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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an ad hoc arbitration to resolve a commercial dispute between two parties is a "foreign or international tribunal" under 28 U.S.C. § 1782 where the arbitral panel does not exercise any governmental or quasi-governmental authority.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners (third-party defendants-appellants below) are AlixPartners, LLP and Mr. Simon Freakley.

Respondent (plaintiff-appellee below) is The Fund for Protection of Investor Rights in Foreign States.

Petitioner AlixPartners, LLP states that it is a privately held limited liability partnership with a principal place of business in New York. AlixPartners, LLP further states that its corporate parent is AlixPartners Holdings, LLP and that no publicly held corporation owns a 10% or greater interest in AlixPartners, LLP.

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The Second Circuit's opinion (Pet. App. 1a-33a) is reported at 5 F.4th 216. The opinion of the district court (Pet. App. 41a-51a) is not published in the Federal Supplement but is available at 2020 WL 3833457. The opinion of the district court denying reconsideration (Pet. App. 34a-40a) is not published in the Federal Supplement but is available at 2020 WL 5026586.

JURISDICTION

The opinion of the court of appeals was issued on July 15, 2021. Pet. App. 1a-33a. The court of appeals denied Petitioners' timely petition for panel rehearing or rehearing *en banc* on September 10, 2021. Pet. App. 52a-53a. AlixPartners, LLP and Mr. Simon Freakley petitioned this Court for a writ of certiorari on October 5, 2021 and this Court granted certiorari on December 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1782(a) of Title 28 of the United States Code provides, in pertinent part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

STATEMENT

In enacting § 1782, Congress authorized U.S. district courts to grant discovery in aid of proceedings before a "foreign or international tribunal." This case turns on the meaning of that statutory phrase and, more particularly, whether it reaches ad hoc arbitration proceedings before private arbitrators that are acknowledged to be "functionally independent" from any government entity or authority. It does not. As made clear by the text, context, and origins of the statute, the defining characteristic of a "foreign or international tribunal" as that phrase was used in § 1782 is that the entity be governmental and exercise some form of governmental authority. The fact that one party to a non-governmental arbitration happens to be a sovereign state, and that it consented to appear before the arbitration in a treaty, changes nothing about the nature of the tribunal itself. The relevant inquiry under § 1782 focuses on the body conducting the proceeding, not on how one or more parties got there.

That fact is particularly clear here, where Respondent chose a private forum over a governmental option. When Respondent decided to pursue its claims against Lithuania, it had several available alternatives—including bringing suit in a Lithuanian court. But Respondent elected, with Lithuania's advance consent, to submit its claims to an ad hoc panel of private arbitrators, selected jointly by Respondent and Lithuania as parties, to fully and finally resolve the dispute without the influence of any governmental authority. The arbitral panel convened to resolve the commercial dispute here is every bit as private as countless other arbitrations, none of which

Congress sought to deem a "foreign or international tribunal" under § 1782.

A. Development Of § 1782

The prior version of § 1782 authorized district courts to assist in the production of evidence for use in "any judicial proceeding pending in any court in a foreign country." In 1964, Congress amended the statute to permit such assistance for use in proceedings "in a foreign or international tribunal." Act of Oct. 3, 1964 § 9(a), Pub. L. No. 88-619, 78 Stat. 997; *see Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). That amendment was the product of significant and careful deliberation.

Codified in 1948, Congress enacted 28 U.S.C. § 1782 to provide judicial assistance for the taking of depositions in the United States "to be used in any civil action pending in any court in a foreign country with which the United States is at peace[.]" Act of June 25, 1948, ch. 646, 62 Stat. 949; *see Intel*, 542 U.S. at 247-48. Section 1782, along with its sister statutes at §§ 1781, 1783-85, revised and consolidated Congress's prior acts providing similar assistance to foreign courts. *See, e.g.,* Act of Mar. 2, 1855, ch. 140, 10 Stat. 630; Act of Mar. 3, 1863, ch. 95, 12 Stat. 769.

In 1958, Congress created a Commission on International Rules of Judicial Procedure (the Rules Commission) "to investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743. Congress directed that the Rules Commission, which reported to the President of the United States, was to

recommend procedural revisions "for the rendering of assistance to foreign courts and quasi-judicial agencies." *Id*.; *Intel*, 542 U.S. at 429.

The Rules Commission submitted its final report in 1963. It recommended that Congress amend § 1782 to, among other things, delete the words "in any judicial proceeding pending in any court in a foreign country" and replace them with the phrase "in a proceeding in a foreign or international tribunal." *See* Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2, 15-52 (1963) (1963 Report). In 1964, both chambers of Congress accepted the Rules Commission's proposed legislation verbatim. The President signed the amendment into law. Act of Oct. 3, 1964 (1964 Act), Pub. L. No. 88-619, 78 Stat. 995; *see Intel*, 542 U.S. at 248.[1]

The proposed amendment to § 1782 additionally replaced 22 U.S.C. §§ 270-270g, "which conferred certain powers on commissioners or members of 'international tribunals.'" *National Broadcasting Co. v. Bear Stearns & Co*, 165 F.3d 184, 189 (2d Cir. 1999) ("*NBC*")). Congress's reference to "international tribunals" in §§ 270-270g was limited to "intergovernmental tribunals" such as state-to-state commissions, like the United States-German Mixed Claims Commission. *Id.* at 189.

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[1] The statute was amended again in 1996, when Congress added "including criminal investigations conducted before formal accusation" after the term "proceedings in a foreign or international tribunal." Div. A, Title XIII, Feb. 10, 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486.

The accompanying House and Senate Committee Reports explained that Congress introduced the word "tribunal" to ensure that "'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'" *Intel*, 542 U.S. at 249 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964) and H. R. Rep. No. 1052, 88th Cong., 1st Sess., 9 (1963)). Those statements echoed the Rules Commission's concrete examples of the types of "foreign or international tribunals" the amended statute would reach, including "proceedings before investigating magistrates in foreign countries," "a foreign administrative tribunal," or a "quasi-judicial agency." Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2, 45 (1963). Neither the Committee Reports nor the 1963 Report suggested that the revised language would reach arbitration.

B. Factual Background

1. Petitioners are AlixPartners, LLP, a consulting firm headquartered in New York, and its current CEO, Mr. Simon Freakley. Pet. App. 7a n.11. Respondent is The Fund for Protection of Investors Rights in Foreign States (the "Fund"), a Russian investment entity. Respondent is an alleged assignee of a former shareholder of AB Bankas Snoras ("Snoras Bank"), a failed Lithuanian bank. Pet. App. 4a.

