No. 21-401

IN THE

Supreme Court of the United States

ZF AUTOMOTIVE US, INC., ET AL.,
Petitioners,

v.

LUXSHARE, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PROFESSORS TAMAR MESHEL, CRINA BALTAG, FABIEN GÉLINAS, AND JANET WALKER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT LUXSHARE, LTD.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE*[1]

Amici are foreign scholars and practitioners of international arbitration who have authored numerous books and articles on arbitration law and practice. They have an

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution. The parties have provided written consent to the filing of this brief.

interest in the proper application of 28 U.S.C. §1782 to foreign-seated international commercial arbitral tribunals and bring a unique comparative perspective to this critical issue.

Dr. Tamar Meshel is an Assistant Professor at the University of Alberta Faculty of Law in Edmonton, Alberta, Canada. Dr. Meshel researches, teaches, and consults in the areas of international and domestic arbitrations, including issues in investor-state, interstate, and international commercial arbitrations. Her work has been cited by scholars, litigants, and the Supreme Court of Israel.

Dr. Meshel has practiced international commercial arbitration as a lawyer at Fasken, an international law firm, and as Deputy Counsel at the International Court of Arbitration of the International Chamber of Commerce in Paris. She has also served as a legal advisor to the Jerusalem Arbitration Center in Israel and Palestine, and was a Research Fellow with the Department of International Law and Dispute Resolution at the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg.

Dr. Meshel frequently consults on arbitration issues for domestic and international bodies. She was a Member of the Sounding Board, which advised on the development of the Hague Rules on Business and Human Rights Arbitration. Dr. Meshel also advised the Alberta Law Reform Institute regarding the adoption of the Canadian Uniform International Commercial Arbitration Act and served as a Member of the Board of Reporters of the Institute for Transnational Arbitration. She also translated the International Council for Commercial Arbitration's 2011 *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, and co-translated the 2021 Arbitration Rules of the International Chamber of Commerce.

Dr. Crina Baltag is an Associate Professor in International Arbitration at Stockholm University in Stockholm, Sweden, and a Director of the University's Master in International Commercial Arbitration Law. Dr. Baltag is frequently appointed as arbitrator and legal expert in commercial and investment arbitrations. She is a member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce and a Vice Chair of the Academic Council of the Institute for Transnational Arbitration. She has previously served as the Secretary General of the Arbitration and Mediation Center of the American Chamber of Commerce for Brazil.

Dr. Fabien Gélinas is the Sir William C. Macdonald Professor of Law and Norton Rose Fulbright Faculty Scholar in Arbitration and Commercial Law at McGill University in Montreal, Quebec, Canada, where he was formerly associate dean of law and director of the Institute of Comparative Law. Dr. Gélinas serves as arbitrator in international commercial and investment matters, and as an appointing authority for the Permanent Court of Arbitration. He was formerly general counsel of the International Court of Arbitration of the International Chamber of Commerce, a dispute resolution expert to the Organisation for Economic Co-operation and Development, and a delegate to the U.N. Commission on International Trade Law.

Dr. Janet Walker is a Distinguished Research Professor and former associate dean at Osgoode Hall Law School in Toronto, Ontario, Canada. She authors Canada's main text on the conflict of laws, which has been cited in more than 400 judgments. Dr. Walker is a chair of the ICC Canada Arbitration Committee and a member of the Global Advisory Board of the New York International Arbitration Center. She is also an independent arbitrator with

chambers in Sydney, London, and Toronto, and has served in matters administered by the International Chamber of Commerce, International Centre for Dispute Resolution, Dubai International Arbitration Centre, Hong Kong International Arbitration Centre, and Singapore International Arbitration Centre, among others.

SUMMARY OF ARGUMENT

I.A. In the international arbitration context, comity concerns counsel toward interpreting domestic laws in a way that harmonizes them with similar laws in foreign jurisdictions. Such an approach facilitates stability, consistency, and predictability in the international arbitration system that reinforces its efficiency and effectiveness. United States courts, for instance, have looked to foreign interpretations of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to promote uniformity in the enforcement of international commercial arbitration agreements and awards.

