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*

## REPLY BRIEF FOR PETITIONERS


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## SUMMARY OF ARGUMENT

Respondent's brief starts with three false premises and builds to a false conclusion. First, Respondent offers nothing beyond its own say-so to support the assertion that "tribunal" and "international tribunal" are "general" terms as they are used in § 1782 and should therefore be construed broadly. To the contrary, the text, statutory context, statements by the Rules Commission and Congress, and decisions of this Court demonstrate that the amendment to § 1782 was designed to reach a proceeding before governmental entities exercising the authority of one or more sovereigns. The Arbitration here is no such proceeding.

Second, nothing in the statute or this Court's cases suggests, as Respondent contends, that Petitioners have the burden of demonstrating that Congress made an exception to these general terms by expressly carving out ad hoc arbitral bodies like the panel of private arbitrators handling the Arbitration. *Id.* at 18.

Third, Respondent's repeated assertions that the Treaty between Lithuania and Russia "create[d]" or "constituted" the ad hoc panel that is adjudicating its claims in the Arbitration is simply wrong. Resp. Br. at 15, 34. The Treaty established Lithuania's consent to participate in an ad hoc arbitration *if* Respondent later elected to proceed with arbitration to resolve a dispute, which it did. The Treaty itself, therefore, "created" neither the agreement between the parties to arbitrate the dispute, nor the panel that will finally resolve that dispute. Rather, that body was created by the two parties selecting the members as parties do in typical private arbitrations. In addition, the treaties

and Commissions that Respondent identifies as exemplars serve only to undermine Respondent's position.

Stripped off its false premises, Respondent's argument collapses entirely. There is overwhelming evidence that Congress intended the term "foreign or international tribunal" would reach only a governmental entity exercising governmental authority.

## ARGUMENT

### I. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT THE AD HOC ARBITRATION PANEL CONSTITUTES A "FOREIGN OR INTERNATIONAL TRIBUNAL" UNDER § 1782.

A. A centerpiece of Respondent's brief is the assertion that Congress purposefully used a "general term" in its 1964 amendment to § 1782, thereby imposing a burden on Petitioners to establish that the ad hoc panel conducting the Arbitration is not a "foreign or international tribunal." Resp. Br. at 18–22 (citations omitted). To the extent the decisions upon which Respondent relies speak to this fundamental interpretive question, however, they undermine Respondent's position.

1. For starters, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), does not state—or even suggest—that the provision of § 1782 under review (or any part of it) is a "general term" that should be construed broadly. Indeed, in its consideration of whether the DG-General and European Commission were acting as a "foreign or

international tribunal," this Court recognized the specificity of the phrase at issue: "We next consider whether the assistance in obtaining documents here sought by an 'interested person' meets the ***specification*** 'for use in a foreign or international tribunal.'" *Intel*, 542 U.S. at 257 (emphasis added). The Court then considered and highlighted the specific governmental nature of the entities involved and the governmental authority they wielded in evaluating whether those entities met the specification of a "foreign or international tribunal":

> To place this case in context, we sketch briefly how the European Commission, acting through the DG–Competition, enforces European competition laws and regulations. The DG–Competition's "overriding responsibility" is to conduct investigations into alleged violations of the European Union's competition prescriptions.

*Id.* at 254. That "context" would have been unnecessary to examine with such particularity if, as Respondent contends, the word tribunal created a "general" category reaching even the sort of non-governmental decisionmaker at issue here.

Similarly, in analyzing the purpose of the 1964 amendment to § 1782, the Court described the new text by reference to *specific* examples the amended term was intended to reach: "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. That is, this Court's analysis did not end with the observation that the revised statute was broader than its predecessor; rather, this Court defined

that expansion by providing *specific* boundaries Congress sought to reach with the new term.

The Court reinforced that analysis by examining the specific goals that ultimately gave rise to the amendment:

> [W]hen Congress established the Commission on International Rules of Judicial Procedure in 1958, . . . it instructed the Rules Commission to recommend procedural revisions "for the rendering of assistance to foreign courts and quasi-judicial agencies." [Emphasis in original]. Section 1782 had previously referred to "any judicial proceeding." The Rules Commission's draft, which Congress adopted, replaced that term with "a proceeding in a foreign or international tribunal." . . . Congress understood that change to "provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]."

*Id.* at 258 (brackets in original; citations omitted.)