In late 2011, the Bank of Lithuania appointed Mr. Freakley as the Temporary Administrator of Snoras Bank. Pet. App. 4a, 42a. Lithuania tasked Mr. Freakley with investigating the bank and its solvency, including allegations that Snoras Bank had provided improper loans, inadequately complied with

Lithuanian bank regulations, and failed to manage risks. Mr. Freakley was assisted in this work by Zolfo Cooper, a financial advisory firm of which he was then CEO. Pet. App. 7a n.11. Following submission of Mr. Freakley's report, Snoras Bank remained under the temporary control of Lithuania until January 16, 2012, when it was placed into Lithuanian bankruptcy proceedings and declared insolvent.

2. Nearly eight years later, in April 2019, Respondent initiated an ad hoc arbitration against Lithuania, asserting claims arising from Lithuania's actions regarding Snoras Bank. J.A. 23a-24a. The Fund asserted that Lithuania had consented to such arbitration via Article 10(2)(d) of the Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (the "Treaty"). J.A. 48a.

The Treaty seeks to establish "favorable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party." J.A. 69a. To that end, Lithuania and Russia agreed that investors based in one country have the option to adjudicate disputes against the other foreign sovereign in one of four ways, namely before: (a) any "competent court or court of arbitration" of Lithuania or Russia, as appropriate; (b) "the Arbitration Institute of the Stockholm Chamber of Commerce;" (c) "the Court of Arbitration of the International Chamber of Commerce;" or (d) "an ad hoc arbitration in accordance with [the] Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." J.A. 77a-78a.

Respondent elected to submit the dispute to ad hoc arbitration (the "Arbitration"), and delivered a notice of arbitration to Lithuania. J.A. 23a.

3. The Fund commenced the arbitration in accordance with the UNCITRAL Arbitration Rules established in 1976 (the "UNCITRAL Rules"). Notice of Arbitration ¶ 1 (J.A. 24). UNCITRAL is an entity created by the United Nations General Assembly. UNCITRAL establishes rules that arbitrators can use with the agreement of the parties, but UNCITRAL does not become involved in individual cases. It does not nominate arbitrators, certify arbitral authorities, administer arbitration proceedings, or otherwise perform any function related to individual arbitration proceedings.[2] And the UNCITRAL Rules may be adopted by any parties to a private contract to resolve any dispute: they are not restricted to disputes involving sovereigns or UNCITRAL member nations.[3]

The UNCITRAL Rules provide that, "[w]here the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing." J.A. 153a. The Treaty, between Russia and Lithuania as "Contracting Parties," constitutes Lithuania's written consent to arbitrate under the UNCITRAL Rules. J.A. 78a.

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[2] The United Nations Commission On International Trade Law, Frequently Asked Questions, https://uncitral.un.org/en/texts/arbitration/faq. ("UNCITRAL FAQs").

[3] *Id.*

The arbitral panel here consists of three private individuals: Dr. Laurent Lévy (a Swiss arbitration lawyer and name partner at the Geneva-based law firm Lévy Kaufman Kohler); Christopher Thomas, QC (a Canadian arbitration lawyer); and Professor William Park (a professor at Boston University School of Law). J.A. 190a-191a. The panel members were chosen by the parties alone; no panel member is affiliated with any government or with UNCITRAL. J.A. 190a-191a. The panel's award will be confidential and binding on the parties. UNCITRAL Rules, Art. 32, ¶¶ 2, 5 (J.A. 175a).

C. Procedural Background

1. Shortly after commencing the Arbitration, but before the arbitral panel was constituted, Respondent filed an application under § 1782 in the Southern District of New York. The application sought leave to serve non-party discovery requests on Petitioners for documents and deposition testimony for use in the merits phase of the Arbitration. Petitioners opposed the application, arguing (among other things) that the ad hoc Arbitration panel was a private adjudicative body and not a "foreign or international tribunal" within the meaning of § 1782. *See* Opposition to Ex Parte Application (Dkt. No. 18).[4]

The district court authorized the subpoenas. It reasoned that the Arbitration "was convened under the authority of the Treaty"; that the Fund "seeks to

[4] "Dkt. No. [#]" refers to documents filed below in *In re the Application of the Fund for Protection of Investor Rights in Foreign States*, No. 1:19-mc-00401-AT (S.D.N.Y). "CA2 ECF No. [#]" refers to documents filed in *The Application of the Fund for Protection of Investor Rights in Foreign States v. AlixPartners, LLP*, No. 20-2653-cv (2d Cir.).

enforce rights established by that treaty against Lithuania as a state"; and that the arbitration "will be conducted pursuant to UNCITRAL Rules." Pet. App. 46a.

The same day the district court issued its decision, the Second Circuit decided *In re Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. 1782*, 965 F.3d 96 (2d Cir. 2020), *as amended* (July 9, 2020) ("*Guo*"). *In Guo*, the court of appeals reaffirmed its earlier ruling that "Section 1782(a) does not extend to private international commercial arbitrations." *Id.* at 100 (citing *National Broadcasting Co. v. Bear Stearns & Co*, 165 F.3d 184 (2d Cir. 1999) ("*NBC*")).[5]

"[E]choing the functional approach adopted by the *Intel* Court," *Guo* articulated a multi-factor test to determine whether the arbitration fell outside § 1782's ambit. *Guo*, 965 F. 3d at 107. The court of appeals considered: (1) "the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body" (*id.*); (2) "the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision" (*id.*); (3) "the nature of the jurisdiction possessed by the panel" (*id.* at 108); and (4) "the ability of the parties to select their own arbitrators" (*id.*). "In short," the court of appeals concluded, "the inquiry is whether the body in question possesses the functional attributes most commonly associated with private arbitration." *Id.* at

[5] In *NBC*, the court of appeals held that § 1782 was designed to reach "only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state." *NBC*, 165 F.3d at 189.

107. Applying that test, the court held that the private arbitration abroad was not a proceeding in a "foreign or international tribunal" under § 1782.

In *Guo*, the court held that an arbitral proceeding before the China International Economic and Trade Commission or "CIETAC" fell outside the scope of § 1782, despite the facts that CIETAC was established by the People's Republic of China, compiles the list of eligible arbitrators, and receives some funding from the Chinese government. *Guo*, 965 F.3d at 100-01. The *Guo* court noted that the inquiry as to whether the arbitral body functions as a private dispute resolution entity "does not turn on the governmental or nongovernmental *origins* of the administrative entity in question." *Id.* at 107 (emphasis in original).

Petitioners moved for reconsideration in light of *Guo*. *See* Reconsideration Mem. at 5 (Dkt. No. 29). The district court denied the motion, holding that Petitioners had "presented arguments based on those same factors" that the Second Circuit considered in *Guo*. Pet. App. 39a.