B. This Court should take the same comparative approach in deciding whether 28 U.S.C. § 1782 applies to foreign-seated international commercial arbitral tribunals, which are often referred to as "private" arbitral tribunals. Section 1782 was designed to promote the orderly resolution of disputes in the United States and abroad and to facilitate international cooperation. Comity principles thus favor an interpretation of § 1782 that is consistent with similar laws in other jurisdictions. A construction of § 1782 guided by these comity concerns respects other countries' interests in a well-functioning international commercial arbitration system.

C. Several leading international arbitration jurisdictions have domestic equivalents of § 1782 that provide judicial assistance in gathering evidence for use in foreign-seated commercial arbitrations. Those jurisdictions in-

clude the United Kingdom, New Zealand, France, Germany, Sweden, and Switzerland, all of which provide for such assistance in their evidentiary rules or arbitration statutes. Although a global consensus has not yet emerged, the practice of these jurisdictions counsels against the wholesale exclusion of foreign-seated international commercial arbitral tribunals from the scope of § 1782. Applying § 1782 to such tribunals would be consistent with, and not anomalous to, the emerging norm in the international system.

II.A. Critics of § 1782 argue that applying the statute to foreign-seated international commercial arbitrations threatens their hallmark characteristics of efficiency and party autonomy. But another key feature of arbitration is the fair adjudication of disputes based on a comprehensive evidentiary record, which § 1782 helps support. Arbitral tribunals also have tools to maintain their efficiency. They can refuse to stay a case pending a § 1782 application or sanction parties for using the statute in ways that contravene the tribunal's rules. And parties, of course, can always choose to contract out of using § 1782. Party autonomy thus supports *including* foreign-seated international commercial arbitrations within the scope of § 1782, so litigants and arbitral tribunals have the option to use the tool when needed.

B. Section 1782 also has safeguards to prevent its abuse by parties to international arbitrations. Production of evidence under § 1782 is discretionary, not automatic. United States courts applying § 1782 thus serve as critical gatekeepers in preventing potential misuse. In exercising this discretion, courts are also discouraged from exerting undue influence in international arbitrations. In *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), this Court set out specific criteria to guide lower

courts' exercise of discretion in evaluating § 1782 applications. Those criteria require courts to consider the international tribunal's management of its own proceedings, the tribunal's position on the need for the requested evidence, whether the requests are designed to circumvent the agreed-upon arbitration rules, and whether the request is unduly intrusive or burdensome, among other considerations. On the whole, lower courts have largely heeded to these requirements, including, for instance, by accounting for the tribunal's receptivity to the requested evidence in deciding whether to grant a § 1782 application. When applied consistently with this Court's criteria, § 1782 supports international arbitration without risking unwarranted judicial interference by United States courts.

ARGUMENT

In the international commercial arbitration context, comity advances uniformity and recognizes countries' shared interests in a stable and effective arbitration system. Courts thus apply comity principles by looking to the practices of other countries when interpreting domestic laws affecting international commercial arbitration.

Those comity considerations support the application of 28 U.S.C. § 1782 to foreign-seated international commercial arbitral tribunals. Such an interpretation would be consistent with the emerging global norm. This norm, which is designed to assist and support international commercial arbitral tribunals, should be encouraged. The experiences of other countries that provide such assistance—including leading international arbitration jurisdictions—undermine the notion that interpreting § 1782 in this manner deviates from the international consensus.

Extending § 1782 to foreign-seated international commercial arbitrations would not necessarily erode the ef-

ficiency and autonomy of such proceedings or lead to undue interference by American courts. Arbitral tribunals can continue to enforce their own procedures notwithstanding a pending § 1782 application, and parties always have the option to contract out of § 1782 or adopt rules that restrict its use. In addition, evidence production under § 1782 is discretionary, not mandatory. And this Court has identified criteria for exercising that discretion in a manner that respects arbitral tribunals' rules and management of their own proceedings, as well as the bargained-for expectations of the parties.

