1999). Thus, while the question of Section 1782's availability in aid of international commercial arbitration has divided the federal courts, there is a consensus, correct so far as it goes, that Section 1782 discovery is availa-

ble in aid of proceedings before treaty-based international investment arbitration tribunals. *See Restatement*, § 3.5 Reporter's Note b; *see also, e.g.*, *In re Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011) (arbitral tribunal constituted under a bilateral investment treaty is "unquestionably" a "foreign or international tribunal" under Section 1782).

There is no basis, however, for distinguishing between international investment and commercial arbitration in this context. Section 1782 discovery should be available in aid of both.

1. Cases drawing this distinction typically rely on two aspects of Section 1782's legislative history: first, that Congress did not specifically mention international commercial arbitration when debating the 1964 amendments, *e.g.*, *National Broad.*, 165 F.3d at 189, and second, that one of Section 1782's predecessor statutes provided for discovery assistance only to tribunals "established pursuant to an agreement between the United States and any foreign government or governments," *id.* at 192. Neither rationale withstands scrutiny.

First, there is no evidence that Congress specifically contemplated arbitration under bilateral investment treaties when it amended Section 1782 in 1964. At that time, treaty-based investor-State arbitration, largely a product of the 1980s and 1990s, barely existed. The United States did not sign its first bilateral investment treaty until 1982. *See* Panama-U.S. Bilateral Investment Treaty, Oct. 27, 1982, S. Treaty Doc. No. 99-14. Since then, the treaty governing most international investment arbitrations involving the United States has been the North American Free Trade Agreement ("NAFTA"), Can.-Mex.-U.S., Dec.

17, 1992, 32 I.L.M. 289, which did not take effect until 1994.[4]

Nor, in this context, should the Court attach particular significance to the United States' signing, in 1965, of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. While the ICSID Convention created a framework for international investment arbitration, it established no investment rights or obligations.

In fact, in 1964 international commercial arbitration was much more established than international investment arbitration. It was over forty years earlier, in 1920, that New York passed its Arbitration Law to respond to "the demands of international commerce" and "establish[] legal machinery for protecting, safeguarding and supervising commercial arbitration." Julius H. Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 148, 150 (1921). Two years later, in 1922, the International Chamber of Commerce ("ICC") published the first version of its Rules of Arbitration, which were designed for, and are still widely used in, international commercial arbitration.[5] That was followed the next year by the establishment of the ICC's International Court of

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[4] *See* United Nations Conference on Trade and Dev., *Investment Dispute Settlement Navigator*, https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited Feb. 26, 2022) (listing twenty investor-State arbitrations brought against the United States, eighteen under NAFTA).

[5] *See* ICC, *Leading Dispute Resolution Worldwide*, https://100.iccwbo.org/theme/leading-dispute-resolution-worldwide (last visited Feb. 26, 2022).

Arbitration with the goal of "making arbitration the preferred method of commercial dispute resolution."[6] The London Court of International Arbitration ("LCIA")—another international arbitration institution—is even older, established in 1892 to facilitate the arbitration of, among others, "trans-national commercial disputes."[7] The arbitration workload of the ICC Court and the LCIA consists overwhelmingly of international commercial cases.

These facts refute the theory that Congress had international investor-State tribunals—but *not* international commercial tribunals—in mind when enacting Section 1782.

Second, and no less significant, one of Section 1782's predecessor statutes, 22 U.S.C. §§ 270–270g, specifically applied only to tribunals established by the United States and foreign governments—a limitation Congress specifically removed when it amended Section 1782 in 1964. *See* Pub. L. No. 88-619, §§ 3, 9(a), 78 Stat. 995, 995, 997 (1964); 22 U.S.C. §§ 270–270g (1958); *see also In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 at 727–28 (6th Cir. 2019); *National Broad.*, 165 F.3d at 189–90. To read a "State-sponsored" tribunal requirement into Section 1782, after Congress excised it from the statute in 1964, undermines Congress's purpose in deleting that requirement. *See Stokeling v. United States*, 139 S. Ct. 544, 561 (2019) ("When Congress

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[6] *Id*.