Thus, looking directly at the specific nature and function of the governmental entity conducting the proceedings abroad, the Court held that "the [European] Commission is a § 1782(a) 'tribunal' when it acts as a first instance decisionmaker." *Id.* at 246–47. In short, nothing in *Intel* supports Respondent's contention that this Court considered the word "tribunal" and statutory phrase "international tribunal" to be a "general term" with virtually no bounds.

2. Likewise, Respondent's reliance on *Smith v. United States*, 508 U.S. 223 (1993) is misplaced.

Respondent cites *Smith*—a case having nothing to do with § 1782—as establishing a principle of statutory interpretation requiring Petitioners to bear the burden to establish that the ad hoc arbitration panel is excluded from the category of "international tribunals eligible for discovery under Section 1782." Resp. Br. at 18–19. *Smith* holds no such thing, nor does any other case upon which Respondent relies.

*Smith*, as well as two related decisions issued later by this Court, concern the construction of 18 U.S.C. § 924(c) and the circumstances under which a defendant can be convicted for the "use" of a firearm during and in relation to a drug trafficking crime. *See also Bailey v. United States*, 516 U.S. 137 (1995); *Watson v. United States*, 552 U.S. 74 (2007). These decisions hold that, in the absence of a statutory definition, the Court will consider and apply the ordinary or natural meaning of a statutory word or phrase, not in dictionary-definition isolation, but in light of the context and purpose of the statute involved. *Smith*, 508 U.S. at 228–229. There is no suggestion in *Smith* that Petitioners here bear a "burden" to *disprove* the virtually limitless definition Respondent urges here. Respondent appears to be relying on the statement in *Smith* that the Court saw no evidence that Congress intended "the narrow construction petitioner urges," *Smith*, 508 U.S. at 229, but the Court did not purport to articulate some default rule in favor of broader readings of a statutory term (much less the broadest reading imaginable).

Tellingly, Respondent omits mention of what follows that selective quotation—namely, a careful analysis of the particular context in which the term was used. "Just as a single word cannot be read in

isolation," the Court explained, "nor can a single provision of a statute." *Smith*, 508 U.S. at 233; *see also ibid.* ("Statutory construction is a holistic endeavor."). Unsurprisingly, in two subsequent cases interpreting the very same provision, this Court again looked to context and purpose, rather than adopting a generalized preference for broader constructions. In *Bailey*, the unanimous Court highlighted the importance of statutory context: "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey*, 516 U.S. at 145. And in *Watson*, the Court noted that the meaning of statutory terms "has to turn on the language as we normally speak it." 552 U.S. at 79. Indeed, both *Bailey* and *Watson* ***rejected*** the broader readings urged by the government, concluding that the relevant context and purpose evinced congressional intent to confine "use" to "active employment" of the gun in the transaction, *Bailey*, 516 U.S. at 149, and did not reach receiving a firearm in exchange for drugs, *Watson*, 552 U.S. at 83.

3. Instead of considering the language as we normally speak it and in the context of the amended statute, Respondent hunts for pre-1964 dictionary definitions of the word "tribunal" in the hope that the ad hoc arbitration panel can be shoehorned into Respondent's theory. *See* Resp. Br. at 19–20. To that end, Respondent invokes various definitions of the word "tribunal" found in Webster's New International Dictionary of the English Language 2707 (3d ed. 1961) and urges the Court to adopt the broadest possible definition of the word, irrespective of its plain meaning in the context of the amendment to § 1782. Specifically, Respondent asks this Court to construe the word "tribunal" to include:

1. "a person or body of persons having authority to hear and decide disputes so as to bind disputants." Resp. Br. at 20;

2. "the seat of a judge *or one acting as a judge*." *id.* (emphasis in original);

3. "*something that decides* or judges." *id.* (emphasis in original).

Respondent's proffered definition makes no attempt to account for congressional intent to reach "administrative and quasi-judicial proceedings abroad." *Intel*, 542 U.S. at 258. Moreover, Respondent's reading would lead to the dubious conclusion that everything from a referee conducting a coin toss ("something that decides") to adjudications by ersatz television judges who resolve disputes between consenting opposing parties ("one acting as a judge") constitute a "tribunal" under § 1782. *See* Lawrence M. Friedman, Judge Judy's Justice, 1 Berkeley J. Ent. & Sports L. 125, 125 (2012) ("All in all, the judge shows are an amazing phenomenon both in and outside of the United States."). Applying plain English as we know it, even as it existed before 1964, can Respondent seriously argue that the international equivalent of The Peoples Court or Judge Judy constitutes a "foreign or international tribunal," and that Congress intended that interested parties in such proceedings would be eligible for relief under § 1782?