2. The Second Circuit affirmed. Pet. App. 33a. The court of appeals held that its analysis was governed by *Guo* and purported to weigh each of the *Guo* factors. *Id.*

With regard to the first factor, the court of appeals acknowledged that "the arbitral panel . . . functions independently from the governments of Lithuania and Russia"; that "[t]he members of the arbitral panel (two arbitration lawyers and a law professor) have no official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity and the panel receives zero government funding"; and that the

panel's "award may be made public only with the consent of both parties." Pet. App. 17a.

"Nevertheless," the court of appeals held, "this functional independence of the arbitral panel must be viewed within the context of the Treaty." *Id.* That "context," the court explained, indicated that arbitration was "expressly contemplated by the Treaty" and was conducted by Rules "developed by UNCITRAL, an international body." *Id.* The court of appeals concluded that the arbitral panel "thus retains affiliation with the foreign States, despite its functional independence in other ways," and "[a]ccordingly, this factor weighs in favor" of bringing this arbitration within § 1782. Pet. App. 18a.

Turning to the second factor, the court of appeals acknowledged that a state's authority "to influence or control" the arbitration "is limited, if not non-existent." *Id.* But the court concluded that this lack of influence was negated by the fact "that an arbitration against a foreign State, whether conducted pursuant to a bilateral investment treaty like this Treaty or otherwise, necessarily requires that the foreign State consent to subject itself to binding dispute resolution." *Id.* The court deemed this factor "neutral as to whether this arbitral panel qualifies" under § 1782. Pet. App. 19a.

The court of appeals afforded the third *Guo* factor paramount significance. "Critically," the court concluded, "the arbitral panel in this case derives its adjudicatory authority from the Treaty . . . rather than an agreement between purely private parties or any other species of private contract." *Id.* The court relied on dicta in *Guo* stating that an "'arbitral body under a bilateral investment treaty may be a 'foreign

or international tribunal' when it derives its adjudicatory authority from the 'intervention or license of any government to adjudicate cases arising from certain varieties of foreign investment.'" Pet. App. 19a-20a (quoting *Guo*, 965 F.3d at 108 n.7). The court concluded that "this factor weighs heavily in favor" of authorizing § 1782 discovery. Pet. App. 20a.

As for the fourth factor, the court of appeals acknowledged that "[t]he three arbitrators selected are all private parties" chosen by the arbitrating disputants. Pet. App. 20a. The court held that "this factor weighs against" authorizing discovery under § 1782, but discounted it as "not determinative." Pet. App. 21a.[6]

Finally, the court of appeals asserted that reading § 1782 to reach the arbitration at issue "is consistent with legislative intent." Pet. App. 22a. The court cited the Second Circuit's prior description of the 1964 Senate Report as indicating Congress's intent to "'broaden'" the statute to reach "'intergovernmental tribunals *not* involving the United States.'" Pet. App. 23a (*quoting NBC*, 165 F.3d at 190).

Petitioners timely filed a rehearing petition, which the court of appeals denied without comment.[7]

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[6] The court of appeals briefly noted two "additional 'functional attributes'" of the arbitration that it held were consistent with deeming the arbitral panel a "foreign or international tribunal." Pet. App. 21a. The court observed that "Lithuania, in its capacity as a foreign State, is one of the parties," and that "bilateral investment treaties [are] tools of international relations." *Id.*

[7] The parties have stipulated, and the district court so-ordered on September 22, 2021, that compliance with the discovery requests here will not be required until after this Court disposes of this case. J.A. 206a-208a. On September 23, the court of

SUMMARY OF ARGUMENT

In 1948, Congress enacted § 1782, captioned "Testimony for use in foreign country." The statute facilitated the taking of deposition testimony "to be used in any civil action pending in any court in a foreign country with which the United States is at peace[.]" Act of June 25, 1948, ch. 646, 62 Stat. 949. The original version of § 1782 thus contemplated assisting the judicial decisionmakers of individual foreign countries. In 1964, Congress amended § 1782. The amended statute authorizes district courts to order documentary or testimonial discovery for use in proceedings "in a foreign or international tribunal." The statute, as amended, continues to facilitate discovery to aid governmental bodies. The text, context, and policy underpinnings of the amendment, as well as the statute's harmonization with other federal laws, demonstrates that a "foreign or international tribunal" means a governmental entity of one or more sovereign states. A non-governmental arbitral panel is not "a foreign or international tribunal" under the statute, and a party in a proceeding conducted, evaluated, and resolved by such a panel is not eligible for relief under § 1782.

I. As originally enacted, § 1782 permitted depositions of "witness[es] within the United States to be used in any judicial proceeding pending in any court in a foreign country," so long as the United States was at peace with that country. 28 U.S.C. § 1782 (1948). The focus of the statute was to facilitate comity with foreign countries. In 1964, Congress

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appeals recalled and stayed its mandate pending action by this Court. CA2 ECF No. 94.

amended § 1782 to delete the words "in any judicial proceeding pending in any court in a foreign country" and replace them with the phrase "in a proceeding in a foreign or international tribunal." 1964 Act. The amendment did not shift the focus of the statute from facilitating comity with foreign countries. At that time, the term "tribunal" was typically used and largely understood to embrace judicial, governmental, or administrative deliberative bodies. Bilateral treaties allowing for investor-state arbitrations (like the Treaty here) did not even exist when the statute was amended in 1964. Based on the language and structure of the statute, its reach was limited to proceedings conducted by governmental entities of one or more sovereign states.

A. The legislative development, context, and policy underpinnings of § 1782 demonstrate that the amended statute was designed to reach proceedings before governmental entities exercising governmental power.

Six years before it amended the statute, Congress established a Rules Commission made up of prominent government officials, state and federal jurists and legislators, scholars, and private citizens. *See Intel*, 542 U.S. at 246-47. The Rules Commission made recommendations designed to improve existing practices of judicial assistance and cooperation between the United States and foreign countries, including recommending amendments to § 1782. The Rules Commission's proposed amendments were incorporated without changes by Congress and signed into law by the President.

The Rules Commission provided a series of examples of proceedings before "foreign or

international tribunals," every one of which included governmental or quasi-governmental entities conducting investigations or resolving disputes in foreign proceedings. None of the Rules Commission, the Senate, the House of Representatives, or the President used the word "arbitration" or included proceedings before private arbitrators as an example of "a foreign or international tribunal."

B. If Congress intended to extend § 1782 to arbitral tribunals, it would have said so. Other statutes, including one passed just two years after the 1964 amendment, use the term "arbitral tribunal." Congress has also expressly distinguished between a "foreign court or international tribunal," on the one hand, and an "arbitration," on the other.

C. Expanding the scope of § 1782 to reach arbitrations would cause tension with the Federal Arbitration Act ("FAA"), which gives arbitrators—not courts—the power to determine what discovery is available in domestic arbitrations. Such expansion would also undermine advantages of arbitration that both Congress and courts have recognized: efficiency and cost-effectiveness.