[7] LCIA, *History*, https://www.lcia.org/LCIA/history.aspx (last visited Feb. 26, 2022).

keeps one piece of statutory text while deleting another, we generally have no trouble concluding that it does so with purpose." (quotation marks omitted)).

In sum, to distinguish between international commercial arbitral tribunals and investment arbitral tribunals would fall afoul of the maxim that "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (when evaluating a statute's legislative history, "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"). The fact remains that neither the text nor the legislative history of Section 1782, as amended in 1964, supports the notion that Congress intended to cover investment arbitral tribunals without covering commercial arbitral tribunals.

2. The distinction is also inconsistent with the realities of international arbitration. Investment and commercial arbitral tribunals are indistinguishable in all their essential functions.

First, both types of tribunals derive their jurisdiction from the consent of the parties. In commercial arbitration, that consent is typically expressed in a contractual clause. *See Scherk*, 417 U.S. at 508. In investment arbitration, that consent is typically formed when an investor accepts a State's standing offer to arbitrate. *See BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 42 (2014). Thus, an agreement between an investor and a State to arbitrate a dispute does not arise solely from entry by the two States into an investment treaty, but from specific action taken by an investor with respect to the host State.

Second, in both international commercial arbitration and investment arbitration, the tribunals typically consist of one or three private individuals (one designated by each party and the chair named either by those party-named arbitrators, by the parties themselves, or by an arbitral institution, such as the ICC or LCIA). Neither an investment nor a commercial arbitral tribunal is in itself a governmental body.

Third, a foreign State can as easily find itself a party to a commercial as to an investor-State arbitration. States and their instrumentalities regularly engage in commercial transactions, including with foreign investors, that are subject to arbitration. The resulting disputes unquestionably fall within the jurisdiction of international commercial arbitral tribunals. Under the distinction that some courts have drawn, parties to such proceedings could not seek assistance under Section 1782. Yet if the investor were to bring an analogous claim against under an investment treaty, Section 1782 discovery would be available.

Fourth, international commercial and investment arbitral tribunals apply identical procedural rules in conducting their proceedings. The United Nations Commission on International Trade Law ("UNCITRAL") Rules, for instance, are used in both investor-State and commercial arbitration. *See Chevron*, 633 F.3d at 158 (UNCITRAL Rules applied to an investor-State arbitration between Chevron and Ecuador); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 32 (5th Cir. 2009) (UNCITRAL Rules applied to an international arbitration between two private parties). A significant percentage of arbitrations even under the ICSID Arbitration Rules are contract disputes that the parties

chose to resolve under ICSID Arbitration Rules.[8] The rules of other international arbitral institutions likewise apply equally to both species of arbitrations. *See, e.g.*, *Novenergia II – Energy & Environ. (SCA) v. Kingdom of Spain*, Civil Action No. 18-cv-01148 (TSC), 2020 WL 417794, at *1 (D.D.C. Jan. 27, 2020) (Stockholm Chamber of Commerce ("SCC") Rules applied to an investor-State arbitration under the Energy Charter Treaty); *AO Techsnabexport v. Globe Nuclear Servs. & Supply, Ltd.*, 656 F. Supp. 2d 550, 551–52 (D. Md. 2009) (SCC Rules applied to an arbitration under a contract for sale of uranium).

Fifth, both types of tribunals interpret and apply rules of law to the facts of a dispute. *See BG*, 572 U.S. at 31 (investor-State arbitral tribunal applied bilateral investment treaty between the United Kingdom and Argentina); *El Paso*, 341 F. App'x at 32 (international commercial arbitral tribunal applied El Salvadoran substantive law and Swiss procedural law).