I. Comity Supports Applying § 1782 To Foreign-Seated International Commercial Arbitrations

A. Comity Encourages Consistency and Judicial Cooperation in the International Commercial Arbitration Context

Courts have long considered concepts of comity in "approach[ing] the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). Although "international comity" resists a single definition, this Court has described the concept as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard * * * to international duty and convenience." *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895). In other words, "whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens." *Emory* v. *Grenough*, 3 U.S. 369, 370 (1797). Comity ultimately reflects the "spirit of cooperation" among different tri-

bunals, *Aérospatiale*, 482 U.S. at 543 n.27, and "the systemic value of reciprocal tolerance and goodwill," *id.* at 555 (Blackmun, J., concurring).

In some contexts, international comity considerations can limit the jurisdiction of domestic courts. In cases that implicate foreign parties, conduct, law, or effects, comity concerns often persuade courts to abstain from hearing a case or to limit the application of domestic law "because [the case] is too 'foreign.'" Pamela K. Bookman, *Litigation Isolationism*, 67 Stan. L. Rev. 1081, 1084 (2015). For example, the "comity of courts" can persuade "judges [to] decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 817 (1993).

Similarly, "prescriptive comity," which involves "the respect sovereign nations afford each other by limiting the reach of their laws," may lead courts to apply the presumption against extraterritoriality to avoid extending United States laws to foreign cases. *Hartford Fire*, 509 U.S. at 817; see Bookman, *supra*, at 1084. In the conflict-of-laws context, too, courts may "invoke[ ] comity * * * as the basis for enforcing foreign laws" and subordinating domestic ones. William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2088 (2015). Or, comity may counsel toward the application of *res judicata* to recognize the finality of foreign judgments. See *Int'l Transactions, Ltd.* v. *Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 593 (5th Cir. 2003) (international comity instructs that, "once the parties have had an opportunity to present their cases fully and fairly before a court of competent jurisdiction, the results of the litigation process should be final"); Ayelet Ben-Ezer & Ariel L. Bendor, *The Constitution and Conflict-of-Laws Treaties: Upgrading the International Comity*, 29 N.C.J. Int'l L. &

Com. Reg. 1, 2 (2003) (recognizing *res judicata* as comity principle).

In the international commercial arbitration context, these traditional notions of comity may encourage domestic courts to refrain from hearing disputes submitted to arbitration; this is the comity between United States courts and international arbitral tribunals. But there is an additional comity concern that exists between United States courts and foreign legal systems that favors cooperation between the two. The arbitration setting requires "sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). Because the goal is to harmonize domestic practices with international norms, comity principles in this context encourage courts to look to the practices of other countries to make their laws consistent with foreign ones.

For instance, in *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020), this Court examined the "postratification understanding of other contracting states" in interpreting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), a multilateral treaty governing the enforcement of international commercial arbitration agreements and awards. *Id.* at 1646 (quoting *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008)). In particular, the Court looked to the judicial decisions of other Convention signatories to determine that the domestic doctrine of equitable estoppel should allow nonsignatory enforcement of arbitration agreements—an interpretation that aligned with "the weight of authority from contracting states." *Ibid.* The Court thus interpreted the New York Convention with a view toward pro-

moting uniformity in the enforcement of international commercial agreements. *Ibid.*; see also Int'l Council for Com. Arb., *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* 13-14 (2011) (noting that "courts should not interpret the terms of the New York Convention by reference to domestic law" and that "[t]he terms of the Convention should have the same meaning wherever in the world they are applied").

Similarly, in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), this Court evaluated whether the Carriage of Goods by Sea Act, 46 U.S.C. §§ 30701 *et seq.*—a statute governing the rights of cargo owners and cargo carriers—invalidated a foreign arbitration clause in a bill of lading. 515 U.S. at 530. The Court examined other countries' interpretations of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, on which the Act was modeled. *Id.* at 536-537. It then observed that no party to the Convention construed the disputed provision to prohibit foreign forum-selection clauses and adopted a similar interpretation. *Ibid.*; see also *Olympic Airways* v. *Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) (recognizing that "[f]oreign constructions [of a treaty] are evidence of the original shared understanding of the contracting parties").

Accordingly, when interpreting laws that affect international commercial arbitration, courts have "increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives." Stephen Breyer, *The Court and the World: American Law and the New Global Realities* 92 (2015). That practice, which is guided by principles of comity, encour-

ages courts to standardize domestic laws with those in foreign jurisdictions.