II. The Arbitration is not a proceeding before "a foreign or international tribunal" as that phrase is used in § 1782.

A. The deliberative body that is conducting and will resolve the Arbitration is not governmental in any sense of the word. Neither Russia nor Lithuania—separately or jointly, or through any agencies or other governmental sub-components—is conducting the arbitral proceedings or resolving the dispute between the parties at any stage of the proceedings. The panel

members, whose decision will be final and binding, are private individuals who were selected solely by the parties and have no connection to or affiliation with any governmental authority. Indeed, the panel itself is not subject to control or oversight by *any* entity at all, not even UNCITRAL, and it will cease to exist after rendering its award. The award itself will remain confidential unless both parties agree otherwise.

B. The existence and terms of the Treaty and Lithuania's status as the responding party do not convert the ad hoc Arbitration panel into a "foreign or international tribunal."

By entering into the Treaty, the "Contracting Parties"—Russia and Lithuania—consented to have specifically identified disputes resolved by one of four dispute-resolution mechanisms, including the ad hoc Arbitration selected by the Fund. Under the terms of the Treaty, therefore, both sovereigns have consented to the adjudication and resolution of eligible investor claims by arbitration, and neither has retained decision-making authority or the right to contest an arbitral award when a claimant elects to proceed in arbitration.

ARGUMENT

I. THE TERM "FOREIGN OR INTERNATIONAL TRIBUNAL" AS USED IN § 1782 MEANS A GOVERNMENTAL BODY WIELDING GOVERNMENTAL AUTHORITY OF ONE OR MORE STATES

A. The Text, Context, And Origins Of § 1782 Demonstrate That The Statute Reaches Only Proceedings Conducted By A Governmental Entity Exercising Governmental Authority

In construing § 1782, as with any other statute, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Because the phrase "foreign or international tribunal" is not further defined in the statute, courts "ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted" the relevant language. *Id.* at 2362 (citation omitted). That analysis demonstrates that, when Congress expanded § 1782 to reach proceedings in a "foreign or international tribunal," it understood that term to reach only governmental bodies wielding governmental authority.

1. As a threshold matter, it is essential to recognize that the statutory term at issue describes the decisionmaking or investigating body itself. That is, the question of what Congress meant to include within a "foreign or international tribunal" requires looking at the nature of the entity (here, the arbitral panel), not simply at the parties, the origin of the

dispute, or other generalized considerations. Congress did not, for example, authorize discovery in aid of a "foreign or international *dispute*," or any "foreign or international *proceeding*." Rather, in amending § 1782 to reach matters in a "foreign or international tribunal," Congress defined the statute's reach in reference to the nature of the body conducting the proceeding.

In that important respect, § 1782 continued the basic definitional approach of its predecessor. The prior version of the statute applied to "any judicial proceeding pending in any court in a foreign country." 28 U.S.C. § 1782 (1948). The 1964 amendment permitted discovery in aid of bodies other than the courts of a foreign sovereign, but it continued to define the statute's reach by reference to the "foreign or international" nature of the decisionmaker. Accordingly, the question presented here cannot be answered by bootstrapping other circumstances (such as one party's sovereign status or the form in which it consented to arbitration) to transform the nature of the panel itself.

The decision below missed this point entirely. It afforded "critical[]" significance to the fact that Russia and Lithuania had entered into a treaty by which each agreed to include ad hoc arbitration in the menu of dispute-resolution options. The court of appeals thus conflated the method of consent to appear before the arbitral panel with the nature and substance of the panel's authority itself. Similarly, in adopting their even more capacious constructions of § 1782, the Fourth and Sixth Circuits focused on the exercise of governmental power by *other* decisionmaking bodies—namely, courts that enforce arbitral awards.

Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 211-13 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 723 (6th Cir. 2019). Were those courts properly focused on the nature of the arbitral panel itself, they would have recognized that the *need* for judicial enforcement tends to confirm that the arbitral panels *lack* essential governmental authority.

2. Moreover, a proper construction of the term "foreign or international tribunal" "requires more than concentration upon isolated words." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). Constructions that "rest upon a dictionary definition of isolated words" but "do[] not account for the governing statutory context" will not suffice. *Bloate v. United States*, 559 U.S. 196, 205 n.9 (2010). As this Court has explained, "construing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities.'" *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (citation omitted). Rather, "[s]tatutory construction . . . is a holistic endeavor." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Accordingly, the Court should not and need not resolve the meaning of the word "tribunal" in a vacuum. Its meaning in § 1782 is clarified by the "statutory context," including § 1782's "history" and "purpose." *Abramski v. United States*, 573 U.S. 169, 179 (2014) (citation omitted). In that light, the phrase "foreign or international tribunal" is properly understood as limited to a *governmental* entity conducting governmental tasks—a judicial or quasi-judicial body of a "foreign" country or an

"international" commission or similar formal entity that is formed and governed by two or more nations.

To be sure, the Court could arrive at this same understanding of "tribunal" through the dictionary definitions and usage of those terms. At the time of § 1782's amendment in 1964, dictionaries commonly defined "tribunal" to encompass courts and other governmental entities. *E.g.*, *Black's Law Dictionary* 1677 (4th Ed. 1951) ("[t]he seat of a judge," "a judicial court") ("*Black's*"); *Webster's New International Dictionary of the English Language* 2707 (3d ed. 1961) ("the seat of a judge"; "a court or forum of justice") ("*Webster's*"); *Oxford English Dictionary* (1933, reprinted 1961) ("[a] court of justice"; "a judicial assembly"). Alternative, broader definitions of the term also existed, encompassing, for example, any "person or body of persons having authority to hear and decide disputes so as to bind the disputants." *Webster's* at 2441. Had Congress envisioned such a broad understanding, however, the boundaries of "foreign or international tribunal" would be nigh limitless—potentially including far-flung things such as insurance claims adjusters, home owners associations, or myriad other informal dispute processes.[8] The governmental nature of "tribunal" is

[8] The definitions of "foreign" and "international" at the time each back up the governmental nature of "foreign or international tribunal." "Foreign" commonly referred to something external to "a place or *country*." *Webster's* 889 (emphasis added); *see, e.g., Black's* 775 ("[b]elonging to another nation or country"; "belonging or attached to another jurisdiction."). "International" commonly related to the "intercourse of nations" or actions "participated in by two [or] more nations." *Webster's* 1181.

further corroborated by its usage by Congress and this Court at the time of the 1964 amendment to § 1782.