Sixth, though not governmental bodies in themselves, both commercial and investment arbitral tribunals render final and binding decisions that courts will enforce. Under the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 217 (the "New York Convention"), the key international instrument in international arbitration, courts of all contracting States must, absent a Convention defense, enforce an award to which the Convention applies, whether rendered by an investment or a commercial arbitral tribunal. So

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[8] *See* ICSID, *Spotlight on Contract-based Disputes at ICSID*, https://icsid.worldbank.org/node/20966 (last visited Feb. 26, 2022).

too with the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (the "Panama Convention"); *see also Restatement*, § 3.5 Reporter's Note b. This further undermines the "State-sponsored" versus "private" dichotomy that has found favor with some courts.

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International commercial arbitral tribunals and international investment arbitral tribunals are materially indistinguishable in form and function. Neither Section 1782's text and legislative history, nor the realities of international arbitration, support distinguishing between them for purposes of Section 1782. There is no basis to conclude that Section 1782's reference to "foreign or international tribunal" captures one type of arbitral tribunal but not the other.

D. The use of the phrase "foreign or international tribunal" elsewhere in Title 28 does not support a narrow interpretation of Section 1782.

Despite the absence of any textual limitation on the phrase "foreign or international tribunal" in Section 1782, Petitioners argue that the use of the same phrase in 28 U.S.C. §§ 1696 and 1781 supports a narrow interpretation of the phrase. *See* Pet. Br. 28–31, *ZF Automotive*, No. 21-401. Section 1696 permits a district court to order service of "any document issued in connection with a proceeding in a foreign or international tribunal" when presented with "a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person." 28 U.S.C. § 1696(a). Section 1781 grants the

U.S. Department of State the power "to receive a letter rogatory issued, or request made, by a foreign or international tribunal" and to transmit "a letter rogatory issued, or request made," by a U.S. tribunal to a "foreign or international tribunal, officer, or agency to whom it is addressed." 28 U.S.C. § 1781(a). Some courts, such as the Seventh Circuit, have held that because the subjects of Sections 1696 and 1781—"[s]ervice-of-process assistance and letters rogatory"—are "matters of comity between governments," the use of the same phrase in the three provisions suggests that Congress meant to refer to "state-sponsored tribunals" rather than international commercial arbitral tribunals in Section 1782. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694–95 (7th Cir. 2020).

This is incorrect. Although "identical words used in different parts of the same statute" will be "presumed to have the same meaning," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006), there is no reason why Sections 1696 and 1781 cannot apply to international arbitral tribunals. Sections 1696 and 1781 refer to "request[s] made" by a foreign or international tribunal. *See* 28 U.S.C. §§ 1696(a), 1781(a). This is not limited to foreign courts or State-sponsored tribunals; international arbitral tribunals can also make a "request" for U.S. federal court assistance with service of a document or to obtain evidence. *See Application to Obtain Discovery*, 939 F.3d at 723; *Intel*, 542 U.S. at 257 n.10 ("Section 1696(a) . . . is not limited to service of process; it allows service of 'any document' issued in connection with a foreign proceeding." (emphasis omitted)).

Nor was Congress solely concerned with international comity when passing these provisions. Section 1696 applies not only to a "request" from a "foreign or international tribunal" but also to an "application of any interested person." 28 U.S.C. § 1696(a). As this Court has held, an "interested person" is anyone who "possess[es] a reasonable interest in obtaining [judicial] assistance." *Intel*, 542 U.S. at 256 (alterations in original) (quotation marks omitted). That extends beyond foreign courts or other State-sponsored tribunals, reaching parties to which comity considerations would not apply. There is therefore "no reason to doubt" the conclusion that the plain meaning of the text of Section 1782 compels, namely that "foreign or international tribunal" includes arbitral tribunals resolving international commercial disputes. *Application to Obtain Discovery*, 939 F.3d at 723.

E. The *Restatement* concludes that international arbitral tribunals are "foreign or international tribunals" under Section 1782.