B. Courts Should Apply Similar Comity Principles in Interpreting § 1782, Which Was Designed To Facilitate International Judicial Cooperation

This Court should apply the same comity principles of judicial cooperation and international harmony when interpreting 28 U.S.C. § 1782. Comity concerns in the context of § 1782 do not involve any "sacrific[ing] [of] an important U.S. public policy embodied in U.S. statutes to the requirements of the global market." Joel R. Paul, *The Transformation of International Comity*, 71 Law & Contemp. Probs. 19, 37 (2008). Unlike in the conflict-of-laws setting, for example, the comity principles relevant to § 1782 do not serve to "mediate conflicts between sovereigns and their laws," but rather to facilitate judicial cooperation and assistance. Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. Davis L. Rev. 11, 15 (2010).

Indeed, § 1782 was intentionally designed to "contribute to the orderly resolution of disputes both in the United States and abroad, elevating the importance of the rule of law and encouraging a spirit of comity between foreign countries and the United States." *Servotronics, Inc.* v. *Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020). In interpreting § 1782, courts have thus "focus[ed] primarily on fostering" the statute's "twin aims" of "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Euromepa, S.A.* v. *R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998) (quoting *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992)); see *Tex. Keystone,*

Inc. v. *Prime Nat. Res., Inc.*, 694 F.3d 548, 553 (5th Cir. 2012) (similar).

International comity should thus guide the application of § 1782 to foreign-seated international commercial arbitrations. In particular, courts should apply § 1782 in a manner that is consistent with equivalent laws in other jurisdictions, and that recognizes other countries' interests in a well-functioning international arbitration system. Such an interpretation would provide certainty, stability, and predictability to international commercial arbitration and reinforce its legitimacy and effectiveness. See Breyer, *supra*, at 195.

C. Judicial Assistance in Gathering Evidence for Use by Foreign-Seated International Commercial Arbitral Tribunals Is Common in the International System

Under comity principles, § 1782 should apply to foreign-seated international commercial arbitrations because that approach is consistent with the emerging international norm. "[C]ontrary to the apparent impression in the United States, many foreign legal systems do provide judicial assistance in the taking of evidence" for use by foreign-seated international commercial arbitral tribunals. Martin Illmer & Ben Steinbrück, *U.S. Discovery and Foreign Private Arbitration: The Foreign Lawyer's Perspective*, 25 J. Int'l Arb. 329, 330-331 (2008); see Gary B. Born, *International Commercial Arbitration* § 16.03[B] (3d ed. 2021) (similar). Such judicial assistance is either explicitly provided for in a statute or recognized in jurisprudence interpreting the relevant domestic legislative scheme. While there is not yet an international consensus on the issue, there is a growing trend of providing such judicial assistance—particularly among leading international commercial arbitration jurisdictions.

In the United Kingdom, for instance, the Arbitration Act provides for judicial assistance in gathering evidence for use by foreign tribunals. That Act allows courts to order "the taking of the evidence of witnesses" for use in arbitrations seated outside the United Kingdom in the same manner that is permitted in domestic legal proceedings. Arbitration Act 1996, c. 23, §§ 2(3), 44(2)(a) (Eng., Wales & N. Ir.). Courts have discretion, however, not to exercise that power if there is any reason the arbitration's foreign seat "makes it inappropriate" to order the production of evidence. *Id.* § 2(3).

In *A.* v. *C.*, [2020] EWCA (Civ) 409, [2020] 1 WLR 3504 (Eng.), the United Kingdom Court of Appeal confirmed the application of this provision of the Arbitration Act to foreign-seated arbitral tribunals. There, a party to an international commercial arbitration in New York sought the testimony of a third-party witness in the United Kingdom. *Id.* ¶ 1. The court determined that the Arbitration Act extends to such tribunals and covers requests for evidence from third parties. *Id.* ¶ 35.