Congress and this Court's use of the term "tribunal" at that time was consistent with the governmental understanding of "foreign or international tribunal." *See Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) (holding that "[t]he record of statutory usage" may illustrate the meaning of a term (quotation omitted)). Up to the time of § 1782's amendment in 1964, Congress consistently used the term "tribunal" to refer to, or in the context of, courts or other governmental entities.[9] This Court likewise used the term "tribunal" unadorned to refer to, or in the context of, courts and governmental entities.[10] By contrast, this Court had also used the more specific term "*arbitral* tribunal" to clarify when it addressed arbitration.[11] Even after 1964, this Court's analysis of

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[9] *See, e.g.*, U.S. Const. art. I, § 8, cl. 9 (authorizing Congress to "constitute *Tribunals* inferior to the Supreme Court" (emphasis added)); Pub. L. 75–696, § 2, 52 Stat. 842, 842-43 (1938) (authorizing suits and proceedings "before any . . . administrative tribunal in any jurisdiction"); Pub. L. 87-187, 75 Stat. 415 (1961) (authorizing payment of "final judgments rendered by a State or foreign court or tribunal against the United States").

[10] *See, e.g.*, *Aspden v. Nixon*, 45 U.S. 467, 490 (1846) (discussing potential efforts to recognize judgments obtained by foreign litigants in "equity tribunals of their own country . . . in our tribunals"); *Canada Malting Co. v. Patterson S.S. Ltd.*, 285 U.S. 413, 423 (1932) (discussing forum non conveniens as between "[c]ourts of equity and of law" and "foreign tribunal[s]"); *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) (discussing the "defense of a suit in a foreign tribunal" as courts have expanded personal jurisdiction over nonresidents due to increased commerce).

[11] *See, e.g.*, *N. Am. Com. Co. v. United States*, 171 U.S. 110, 133 (1898) (using "arbitral tribunal" to refer to dispute between the United States and Great Britain); *Louisiana v. Mississippi*, 202

the meaning of "foreign or international tribunal" supports the term's governmental scope.

3. In *Intel*, the only decision by this Court addressing § 1782, the Court considered whether the Commission of the European Communities (the "European Commission") is a foreign or international "tribunal" when it acts as a "first-instance decisionmaker." *Intel*, 542 U.S. at 246-7. Every aspect of the Court's analysis and reasoning supports the conclusion that the term applies to governmental adjudicators, and not to private arbitral bodies.

The European Commission was formed by the sovereign members of the European Union to enforce EU competition laws.[12] In deciding that the European Commission is indeed a "foreign or international tribunal," the *Intel* Court closely reviewed the meaning of the term as used in the statute and considered and highlighted the legislative developments that led to the 1964 amendment.

As the Court recounted, Congress established the Rules Commission with the express instruction that it evaluate and recommend statutory revisions "for the rendering of assistance to foreign courts and *quasi-judicial agencies*." *Intel*, 542 U.S. at 257–58 (emphasis in original). In fulfilling its mandate, the Rules Commission recommended that Congress delete the phrase "any judicial proceeding" and replace it with "a

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U.S. 1, 50-51 (1906) (reviewing decisions of "arbitral tribunals" concerning boundary disputes).

[12] Fact Sheets on the European Union, The European Commission, https://www.europarl.europa.eu/factsheets/en/sheet/25/the-european-commission (last visited Jan. 18, 2022).

proceeding in a foreign or international tribunal." *Id.* at 258. As the Court noted, Congress "unanimously adopted" the proposed language and the amendment was signed into law in 1964. *Id.* at 248.

This Court recognized that Congress "introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'" *Id.* at 249. Having ascertained the meaning and purpose of the word "tribunal" in the amended statute, the Court considered whether the European Commission was the equivalent of a foreign court or quasi-judicial agency, and held: "We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decision maker, from § 1782(a)'s ambit." *Id.* at 258.[13]

4. A more detailed look into the Rules Commission's creation and membership, its mandate from Congress, the study the Commission undertook, and the recommendations it made, support the conclusion that the term extends only to governmental entities abroad.

The nine members of the Rules Commission were chosen, in part, by the President of the United States, the Attorney General, and the Secretary of State.[14]

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[13] *Intel* instructed district courts to consider "the receptivity of the *foreign government or the court or the agency abroad* to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264 (emphasis added). Here again, the Court emphasized the *governmental* nature of the entity conducting the proceeding abroad.

[14] Its members included, among others, Charles D. Breitel, Associate Justice of the New York State Supreme Court, Appellate Division; J. Lee Rankin, Solicitor General of the

The Commission then appointed a fifteen-member Advisory Committee, selecting from "lawyers, judges of Federal and State courts and other persons competent to provide advice to the Commission." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 5, 72 Stat. 1743.

Congress directed the Rules Commission to investigate and recommend changes to "existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." *Id.* at § 2. Thus, Congress was focusing on statutory changes that would improve the relationship between the United States and other sovereign states. As the Seventh Circuit recently recognized, "[n]oticeably absent from this statutory charge [to the Rules Commission] is any instruction to study and recommend improvements in judicial assistance to private foreign arbitration." *Servotronics*, *Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694 (7th Cir. 2020).

In the Rules Commission's Fourth Annual Report to the President and Congress, it recommended that Congress amend § 1782 to authorize districts courts to provide discovery assistance "for use in proceedings in foreign or international tribunals." Of critical importance here, the Commission provided specific examples of proceedings before "foreign or international tribunals," *every one of which included governmental or quasi-governmental entities conducting a proceeding or investigation abroad.*

United States; John W. Hanes, Jr., Administrator of Security and Consular Affairs, Department of State; and Malcolm R. Wilkey, Assistant Attorney General in charge of the Criminal Division, Department of Justice.

For example, the proposed language was intended to reach "proceedings [that] are pending before investigation magistrates in foreign countries." 1963 Report at 45. Recognizing "the constant growth of administrative and quasi-judicial proceedings all over the world," the Commission noted that the amendment would reach "proceedings before a foreign administrative tribunal or quasi-judicial agency." *Id.* The House and Senate Committees identified the same governmental entities as examples of "foreign or international tribunals." S. Rep. No. 1580, 88th Cong., 2d Sess., 7-8 (1964) and H. R. Rep. No. 1052, 88th Cong., 1st Sess., 9 (1963).

Critically, none of the Rules Commission, the Senate, the House of Representatives, or the President used the word "arbitration" or included proceedings before arbitrators as an example of "a foreign or international tribunal." Indeed, § 1782 does not use the words arbitration, arbitral, or arbitrator. In short, the Rules Commission was not asked to propose an amendment to reach international commercial arbitration; the Rules Commission did not, in fact, suggest that its amendment would reach such proceedings; and Congress gave no hint in adopting the recommendation verbatim that § 1782 would apply to anything other than a broader category of *governmental* bodies wielding governmental authority (much less to ad hoc arbitral panels).

B. Congress Has Used The Term "Arbitral Tribunals" To Refer To Arbitration Entities

When Congress has meant to refer to proceedings before arbitration bodies, it has called them "arbitral tribunals." That was true around the time of the 1964

amendment and since, and is true for arbitration proceedings in which a foreign state is a party.