The *Restatement*'s drafters carefully considered how Section 1782 applies to international arbitrations and concluded that international commercial and investment arbitral tribunals stand on the same footing and may both receive assistance under Section 1782. *Restatement*, § 3.5 Reporter's Note b. The American Law Institute ("ALI") unanimously adopted that position when it approved the *Restatement* in May 2019.

The *Restatement* did not reach that conclusion lightly. As with all ALI Restatements, the *Restatement* underwent a rigorous deliberative and drafting process, in this case lasting twelve years. After closely analyzing the issue, the *Restatement*'s drafters agreed

that Section 1782's plain language compels the conclusion that international commercial arbitral tribunals are "tribunals" under Section 1782 and that there is no principled basis outside the statutory text for holding otherwise. *Restatement*, § 3.5 cmt. b. That conclusion follows from the bedrock principle that this Court's statutory interpretation "begins with the language of the statute" and "ends there as well" when "the statutory language provides a clear answer." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quotation marks omitted).

II. This Court's *Intel* decision confirms that Section 1782 should be interpreted to apply to international arbitral tribunals.

Intel—this Court's only decision interpreting Section 1782—confirms the outcome urged by amici. In *Intel*, the Court considered whether the European Commission's Directorate-General for Competition ("DG-Competition") was a "tribunal" under Section 1782. 542 U.S. at 246. Throughout *Intel*, the Court confirmed that the phrase "foreign or international tribunal" should be interpreted broadly. *See*, *e.g.*, *id.* at 258 (emphasizing that "foreign or international tribunal" has a broader scope than language used in Section 1782's predecessor statutes and holding that there is "no warrant to exclude" a body that "acts as a first-instance decisionmaker"). The Court ultimately concluded that DG-Competition, which is not a court and was not at the time of the Section 1782 request acting in an adjudicatory capacity, was still a "tribunal" within the scope of Section 1782. *Id.*

In reaching that conclusion, the Court gave no particular weight to the fact that the European Commission is a governmental entity. To the contrary, that feature of the Commission received no attention.

Instead, the *Intel* Court articulated its opposition to subjecting the availability of Section 1782 to hard-and-fast rules. *Id.* at 255. As noted, a foreign or international body need not be a court and need not be engaging in adjudicatory activity at the time of the discovery request in order to qualify as a tribunal under Section 1782. But *Intel* went further. It announced that Section 1782 discovery is not subject to categorical exclusions or limitations, such as a requirement that the material sought to be discovered under Section 1782 be discoverable either in the foreign or international forum or in an analogous domestic proceeding. Categorically excluding international commercial arbitral tribunals from the scope of Section 1782 would be contrary to *Intel*'s core teachings.

Intel's repeated reliance on articles by Professor Hans Smit only bolsters the conclusion that the Court viewed Section 1782 as applying to commercial arbitrations. *See id.* at 248, 256–59, 261–62, 264. Professor Smit was the "dominant drafter of, and commentator on, the 1964 revision[s]" to Section 1782. *In re Letter of Request from Crown Prosecution Serv. of UK*, 870 F.2d 686, 689 (D.C. Cir. 1989). One of those articles, published in 1965, specifically identified "arbitral tribunals" as one type of "tribunal" within the scope of Section 1782. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1021, 1026 n.71, 1027 n.73 (1965). The Court cited that portion of Professor Smit's article deliberately

and with approval. *See Intel*, 542 U.S. at 258. Although the Court omitted part of the relevant passage ("all bodies exercising adjudicatory powers") in quoting Professor Smit, it maintained Professor Smit's specific reference to arbitral tribunals as falling within Section 1782's scope. *Compare id.*, *with* Smit, 65 Colum. L. Rev. at 1026 n.71.

Amici do not argue that academic commentary on Section 1782 can itself overcome the plain text and acknowledge that the *Intel*'s reference to arbitral tribunals was *dictum*. That commentary is instructive here, however, because it accords with the plain meaning of "tribunal" and reflects the intention of the provision's principal drafter.