B. Respondent also has little to say in direct response to the clear evidence of congressional intent Petitioners and the United States have identified. Instead, Respondent repeatedly misstates Petitioners' arguments. For example, Petitioners' "primary argument" has nothing to do with whether the panel

is "composed of active jurists." Resp. Br. at 2. Nor do Petitioners contend that "the Treaty equates the Lithuanian courts and arbitration under the UNCITRAL Rules." *Id.* at 19. Those are simply two different fora that an eligible claimant can elect to pursue its claim. Petitioners *do* contest that the arbitral panel here constitutes an "international" tribunal as that term is used in § 1782. *Id*. at 16. In the context of the statute an "international tribunal" is a multinational governmental adjudicator, which the arbitral panel here is not.

Likewise, Respondent's attempt to counter Petitioners' analysis of other statutes that distinguish arbitrations from other types of adjudications falls flat. For example, 5 U.S.C. § 552b(c)(10) refers to an "agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration." *See* Pet. Br. at 26–27 (citing 5 U.S.C. § 552b(c)(10)). This construction reflects Congress's views that "an arbitration" is separate from a "foreign court or international tribunal."

Respondent argues that "the context of [§ 552b(c)(10)] indicates that it . . . refer[s] to *domestic* arbitrations" and that the "statute is drafted redundantly." Resp. Br. at 30 (emphasis in original). But that is not what the statute says, and no reading of § 552b can support the conclusion that Congress meant to include "international arbitrations" in the phrase "international tribunal," but that it meant to include only "domestic" arbitrations in the phrase "an arbitration." In addition, Respondent's contention that the statute is "redundant" runs counter to the settled rule of construction that statutes should be read to *avoid* redundancy. *See, e.g.*, *Bailey*, 516 U.S.

at 146 ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."). Moreover, Respondent's contention does not answer *why* Congress would have separately delineated "foreign court or international tribunal[s]" and "arbitration[s]" in § 552b if the former encompassed international arbitration. In short, Respondent's reading relies on *ignoring* settled principles of statutory construction.

Respondent's reliance on 22 U.S.C. § 1650a(a), which uses the phrase "arbitral tribunal," is likewise unavailing. Resp. Br. at 29–30. It is entirely unsurprising that § 1782 does not use the term "arbitral tribunal," because investor-state arbitrations arose only after the enactment of § 1782. *See* U.S. Br. at 28 (discussing the historical development of investor-state arbitration). And even if an investor-state arbitration could qualify as an "arbitral tribunal" for purposes of § 1650a, and, thus, as Respondent would have it, "must also be considered a 'tribunal' more generally" (Resp. Br. at 30), it does not follow that the same arbitration would constitute an "international tribunal" for purposes of § 1782. Indeed, it is irrelevant whether an arbitration can be a "tribunal" when § 1782 uses the terminology "foreign tribunal" or "international tribunal"—phrasing that connotes a governmental character.[1] Despite Respondent's attempted parsing, Congress has continued to use the specific phrase "arbitral

[1] In its reply memorandum, Petitioner ZF Automotive presents a detailed analysis and collects examples confirming that the use of the phrasing "*foreign* tribunal" and "*international* tribunal" connotes a governmental nexus as used in § 1782. *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401.

tribunal" in later statutes when referring to arbitrations, not the more general term "tribunal." *See* Pet. Br. at 26 (citing 22 U.S.C. § 290k-11; 16 U.S.C. § 973n).

## II. RESPONDENT'S ARGUMENTS ON THE EXISTENCE AND TERMS OF THE TREATY DO NOT TRANSFORM THE AD HOC ARBITRATION PANEL INTO A "FOREIGN OR INTERNATIONAL TRIBUNAL."

Respondent also relies heavily on the Treaty between Lithuania and Russia to argue that the ad hoc arbitral panel should be considered an "international tribunal." Resp. Br. at 13–18. Respondent's arguments fail.