1. Several statutes refer to "arbitral tribunals," as distinct from other tribunals. The statute that provides a mechanism for enforcing ICSID arbitral awards, 22 U.S.C. § 1650a(a), calls them "award[s] of an *arbitral* tribunal," not a foreign or international tribunal. 22 U.S.C. § 1650a(a) (emphasis added). Congress likewise called an arbitration award resolving an investment dispute under the Convention Establishing the Multilateral Investment Guarantee Agency an "award of an arbitral tribunal[.]" 22 U.S.C. § 290k-11. And Congress called an arbitration panel under the South Pacific Tuna Treaty an "arbitral tribunal[.]" 16 U.S.C. § 973n.

2. Congress's use of the term "arbitral tribunal" is not some new development. Section 1650a was enacted in 1966, just two years after Congress amended § 1782. The 1966 version of that statute used the term "arbitral tribunal," as the statute still does today. Act of Aug. 11, 1966, Pub. L. No. 89-532, 80 Stat. 344. Congress used the same term again when it passed § 290k-11 and § 973n over thirty years ago. Act of Dec. 22, 1987, Pub. L. 100-202, § 101(e) [title I], 101 Stat. 1329–131, 1329–134; Act of Jun. 7, 1988, Pub. L. 100–330, § 16, 102 Stat. 600.

3. Congress has even expressly distinguished between a "foreign court" or "international tribunal," on the one hand, and an "arbitration," on the other. 5 U.S.C. § 552b(c)(10) refers to actions "in a foreign court or international tribunal, *or* an *arbitration*[.]" 5 U.S.C. § 552b(c)(10) (emphases added). When a single statute uses different terms, they are presumed to mean different things. *See Burlington N. & Santa Fe*

Ry. Co. v. White, 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Congress likewise could have amended § 1782 to refer to a "foreign, international, *or arbitral* tribunal"—but chose not to.[15]

C. Limiting § 1782 To Proceedings Conducted By Governmental Entities Abroad Harmonizes The Statute With The Federal Arbitration Act

In interpreting and enforcing federal law, the Court construes statutes "as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). Expanding the definition of § 1782 beyond proceedings before governmental entities, however, would create anomalies and apparent tensions with the FAA.

The FAA governs all arbitrations seated in the United States involving interstate or foreign commerce. 9 U.S.C. §§ 1, 2; *accord* 9 U.S.C. §§ 208, 307. Congress enacted the FAA in 1925 to codify the enforcement of arbitration agreements and to eliminate the revocability of such agreements under the common law. Alexandra Dosman, et al., *The Federal Arbitration Act and State Arbitration Acts*, *in*

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[15] In its merits brief, Petitioner ZF Automotive canvasses in detail the meaning, legislative context, and policy underpinnings of the term "foreign or international tribunal" as used in § 1782. *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401. The analyses and arguments presented in that brief, which are not repeated here, demonstrate that the relevant term is limited to governmental bodies of one or more sovereign states.

INTERNATIONAL ARBITRATION IN THE UNITED STATES 34-35 (2017). As this Court has noted, the FAA "ensure[s] the enforcement of arbitration agreements according to their terms so as *to facilitate streamlined proceedings*." *AT&T Mobility* v. *Concepcion LLC*, 563 U.S. 333, 344 (2011) (emphasis added). The popularity of arbitral proceedings "rests in considerable part on [their] asserted efficiency and cost-effectiveness" which are "at odds with full-scale litigation" and the "broad-ranging discovery" permitted to parties before United States courts. *NBC*, 165 F. 3d at 190-91.

To ensure those efficiencies and the resulting cost savings of arbitration, the FAA materially limits the parties' ability to obtain the assistance of district courts to secure discovery. Parties to an arbitration cannot unilaterally seek non-party discovery for use in arbitration proceedings, secure pre-trial document productions, or obtain an order compelling a witness to provide deposition testimony. 9 U.S.C. § 7. The FAA delegates to arbitrators control of the discovery process. The FAA directs that "arbitrators," not parties, "may summon in writing any person to attend before them . . . as a witness" and "to bring with him" documents and information. *Id.*; *accord id.* § 208.

By contrast, § 1782 imposes none of these gate-keeping barriers, even when the target is not a party to the proceeding. Any "interested party" to proceedings that fall within § 1782's ambit may seek the full-scale discovery allowable under the Federal Rules of Civil Procedure. Such discovery may be sought (as here) against non-parties to the dispute and in connection with any adjudication "within reasonable contemplation," even before an actual

proceeding has commenced. *Intel*, 542 U.S. at 259.[16] It would be passing strange to suppose that, when amending § 1782, Congress sought to make U.S. courts tools for obtaining sweeping discovery that is generally *not afforded* under the FAA in aid of domestic arbitration.

II. THIS ARBITRAL PANEL DOES NOT WIELD GOVERNMENTAL AUTHORITY AND THUS IS NOT A "FOREIGN OR INTERNATIONAL TRIBUNAL" UNDER § 1782

The Arbitration in this case is a proceeding conducted by a panel of private arbitrators who have no affiliation with any governmental or quasi-governmental entity. That panel does not wield any governmental authority—it is adjudicating the dispute solely on the basis of the parties' consent. The panel will resolve the dispute without any control, oversight, or appellate review by a single foreign sovereign. The proceedings in the Arbitration are indistinguishable in all material respects from an arbitration between two private parties being conducted pursuant to a commercial contract.

That one party to the arbitration is a government does not change the nature of the panel, nor does the fact that the government consented to arbitration via

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[16] Here, Respondent sought leave from the district court to issue subpoenas to Petitioners even before the arbitral panel was constituted. *See* Yanos Declaration at ¶ 2 (Dkt. No. 22) ("The parties in the Arbitration have each appointed an arbitrator and are currently negotiating the appointment of a presiding arbitrator within the framework of the UNCITRAL Arbitration Rules, such that a full tribunal will be constituted in a matter of weeks.").

a treaty. By its terms, § 1782 focuses on the nature of the deliberative body itself, not whether a state is a disputant or the manner in which the state consented to be bound by the adjudicator's decision. Because the ad hoc panel is a non-governmental entity, it is not a "foreign or international tribunal."

A. The Arbitration Is Being Adjudicated By A Private Deliberative Body Without Governmental Intervention, Control, Or Oversight

1. Respondent was able to select from a menu of available fora to adjudicate its dispute against Lithuania, and elected to submit the matter to "ad hoc arbitration in accordance with the Arbitration Rules of [UNCITRAL]." The Fund also expressly waived its "right to prompt review of the case by the appropriate judicial or administrative authorities."[17] J.A. 82a; J.A. 77a-78a. By these decisions, the Fund declined to involve any judicial, quasi-judicial, or administrative entity of Lithuanian or any other governmental authority in the adjudication of its dispute and any appeal from the panel's decision and award.