III. Holding that "foreign or international tribunal" encompasses international commercial arbitral tribunals will not prove detrimental to international commercial arbitration or the principles underlying it.

The procedural autonomy and efficiency of arbitration are some of arbitration's core purposes as an alternative to litigation and amici are not arguing for unfettered U.S.-style discovery in international arbitral proceedings. But discovery is not alien to international commercial arbitration,[9] and the claim that making Section 1782 discovery available in respect of international commercial arbitration would work

[9] For example, the LCIA's 2020 Arbitration Rules provide that the arbitral tribunal has the power "to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant." LCIA, *LCIA Arbitration Rules* (Oct. 1, 2020), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

great mischief is fundamentally misplaced. *See*, *e.g.*, Pet. Br. 49–50, *ZF Automotive*, No. 21-401; *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 214 (4th Cir. 2020); *Application to Obtain Discovery*, 939 F.3d at 729–30.

To begin with, this Court has held that "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." *Intel*, 542 U.S. at 264. Moreover, arbitral tribunals can exclude documents obtained through Section 1782 and even preemptively make known to a U.S. court that they have no interest in such discovery. *Interglobe Enters. Private Ltd. v. Gangwal*, No. 1:19-mc-24257 (S.D. Fla. Apr. 21, 2020), ECF No. 31-1 (tribunal ruling that Section 1782 discovery was neither necessary nor helpful, and directing the party seeking Section 1782 discovery to advise the U.S. court of its ruling); *see also Intel*, 542 U.S. at 265 (noting that the European Commission stated in amicus briefs that it did not "need or want the District Court's assistance").

Moreover, this Court and lower federal courts have long guided district courts in exercising their wide discretion under Section 1782. In *Intel*, the Court identified four factors relevant for this purpose: (i) whether the person from whom discovery is sought is a party to the foreign proceeding; (ii) the nature of the tribunal, the character of the foreign proceeding and the tribunal's receptivity to Section 1782 discovery; (iii) whether the Section 1782 application conceals an attempt to circumvent foreign proof-gathering restrictions; and (iv) whether complying with the discovery requests would be unduly intrusive or burdensome. 542 U.S. at 264–65.

These criteria not only permit courts to deny discovery requests under Section 1782, even when the statutory requirements are met, but also to grant them subject to conditions and limitations. *Intel* made clear that courts should approach each Section 1782 application strictly on its own terms. For example, a court may require a party in whose favor discovery has been ordered under Section 1782 to make a reciprocal exchange of information. *See id.* at 262 (citing *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995)). Courts can and do take these considerations into account as soundly and effectively in the international arbitration context as in any other. If the lower courts require further guidance on how to apply those considerations properly in Section 1782 proceedings, this Court can provide that guidance without artificially limiting the meaning of "foreign or international tribunal."

While each of these factors is relevant to requests in aid of international commercial arbitrations, two have especially heightened utility in that context:

First, precisely because arbitral tribunals enjoy a high degree of procedural autonomy, it is all the more important that U.S. courts refrain from ordering discovery that is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 265; *see Restatement*, § 3.5 cmt. c.

Second, courts must seriously consider the "receptivity" of an international commercial arbitral tribunal to the discovery sought. Indeed, district courts recognize the limitations on discovery in international commercial arbitration and have demonstrated an ability to "exercise considerable restraint, granting access to requested information only in limited circum-

stances when the grant is consistent with the tribunal's receptivity to the information." *Restatement*, § 3.5 Reporter's Note b; *accord id.* § 3.5 cmt. C. Real-world examples confirm this. *See* Order at 4, *Interglobe*, No. 1:19-mc-24257 (S.D. Fla. Apr. 30, 2020), ECF No. 33 (denying Section 1782 discovery after international commercial arbitral tribunal ruled that such discovery was neither necessary nor helpful); *In re Application of Chevron Corp.*, 762 F. Supp. 2d 242, 251 (D. Mass. 2010) ("[S]ince international arbitrators usually control the discovery process, this court believes it should exercise at least some restraint before granting the instant Section 1782 application.").