A. Respondent asserts that the Treaty between Lithuania and Russia "create[d]" or "constituted" the ad hoc panel that is adjudicating its claims in the Arbitration. Resp. Br. at 15, 34. Respondent also asserts, without citation, that Petitioners and the Solicitor General purportedly "agree" that the Arbitration panel "derives its authority from" the Treaty. Resp. Br. at 13. Respondent once more mischaracterizes Petitioner's position (*see* Pet. Br. at 29), and neither the authorities cited by Respondent nor the facts in this case support these assertions.

1. Respondent notes that this Court has previously considered issues relating to bilateral international investment treaties and investor-state arbitrations. Resp. Br. at 14 (citing *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2014)). While that case did not involve the construction of § 1782, the analyses in both the decision of the Court and the dissenting opinion (from which Respondent liberally quotes)

demonstrate that the arbitral panel here was not created or constituted by the Treaty.

*BG Group* involved an investment treaty between the United Kingdom and Argentina that contained an arbitration provision applicable to disputes between one of those nations and an investor from the other. The relevant provision required litigation in local court prior to arbitration. The issue for the Court concerned whether, in reviewing a resulting arbitration award, a U.S. court should afford the same deference that courts ordinarily owe arbitration decisions or whether the terms of the treaty required a *de novo* review when the local litigation requirement was not followed prior to the arbitration. To make that determination, the Court analyzed whether the local litigation provision was a substantive or procedural condition precedent to arbitration. *BG Group,* 572 U.S. at 34–35.

This Court's decision to afford ordinary deference to the arbitral award had nothing to do with whether the treaty "created" or "constituted" the arbitral body that rendered the award. To the contrary, the Court's analysis recognized that "[a]s a general matter, a treaty is a contract, though between nations." *Id*. at 37. With that foundation, the Court first treated the award as if it resulted from "an ordinary contract between private parties." *Id.* at 33. Under that approach, the Court held that ordinary deference to the arbitrators would be appropriate. *Id.* at 37. The Court then considered whether the existence and terms of the treaty made a critical difference in treating the agreement between the disputants as anything more than an ordinary contract between private parties. *Id.* at 36. After closely reviewing the

treaty, and, in particular, finding it did not state the local litigation requirement was a condition of consent to arbitration, the Court concluded there was no reason to interpret the treaty differently from a contract. *Id.*

As in *BG Group*, the Treaty between Lithuania and Russia is a contract between nations, under which Lithuania consented to be bound by the results of an ad hoc arbitration if the Fund elected that forum. Nothing about the Treaty alters or adds to the consensual nature of the parties' decision to have the dispute resolved by private arbitrators. The Treaty is simply the vehicle by which Lithuania consented to an arbitral adjudication.

Respondent's extensive reliance on Chief Justice Robert's dissent in *BG Group* is puzzling. Even aside from the fact that it is a dissenting opinion, the Chief Justice's rationale contradicts Respondent's argument here that the Treaty "created" this arbitral panel:

> When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises. The Treaty by itself cannot constitute an agreement to arbitrate with an investor. How could it? No investor is a party to that Treaty. Something else must happen to *create* an agreement where there was none before.

*BG Group*, 572 U.S. at 50 (emphasis in original). That observation applies with equal force here. The Treaty itself does not and cannot create an agreement between Lithuania and the Fund; it constitutes

Lithuania's consent to arbitrate before, among other fora, an ad hoc arbitration applying UNCITRAL Rules. Something more than the Treaty was required, namely the Fund's ***election*** to have such a panel adjudicate the Fund's dispute. Thus, even assuming that mere consent were equivalent to "creation" of such an agreement—which it is not—the Treaty by itself did not manifest mutual consent by both parties to the dispute.

Nor did the Treaty "create" the arbitral body in any other sense. The Treaty does not mandate who can or must serve as an arbitrator, whether they must be government employees or meet some governmentally established standards, or anything else concerning the nature or situs of the decisionmakers. Rather, each party selected one private arbitrator who together selected the third (*see* Pet. App. 20a), exactly as parties do in many commercial arbitrations. The arbitral panel here was authorized by two parties on equal footing, one manifesting a prior agreement to have the dispute arbitrated, the other electing after the dispute arose to proceed with the ad hoc arbitration. The timing and manner in which they granted their consent does not imbue a manifestly nongovernmental entity with governmental character or authority.