New Zealand similarly allows for evidence gathering in aid of foreign-seated international commercial arbitrations. Unlike the Arbitration Act in the United Kingdom, New Zealand's Arbitration Act does not extend such assistance, but courts have broadly interpreted the country's Evidence Act to do so. In *Dalian Deepwater Developer Ltd.* v. *Sveinung Dybdahl*, [2015] NZHC 151, [2015] 3 NZLR 260 (N.Z.), an arbitral tribunal seated in the United Kingdom sought assistance from the New Zealand courts in obtaining testimony from a New Zealand witness, invoking the Evidence Act. *Id.* ¶ 1. That Act allows domestic courts to provide "assistance in obtaining evidence for civil proceedings" upon application by "any court or tribunal exercising jurisdiction in a country or territory

outside New Zealand." Evidence Act 2006, pt. 4, §§182, 184-185 (N.Z.). The New Zealand High Court addressed a question similar to the one at issue here: whether the phrase "any court or tribunal" requesting assistance under the Evidence Act included an international commercial arbitral tribunal. [2015] NZHC 151 ¶¶3-4.

The court concluded that the phrase "any court or tribunal" required only that the requesting tribunal exercise jurisdiction outside New Zealand—not that the tribunal exercise jurisdiction over the foreign country or territory itself. [2015] NZHC 151 ¶¶27-28. That phrase thus included international commercial arbitral tribunals as a matter of plain text. *Id.* ¶36. The court also implied that exclusion of those tribunals from the statute would produce the undesirable result of leaving them without access to any judicial assistance for evidence-gathering in New Zealand. *Id.* ¶40. Finally, the court observed that New Zealand courts ultimately retain discretion over whether to exercise their power to authorize the production of evidence, minimizing the risk of abuse. *Id.* ¶38.

In addition, France, Germany, Sweden, and Switzerland have all enacted provisions within their codes of civil procedure or arbitration statutes that allow judicial assistance in gathering evidence for use by foreign-seated international commercial arbitral tribunals. See Code de procédure civile [C.P.C.] [Civil Procedure Code] arts. 1469, 1506 (Fr.); Zivilprozeßordnung [ZPO] [Code of Civil Procedure], §§1025, 1050, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.); Lag om skiljeförfarande (Svensk författningssamling [SFS] 1999: 116), §§26, 50, https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf (Swed.); Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] Dec. 18, 1987,

SR 291, art. 185*a*, para. 2, https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en (Switz.). Many of those statutes also include safeguards that prevent overbroad requests, including requirements that the party identify the requested evidence with sufficient specificity and that the arbitral tribunal approve the request. See Robert Bradshaw, *How To Obtain Evidence from Third Parties: A Comparative View*, 36 J. Int'l Arb. 629, 654 (2019) (recognizing provisions that avoid "fishing expeditions"); Reinmar Wolff, *Judicial Assistance by German Courts in Aid of International Arbitration*, in *Int'l Arb. and the Courts* 233, 245-246 (Devin Bray & Heather L. Bray eds., 2015) (similar).

Accordingly, some of the most important arbitration jurisdictions provide judicial assistance in gathering evidence for use by foreign-seated international commercial arbitral tribunals. Such practices are increasingly the norm. The experiences of these countries belie the notion that including such tribunals within the scope of § 1782 would render the statute an anomaly in the international system.

II. Section 1782 Supports The Goals Of International Commercial Arbitration

A. Section 1782 Does Not Undermine Efficiency or Party Autonomy

A common criticism of applying § 1782 to foreign-seated international commercial arbitrations is that it would undermine the basic features of those proceedings, including efficiency and party autonomy. See, *e.g.*, Xu Guojian *Amicus* Br. 10-16; Chamber of Commerce *Amicus* Br. 14-23. That criticism is overstated.

As an initial matter, while efficiency and cost-effectiveness are important features of international commercial

arbitration, they are not the *only* ones. Another "value of arbitral tribunals comes from * * * their ability to fairly adjudicate disputes based on evidence; if §1782(a) can from time to time help those tribunals get the evidence they need to reach more informed decisions, [then] certainly that serves the purpose of such proceedings." *HRC-Hainan Holding Co., LLC* v. *Yihan Hu*, No. 19-MC-80277, 2020 WL 906719, at *8 (N.D. Cal. Feb. 25, 2020). Indeed, some arbitral tribunals have indicated their receptiveness to §1782. See, *e.g.*, *In re Hallmark Cap. Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007) ("[T]he Israeli arbitrator has stated his 'receptivity' to this Court's assistance.").