Though district courts have been ordering Section 1782 discovery in aid of international commercial arbitrations for years, arbitration remains the mode of choice for the resolution of international disputes.[10] There is no evidence that the availability of Section 1782 has been detrimental to international arbitration. To the contrary, the LCIA, for example, reported "an all-time high" number of cases in 2020—the most recent year for which figures are available—that was

[10] For example, the 2021 Queen Mary International Arbitration Survey found that 90% of respondents preferred arbitration (either on its own or together with other forms of alternative dispute resolution) for resolving cross-border disputes. White & Case LLP & Sch. of Int'l Arbitration Queen Mary Univ. of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* 2 (2021), https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

"an increase of approximately 10% compared with 2019, which was then a record year."[11]

Finally, if the availability of Section 1782 discovery in aid of proceedings before international commercial arbitral tribunals posed a threat to the procedural autonomy of arbitral tribunals, then so would the availability of Section 1782 discovery in aid of proceedings before international investment arbitration tribunals. International investment tribunals are entitled to no less respect for their procedural autonomy than international commercial tribunals. Yet that has not deterred courts, even while correctly treating the former as perfectly eligible under Section 1782, to treat the latter as categorically ineligible. If the availability of Section 1782 discovery is—and it is—appropriate in investor-State arbitration, then it should be equally appropriate in international commercial arbitration.

Congress gave district courts discretion in enacting Section 1782. If it finds that they fail properly to exercise that discretion, Congress can readily act. The problem, if there is any, should be addressed that way, not by rewriting Section 1782 to indulge the fiction that international commercial arbitral tribunals are not "foreign or international tribunals." *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019)

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[11] LCIA, *Record Number of LCIA Cases in 2020* (Jan. 20, 2021), https://www.lcia.org/News/record-number-of-lcia-cases-in-2020.aspx; *see also* Int'l Chamber of Commerce, *ICC announces record 2020 caseloads in Arbitration and ADR* (Jan. 12, 2021), https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/ (noting registration of 946 new arbitrations in 2020, the highest number since 2016).

("[C]ourts aren't free to rewrite clear statutes under the banner of [their] own policy concerns.").

IV. There is no conflict between Section 1782 and the Federal Arbitration Act.

Petitioners and the decisions of some lower courts suggest that applying Section 1782 to international commercial arbitration would cause a conflict between that statute and the FAA. This is allegedly because Section 1782 authorizes broader discovery than is available under Section 7 of the FAA. *See* Pet. Br. 37–40, *ZF Automotive*, No. 21-401; *Republic of Kazakhstan v. Biedermann, Int'l*, 168 F.3d 880, 882–83 (5th Cir. 1999); *National Broad.*, 165 F.3d at 187–88. More specifically, under Section 7, the federal district court where an arbitral tribunal is seated may compel a person to comply with that tribunal's order to appear before it as a witness or to produce documents. 9 U.S.C. § 7. By contrast, Section 1782 allows any interested party to ask a federal district court for an order to provide testimony or produce documents for use in a proceeding in a foreign or international tribunal. 28 U.S.C. § 1782(a). Courts that oppose applying Section 1782 to international commercial arbitration consider it "not likely that Congress would have chosen to authorize . . . broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart." *Biedermann*, 168 F.3d at 883. This position is wrong.