2. The Arbitration is being conducted under Rules established by UNCITRAL. Contrary to the decision below, which suggested that the use of UNCITRAL's Rules in the Arbitration weighed in favor of bringing this arbitration within § 1782, those rules further demonstrate that the panel is not a governmental agency and is not exercising any governmental power. *See supra* at 7-8.

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[17] In addition, under the applicable UNCITRAL Rules, there is no opportunity for Russia or Lithuania to intervene in the arbitration in their capacity as sovereigns. *See* J.A. 150a-183a.

UNCITRAL was established by the United Nations General Assembly in 1966 to advance the field of international trade, not to exercise any governmental power. UNCITRAL has created and published Rules that can be used by ad hoc arbitral bodies if—and only if—adversaries to a dispute give their consent. J.A. 153a. And those Rules may be used by any consenting parties. They are not limited to disputes involving UNCITRAL member nations or those involving sovereigns. UNCITRAL FAQS.

The court of appeals held that, because the "rules that will govern the dispute were developed by UNCITRAL, an international body," "this arbitral panel . . . retains affiliation with the foreign States[.]" Pet. App. 17a-18a. The court's focus on the origins of UNCITRAL, rather than the ad hoc panel conducting the Arbitration, is misplaced.

That UNCITRAL was formed by the United Nations General Assembly has nothing to do with whether the deliberating body—here, the ad hoc Arbitration panel—is a governmental entity wielding governmental power. The panel is not a "UNCITRAL panel" in any respect. The panel was not selected by UNCITRAL, is not staffed with UNCITRAL employees or agents, is not controlled or supervised by UNCITRAL, and does not answer to UNCITRAL in any way, even as to the application of UNCITRAL's Rules. And UNCITRAL itself does not "perform any function related to individual arbitration proceedings, or any other system of public or private dispute settlement." UNCITRAL FAQS. Nor does it receive any compensation from the parties in connection with the Arbitration. *Id.* The Panel simply applies UNCITRAL Rules—in the same manner that it would

apply any procedural rules of arbitration, whether established by wholly private entity or an intentional body—to the extent the arbitral parties agree.[18]

3. The arbitrators were selected by the parties in their capacity as disputants in the Arbitration. Pet. App. 20a. The arbitrators are private citizens who are not affiliated with, and do not answer to, Russia, Lithuania, any foreign state or intergovernmental body, or any external entity of any kind. J.A. 190a-191a.

The arbitral decision and award will be final and binding as between the parties and may not be disclosed unless both parties agree. The Arbitration panel itself, which "receives zero government funding," will disband after it resolves the dispute before it. Pet. App. 17a.

Accordingly, the ad hoc panel conducting the Arbitration is acting independently, free from any governmental control or influence, and in a manner identical to private arbitrations panels in the United States and around the world. The Arbitration, therefore, is not a proceeding "in a foreign or international tribunal" and the Fund is not eligible to secure relief under § 1782.

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[18] In *Guo*, the arbitral panel was a deliberative body supervised by CIETAC, an entity created and partially funded by the Chinese government. 965 F.3d at 100-01. There, CIETAC's governmental origins did not affect the arbitral panel's independence in conducting the arbitration, and therefore did not convert the panel into a "foreign or international tribunal." *Id.* at 107-08. Here, the ad hoc arbitrators have no connection to UNCITRAL, or any foreign or international body, making a more compelling case that the panel is not a "foreign or international tribunal."

B. The Treaty Does Not Convert The Panel Into A Governmental Entity Wielding Governmental Authority

1. The decision below recognized many of the ways in which the Arbitration panel is not a governmental entity. Indeed, the court of appeals conceded that the panel is "functionally independent" from any foreign or international states. The specific characteristics recited by the court merit repeating here:

> "The three arbitrators selected are all private parties—two arbitration lawyers and one law professor—which is suggestive of a 'private' arbitration" (Pet. App. 20a);
>
> "The members of the arbitral panel have no official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity" (*id*. at 17a);
>
> "the panel receives zero government funding" (*id*.);
>
> "the proceedings here maintain confidentiality from non-participants" and the "award may be made public only with the consent of both parties" (*id*.);
>
> "State authority to influence or control an arbitration pursued under this Treaty is limited, if not non-existent" (*id*. at 18a);
>
> "the Treaty curtails the ability of Lithuania or Russia to intervene in an arbitration under it or alter the outcome

> after the panel renders a decision" (*id.*); and
>
> "the Fund has waived its right to have a Lithuanian court review the result from this arbitration" (*id.*)

Despite the foregoing, the court of appeals held that the Arbitration "constitutes a 'proceeding in a foreign or international tribunal' under Section 1782." Pet. App. 16a. The decision below thus gave virtually no weight to any of these functional attributes of the Arbitration, all of which reflect the absence of governmental control or influence over the arbitral proceedings.

Instead, the court afforded dispositive significance to the existence and role of the Treaty. In the court's words, it is "critical[]" that the arbitral body "derives its adjudicatory authority from . . . a bilateral investment treaty." Pet. App. 19a. Above all other considerations, the court held that the role of the Treaty "weighs heavily in favor of concluding that this arbitral panel qualifies as a foreign or international tribunal." Pet. App. 18a. That is wrong.

2. The existence and terms of the Treaty do not alter the non-governmental nature of the panel. The Treaty does not create the panel. The Treaty does not imbue the panel with the authority of the governments of Lithuania or Russia. The Treaty does not dictate, control, or influence the outcome of the panel's decision. The Treaty merely manifests the consent of the signatories to appear before an arbitral panel if that forum is selected to resolve a particular dispute—it literally says nothing about the nature of the arbitral panel itself.

To the contrary, to the extent the Treaty is relevant, it supports the opposite conclusion—*i.e.*, that the Arbitration is a private, non-governmental proceeding like other private arbitrations. As an initial matter, despite their dramatic growth and importance, bilateral investment treaties ("BITs") providing for the arbitration of investor-state disputes are of relatively recent vintage. The earliest BITs did not address investor-state dispute settlement. Marc Bungenberg, *A History of Investment Arbitration and Investor-State Dispute Settlement in Germany*, INVESTOR-STATE ARBITRATION SERIES, Paper No. 12 at 5-6 (October 12, 2016). It was not until the proliferation of BITs in the mid-1980s that BITs began to incorporate arbitration provisions, *see id*. at 6, and not until 1990 that the first award pursuant to such a provision was issued. Nigel Blackaby, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 8.09 (6th Ed. 2015). None had taken place before § 1782 was amended in 1964, precluding the possibility that the term "proceeding in a foreign or international tribunal" was designed to reach them.