Judicial assistance in gathering evidence is particularly important with regards to third-party evidence, which an arbitral tribunal may want but typically has no authority to order. Born, *supra*, §16.02[D]. The absence of third-party documents from an arbitration "may leave an issue unclear and will rarely provide a tribunal with a firm factual situation." Julian D.M. Lew, *Document Disclosure, Evidentiary Value of Documents and Burden of Evidence*, in *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* 11, 23 (Teresa Giovannini & Alexis Mourre eds., 2009). In this context, "some arbitral participants have been frustrated on occasion by the lack of a State court mechanism to provide more direct support for arbitral proceedings." Laurence Shore, *State Courts and Document Production*, in *Written Evidence and Discovery in International Arbitration*, *supra*, at 57, 57. Section 1782 helps to fill those gaps.

In addition, several features of the international commercial arbitration system prevent a §1782 application from delaying the underlying arbitration. For instance, arbitral tribunals are not required to stay proceedings or

deviate from their own procedures pending a § 1782 application. They can also communicate their concerns about timing to the parties and to the United States courts, which take those views into account. For instance, in *Comisión Ejecutiva Hidroeléctrica del Río Lempa* v. *Nejapa Power Co. LLC*, 341 F. App'x 821 (3d Cir. 2009), the arbitral tribunal had "repeatedly and emphatically made clear that any documents obtained through the § 1782 process would have to be submitted pursuant to the Arbitral Tribunal's own directives and deadlines." *Id.* at 826. The court thus denied the petition, deferring to "the Arbitral Tribunal's own past rulings indicat[ing] that the time to submit any evidence in the current arbitration proceeding has passed." *Id.* at 827; see also *In re Grupo Unidos Por El Canal, S.A.*, No. 14-MC-00226, 2015 WL 1810135, at *11 (D. Colo. Apr. 17, 2015) (denying application where, among other things, the "delay" associated with the request would not be "well-received" by the arbitration panel).

Arbitral tribunals have other tools to curb the potential misuse of § 1782. Parties to arbitrations make "a commitment to cooperate in good faith in the arbitral process, with both the arbitral tribunal and other parties to the arbitration, in resolving the parties' disputes in a fair, objective and efficient manner." Born, *supra*, § 8.02[B]. A party who attempts to use § 1782 to circumvent the parties' agreements or the arbitral tribunal's procedural rules thus may be subject to sanctions. *Id.* § 15.10.

Nor does § 1782 inherently undermine party autonomy or impede the parties' freedom to "design cooperatively the arbitral process and procedure." Born, *supra*, § 8.02[B]. Parties remain free to contract out of § 1782 and similar statutes in other countries, including by incorporating into their arbitration agreements institutional rules

that restrict such access. *Id.* §16.03[C] & nn.531-534. Thus, categorically excluding all foreign-seated international commercial arbitrations from the scope of §1782 actually *undermines* party autonomy, because it leaves parties unable to agree to invoke the tool in appropriate circumstances.

The mere availability of §1782 and similar statutes in other jurisdictions does not, by itself, undermine efficiency or party autonomy in international commercial arbitrations. Upholding parties' expectations in this setting does not require categorically excluding such proceedings from the scope of §1782. Quite the opposite, arbitral tribunals and parties can structure the use of §1782 in a way that is consistent with their agreements and applicable procedural rules.

B. Section 1782 Contains Safeguards To Minimize Disruptions to the International Commercial Arbitration System

Like its foreign equivalents, §1782 can be applied in a manner that preserves the efficiency of international commercial arbitration proceedings, respects the parties' autonomy, and prevents potential abuses. Critically, "a district court is not required to grant a §1782(a) discovery application simply because it has the authority to do so." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004). To the contrary, courts serve as "gatekeepers" to evidence production, as the statute "leaves to the district courts' discretion both the decision to grant discovery" and the ability "to 'prescribe the practice and procedure' for its production." *In re Accent Delight Int'l Ltd.*, 869 F.3d 121, 134 (2d Cir. 2017); see 28 U.S.C. §1782(a) ("district court * * * *may* order" discovery (emphasis added)). That discretion, moreover, "is not boundless," as courts must evaluate an application in light of the statute's

goals of "providing efficient means of assistance" and "encouraging foreign countries by example to provide similar means of assistance to our courts." *Schmitz* v. *Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004) (quoting *Malev Hungarian Airlines*, 964 F.2d at 100).