2. Similarly, Respondent asserts that "courts have uniformly agreed that investor-state arbitral tribunals that derive authority from intergovernmental agreements are 'international tribunals' within the meaning of the statute." Resp. Br. at 47. This is simply not true. In *Biedermann*, the Fifth Circuit reversed an order granting Section 1782 discovery for use in an arbitration between the

Republic of Kazakhstan and a private litigant pending before the Arbitration Institute of the Stockholm Chamber of Commerce. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999). The panel reasoned that "not every conceivable fact-finding or adjudicative body is covered" by Section 1782, "even when the body operates under the imprimatur of a foreign government." *Id.* at 882. And the arbitration in *Biedermann* was authorized, in part, under a bilateral investment treaty between Kazakhstan and the United States.

The cases Respondent relies on to support its argument that bilateral investment treaty arbitrations must be proceedings before "international tribunals" have not thoroughly engaged on the issue or are otherwise unavailing. For instance, Respondent cites *Chevron Corp. v. Berlinger*, and related cases.[2] But in *Chevron* the Second Circuit expressly declined to decide whether the arbitration was a "foreign or international tribunal" under § 1782. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 310–11 (2d Cir. 2011). And while the district court had found that the arbitration was a "foreign or international tribunal," it did so only in *dictum*. *In re Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *as corrected* (May 10, 2010). All of the other district court decisions cited by Respondent on this point (*see* Resp. Br. at 47, n.30), are dissimilar or did not critically consider the issue.[3]

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[2] *See, e.g., In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011).

[3] *See, e.g., In re Veiga*, 746 F. Supp. 2d 8 (D.D.C. 2010) (no fact-based analysis on whether the bilateral investment treaty arbitration there constituted a "foreign or international tribunal"); *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d

B. Respondent also argues that the phrase "international tribunal," as used in § 1782, "comes from a series of statutes [collectively Section 270] that were enacted to directly address two international arbitrations between sovereigns instituted pursuant to intergovernmental agreements: the *I'm Alone* case, and the United States-German Mixed Claims Commission."[4] Resp. Br. at 11. Respondent claims that these two "international arbitration[s] arising under intergovernmental agreements" are "very similar to the proceedings between the Fund and Lithuania." *Id.* at 35. The Fund's comparison misses the mark; both of the examples cited by Respondent were *state-to-state commissions*, as Respondent concedes (Resp. Br. at 42–43), and quintessentially governmental in form and substance.

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1121 (D. Colo. 2011) (the statutory requirements of Section 1782 were not at issue); *Islamic Republic of Pak. v. Arnold & Porter Kaye Scholer LLP*, No. 18-103 (RMC), 2019 U.S. Dist. LEXIS 61780 (D.D.C. Apr.10, 2019) (involved an ICSID arbitration, not an ad hoc arbitration, and applied ICSID Arbitration Rules, not UNCITRAL Rules); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 3:09 MC 265 (JBA), 2009 U.S. Dist. LEXIS 109492 (D. Conn. Aug. 27, 2009) (involved a proceeding before a Swedish court and an arbitration that was subject to judicial review).

[4] Respondent's contention that "the 1964 Act repealed Section 270 and inserted its scope relating to 'international tribunals' into Section 1782" (Resp. Br. at 6) fails for an additional reason. Section 270 provided assistance to "an international tribunal *or commission*," 22 U.S.C. § 270 (1958) (emphasis added), whereas Section 1782 provides assistance to an international tribunal, but not a commission, *see* 28 U.S.C. § 1782. While the arbitral panel here is neither an international tribunal nor a commission like the *I'm Alone* commission or U.S.-German Mixed Claims Commission, the 1964 amendment narrowed the scope of assistance provided in this respect.

Prompted by the sinking of a Canadian-registered ship by the U.S. Coast Guard in international waters, the *I'm Alone* case involved a sovereign-to-sovereign arbitration between the United States and Canada resolved by a commission vested with governmental authority. The downing of the ship—a suspected rumrunner—resulted in diplomatic tensions between the two nations, including a series of protests by the Canadian government and formal response by the U.S. Secretary of State. *See* Nancy G. Skoglund, *The I'm Alone Case: A Tale from the Days of Prohibition*, 23 U. Rochester Libr. Bull. No. 3 (1968). Ultimately, a state-to-state commission was constituted pursuant to the Convention to Aid in the Prevention of the Smuggling of Intoxicating Liquors. *See id.*; Convention to Aid in the Prevention of the Smuggling of Intoxicating Liquors into the United States, Art. IV., U.S.-Gr. Brit., Jan. 23, 1924, 43 Stat. 1761, T.S. No. 685.