First, this Court in *Intel* rejected comparisons between Section 1782 and analogous domestic proceedings, holding that Section 1782, as "a provision for assistance to tribunals abroad," nowhere "direct[s] United States courts to engage in comparative analysis to determine whether analogous proceedings exist

[in the United States]." 542 U.S. at 263; *see Servotronics*, 954 F.3d at 216 (rejecting comparison); *Application to Obtain Discovery*, 939 F.3d at 729 (same). This Court was untroubled by the possibility that a Section 1782 applicant might be entitled to broader discovery than a party to a domestic proceeding. Yet that is precisely the kind of comparison between foreign and domestic proceedings that Petitioners make here. *See* Pet. Br. 38–39, *ZF Automotive*, No. 21-401.[12]

Second, there is no conflict between Section 1782 and Section 7 of the FAA. Section 7 concerns only the authority of the federal court of the district where the arbitration is seated. *See Servotronics*, 954 F.3d at 215. It does not address seeking evidence for use in arbitral proceedings seated outside the United States—the only scenario to which Section 1782 applies. *See Intel*, 542 U.S. at 263. By definition, then, Section 1782 applies to proceedings to which Section 7 of the FAA does not apply. Because Congress knows of "existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185

[12] The English courts recently confronted an analogous situation. In *A and B v. C, D and E*, [2020] EWCA (Civ) 409, [2020] 1 WLR 3504, the court was asked to determine whether Section 44 of the English Arbitration Act, which allows English courts to order the production of evidence in aid of arbitration, allowed a court to order a nonparty witness located in the United Kingdom to provide evidence for an arbitration seated in New York. *Id.* at [1]; Arbitration Act 1996, c. 23, §§ 2(3), 44. In holding that the statute authorized discovery from third parties, the court noted that courts would have more flexibility in ordering discovery in aid of a foreign arbitration than a foreign court proceeding but determined that was "not a reason for placing limitations on the statutory language which it will not bear." *A and B*, [2020] EWCA (Civ) 409 at [39].

(1988), it would have understood the reach of Section 7 when it enacted Section 1782.

This is the only interpretation that "interpret[s] Congress's statutes as a harmonious whole," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018), while giving effect to the "ordinary public meaning" of the words that Congress chose to use in Section 1782. *Bostock*, 140 S. Ct. at 1738.

Finally, Section 1782 reflects a legislative judgment that making discovery in the United States available for use in proceedings before non-U.S. adjudicatory bodies will foster international cooperation in evidence-gathering and thereby encourage foreign countries to provide similar assistance to U.S. proceedings. *See Intel*, 542 U.S. at 252 (describing "twin aims" of Section 1782); S. Rep. No. 88-1580, at 3783 (1964) (desiring to "provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects").

Since the 1964 amendments, other countries have extended judicial assistance to arbitrations taking place outside of their borders—the exact international reciprocity that Congress was hoping to encourage in 1964. *See Intel*, 542 U.S. at 252. The English Arbitration Act, for example, authorizes courts to order discovery in aid of an arbitration taking place abroad, including at least one arbitration taking place in the United States. *See* Arbitration Act 1996, c. 23, §§ 2(3), 44; *supra* p. 30 n. 12. Germany also permits its courts to assist arbitrations seated abroad. *See* Code of Civil Procedure, Dec. 5, 2005, BGBl I at 3786, §§ 1033, 1050 (last amended Oct. 10, 2013). As this Court emphasized in *Intel*, the 1964 amendment to Section 1782 was part of a larger project to "investigate and study

existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." 542 U.S. at 248 (quoting Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (1958)). Interpreting Section 1782 to include international commercial arbitral tribunals furthers those goals. *See Application to Obtain Discovery*, 939 F.3d at 730.

CONCLUSION

Lower courts should exercise their discretion under Section 1782, with appropriate regard for tribunals' receptivity to the discovery sought and this Court's other guidance in *Intel*. But the notion that either commercial or treaty-based international arbitral tribunals lie outside the scope of Section 1782 is untenable. Had Congress intended to deny Section 1782's assistance to the adjudicatory bodies that come most readily to mind at the mention of "foreign or international tribunal," it would and easily could have said so. But the plain language of the statute, together with its legislative history, including commentary from its principal drafter, and this Court's decision in *Intel*, all compel the opposite conclusion: both kinds of international arbitral tribunal fall unambiguously within the meaning of "foreign and international tribunal" under Section 1782.

The district courts' orders should be affirmed.

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