The discretion of the lower courts is also cabined by the criteria articulated by this Court, which prevent applications of §1782 that unduly interfere with the underlying arbitration. For instance, a court evaluating a §1782 application should consider "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264. Those factors prevent courts from "interfer[ing] with the parties' bargained-for expectations concerning the arbitration process" and the tribunal's management of its own proceedings. *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 105 (D.D.C. 2010).

Applying those principles, courts have conditioned the grant of a §1782 application on the approval of the arbitral tribunal. See, *e.g., Nejapa Power*, 341 F. App'x at 826-827 (denying request that contravened tribunal's procedures and timelines); *In re Peruvian Sporting Goods S.A.C.*, No. 18-MC-91220, 2018 WL 7047645, at *6 (D. Mass. Dec. 7, 2018) ("In a situation where the foreign court restricts discovery, * * * granting the application could undermine the statute's objective."). And they have denied requests where "it is unclear what the arbitrator's position [would be] regarding the parties' need for documents," or there is "no evidence about the arbitral panel's receptivity to the requested materials"—such as where a party seeks discovery before the arbitral panel has been constituted. *In re Dubey*, 949 F. Supp. 2d 990, 996-997 (C.D. Cal. 2013).

Courts should also "consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country." *Intel*, 542 U.S. at 265. A court should thus deny an application if it believes that the request contravenes the procedural rules governing the arbitration or is otherwise "clearly an end-run around the Tribunal's evidentiary procedures." *Islamic Republic of Pakistan* v. *Arnold & Porter Kaye Scholer LLP*, No. 18-MC-103, 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) (observing that arbitral tribunal "repeatedly refused" to order the requested discovery because it was contrary to tribunal's procedures); *Grupo Unidos*, 2015 WL 1810135, at *11 (rejecting application that "directly conflict[ed] with the agreed IBA Rules"). Those procedural rules, for example, may require the arbitral tribunal's approval before evidentiary requests can be submitted to the courts. See Int'l Bar Ass'n, *Rules on the Taking of Evidence in International Arbitrations* art. 3.9 (2020) (third-party evidence requests must be approved by tribunal).

In addition, "unduly intrusive or burdensome requests may be rejected or trimmed." *Intel*, 542 U.S. at 265. Courts often attempt to "distinguish a request for useful discovery from a request that is designed merely to burden an opponent." *In re Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1115 (E.D. Wis. 2004). Courts may also bear in mind that what is considered material and relevant evidence in an international arbitration may differ from United States standards. See Lucy F. Reed & Ginger Hancock, *US Style Discovery: Good or Evil?*, in *Written Evidence and Discovery in International Arbitration*, *supra*, at 339, 351. And they can impose limitations on production, including by requiring a protective order or narrowing the scope of the request. See, *e.g.*, *In re Eni S.p.A.*,

No. 20-MC-334, 2021 WL 1063390, at *6 (D. Del. Mar. 19, 2021) (granting protective order to limit use of discovery); *In re Mesa Power Grp., LLC*, No. 11-MC-280, 2012 WL 6060941, at *8 (D.N.J. Nov. 20, 2012) (limiting discovery to "narrowly tailored" requests "to prevent it from being unduly intrusive or burdensome").

This Court has recognized several criteria that guide courts' exercise of discretion in evaluating § 1782 applications. On balance, the experience in the lower courts demonstrates that they have adhered to those criteria in their decisionmaking. To the extent they have not done so, this Court can simply reinforce its guidance rather than categorically exclude foreign-seated international commercial arbitral tribunals from the scope of § 1782. Applying § 1782 in accordance with the Court's directives will not disrupt the international arbitration system or threaten the autonomy and efficiency of such proceedings.

CONCLUSION

This Court should interpret 28 U.S.C. § 1782 to apply to foreign-seated international commercial arbitral tribunals.

Respectfully submitted.

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