Moreover, the terms of the Treaty do not alter the non-governmental nature of the Arbitration. By entering into the Treaty, Lithuania and Russia consented to have a neutral, ad hoc arbitration panel resolve certain investor claims against either sovereign if the investor elected such a forum. Consenting to the jurisdiction of a private arbitral panel is the *opposite* of submitting the dispute to a body exercising *governmental* power to adjudicate disputes.

The decision below cited two principal components of the Treaty in its analysis. Pet. App. 5a, 6a. First,

the Treaty identifies four dispute-resolution fora that the claimant can select to resolve the dispute if it cannot be settled within six months of written notification of the claim, one of which is an arbitration under UNCITRAL Rules. Pet. App. 65a. Second, Russia and Lithuania agreed that any arbitral decision rendered by the forum selected by the claimant shall be final and binding on both parties to the dispute, including the sovereign respondent. *Id.*

From these provisions, the court below concluded that "the arbitral panel in this case derives its adjudicatory authority from the Treaty," and not from "an agreement between purely private parties and any other species of private contract." Pet. App. 19a; *see also id.* at 22a ("That this arbitral panel was assembled pursuant to this Treaty—as part of this effort to facilitate mutually beneficial relations between Russia and Lithuania—signals that this arbitration differs from a private commercial arbitration."). But the court offered no basis for its conclusion that agreeing to arbitrate via a treaty is fundamentally different from agreeing to arbitrate via a private contract.

Treaties are, of course, contracts between or among sovereigns, and the terms of a treaty identify the agreements that the signatories have reached and will abide by. *See BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 12 (2014).[19] Arbitrations between purely private parties are also contractual in

[19] Russia and Lithuania are defined as "Contracting Parties" in the Treaty. Pet. App. 56a.

nature, and in the absence of an agreement to arbitrate a party cannot be compelled to arbitrate. *United Steelworkers of Am. v. Warrior & Golf Nav. Co.*, 363 U.S. 574, 582 (1960).[20] "[A]rbitration is strictly a matter of consent," *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 298 n.6 (2010) (internal quotations omitted), so both sides must agree to it. Rather than assembling or creating any arbitral body, as the court below concluded, the Treaty constitutes Russia and Lithuania's consent to allow a claimant to submit its dispute to arbitration if it so chooses. That fact does not transform the ad hoc Arbitration panel into a foreign court, an "administrative or quasi-judicial agenc[y]," or any other kind of governmental entity. *See Intel*, 542 U.S. at 257.

In addition, the Treaty establishes "favorable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party." Pet. App. 56a. It is designed to promote the "reciprocal protection of investments." *Id.* By affording investors forum optionality, the Treaty assures investors that their claims will be considered, evaluated, and resolved by a neutral panel of decisionmakers who are *not* controlled or influenced by the government that allegedly misappropriated the investment. The very essence of the Treaty, therefore, is to assure investors in each country that they will get an unbiased adjudication if they choose

[20] The UNCITRAL Rules, to cite a relevant example, require the consent of both parties to the dispute to agree to arbitration and to be bound by any decision rendered by the arbitrators. J.A. 155a, 175a.

arbitration, and that the ensuing proceedings will be free of any governmental involvement or taint.

By giving outcome-determinative weight to the arbitration-consent element of the Treaty, the court below effectively ignored all the ways in which the Arbitration is non-governmental—including the fact that "State authority to influence or control an arbitration pursued under this Treaty is limited, if not non-existent." Pet. App. 18a. The absence of governmental involvement in the functions of the Arbitration, and not the way in which the sovereign parties consented to its jurisdiction, demonstrate that the arbitral proceedings are not before "a foreign or international tribunal."

The court below also gave some weight to the fact that Lithuania, a foreign sovereign and a party to the Treaty, is a party in the Arbitration. Pet. App. 21a. Lithuania's involvement in the Arbitration, however, is solely as a potentially liable party that has consented to arbitration. In that sense, its role is identical to any other party, private or otherwise, in an arbitration that hopes to convince the private arbitrators that the claimant should not prevail on the merits. That fact has nothing to do with whether the arbitral panel is an adjudicating body wielding governmental power, which in this case it is not. At bottom, Lithuania's status as a respondent in the Arbitration does not alter the non-governmental nature of the ad hoc arbitration.

Finally, in concluding that the ad hoc Arbitration panel is an "international tribunal" under the statute, the court below quoted a passage in an article by Hans Smit, where the professor commented that "an international tribunal owes both its existence and its

powers to an international agreement." Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264, 1267 (1962). The ad hoc panel that is adjudicating the Fund's dispute, however, does not owe its existence or its powers to the Treaty. The ad hoc panel exists because the Fund selected that forum to conduct the proceedings, take testimony, and resolve its dispute with Lithuania. While Russia and Lithuania consented to such proceedings, they did not create the adjudicating body, unilaterally select its members, or have any sway over the individuals chosen. The private members of the panel were selected by the Fund and Lithuania as equal parties on different sides of the caption. Had the Fund pursued a different option, the panel would not exist at all.

In conducting the proceedings and deciding the outcome, the panel is not exercising governmental power; it is doing exactly what private arbitration panels do every day around the world, resolving disputes without governmental influence or oversight. The ad hoc panel conducting the Arbitration proceeding does not owe its existence or its power to an international agreement between sovereign states. Like other such panels—including those operating under UNCITRAL Rules, or the rules of numerous other such entities—the panel here is operating solely on the authority of the parties' consent.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such

a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. § 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

APPENDIX B

28 U.S.C. 1782 (1958). Testimony for use in foreign country

The deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

28 U.S.C. 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By

virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

APPENDIX C

Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630

And be it further enacted, That where letters rogatory shall have be [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

APPENDIX D

Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. Such summons shall specify the time and place at which such witness is required to attend, which place shall be within one hundred miles of the place where said witness resides or shall be served with said summons.

APPENDIX E

Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949. Testimony for use in foreign country

The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

APPENDIX F

Act of Sept. 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743

ESTABLISHMENT OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE

SECTION 1. There is hereby established a Commission to be known as the Commission on International Rules of Judicial Procedure, hereinafter referred to as the "Commission".

PURPOSE OF THE COMMISSION

SECTION 2. The Commission shall investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements. To the end that procedures necessary or incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, and expeditious, and that the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved, the Commission shall—

(a) draft for the assistance of the Secretary of State international agreements to be negotiated by him;

(b) draft and recommend to the President any necessary legislation;

(c) recommend to the President such other action as may appear advisable to improve and codify international practice in civil, criminal, and administrative proceedings; and

(d) perform such other related duties as the President may assign.

APPENDIX G

Act of Oct. 3, 1964, Pub. L. No. 88-619, 78 Stat. 995

SEC. 9. (a) Section 1782 of title 28, United States Code, is amended to read:

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.