In contrast to the ad hoc arbitration panel here, the *I'm Alone* Commission comprised two sitting Supreme Court justices from the United States and Canada, who, when faced with a question over the scope of their authority to compel witness testimony, turned to Congress for legislation. *I'm Alone* Case - Joint Interim Report of the Commissioners dated the 30th June, 1933, 1611, 1614 (1935) (the "Joint Interim Report"); Act of July 3, 1930, ch. 851, 46 Stat. 1005; *see also* Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264, 1264 (1962). The United States was represented by a former U.S. Senator, and Canada was represented by the equivalent of its Solicitor General. Skoglund, *supra* at 16. Moreover, the *I'm Alone* dispute itself involved questions of

international borders and the right of hot-pursuit by a military vessel, and the case was ultimately resolved via a formal apology from the United States to Canada for the wrongful sinking of the *I'm Alone*. Joint Interim Report at 1618. It bears no resemblance to an ad hoc arbitration between the Fund and Lithuania over alleged financial harm to a private investor from the insolvency of a bank.

Likewise, the United States-German Mixed Claims Commission was a state-to-state commission rife with governmental character and authority that is completely lacking here. The Mixed Claims Commission was established pursuant to a Special Agreement between the U.S. and Germany on August 10, 1922 to determine Germany's post-WWI financial obligations in accordance with the economic and reparation clauses of the Treaty of Versailles. Agreement for a Mixed Claims Commission, U.S.-Ger., Aug. 10, 1922, 42 Stat. 2200, T.S. No. 665 (the "Special Agreement"). The Special Agreement created the Mixed Claims Commission and specified the jurisdiction of the Commission (Art. I), method of appointing commissioners (Art. II), situs of the initial meeting (Art. III), record keeping requirements (Art. IV), and method of funding (Art. V), providing, in particular, that expenses of the Commission were to be divided between the U.S. and Germany. *Id.*

Over the course of its existence, its Commissioners included not only distinguished practitioners, but also two United States Supreme Court Justices—Owen Roberts and William Day—and the Chief Justice of the German Hanseatic Supreme Court, Dr. Wilhelm Kiesselbach. *See* Joseph Conrad Fehr, *Work of the Mixed Claims Commission*, 25 A.B.A. J. 845, 846

(1939). Furthermore, the Mixed Claims Commission was a standing tribunal that, over a period of 17 years, adjudicated 20,433 claims and awarded over $181 million in damages, *see Reports of International Arbitral Awards – Mixed Claims Commission (United States and Germany)*, Volume VII, Historical Note, 5 (1 Nov. 1923-30 Oct. 1939) (https://legal.un.org/riaa/cases/vol_VII/1-391.pdf), and issued precedential decisions intended to resolve other claims, *see* Edwin M. Borchard, *Opinions of the Mixed Claims Commission, United States and Germany (Part II)*, 20 Am. J. Int'l L., 69 (1926).

Accordingly, these historical examples upon which Respondent relies serve only to demonstrate that the panel here pales in comparison. Whereas the *I'm Alone* Commission and the Mixed Claims Commission both involved state-to-state disputes directly implicating international comity and were imbued with governmental character at every turn, the arbitral panel here bears no such indicia.[5]

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[5] Respondent's attempt to analogize the Arbitration to the commissions established under the Jay Treaty (Resp. Br. at 39) fails for the same reason: the Jay Treaty constituted standing governmental commissions to resolve factually distinct disputes between the United States and United Kingdom arising out of the Revolutionary War and the 1783 Treaty of Paris that ended the war. Such disputes included which river St. Croix delineated the border between the U.S. and present-day Canada by the Treaty of Paris, and claims for property damage caused by the war. *See* George Schwarzenberger, Present-Day Relevance of the Jay Treaty Arbitrations, 53 Notre Dame L. Rev., 715, 720-21 (1978); O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, Y.B. on Int'l Inv. L. & Pol'y 649, 653 n.19 (2010/2011).

C. Respondent's other arguments relating to the existence and terms of the Treaty are meritless. Respondent's claim that the arbitral panel is "a public tribunal," Resp. Br. at 2, does not withstand scrutiny. The hearings in the ad hoc Arbitration are not open to the public, the transcripts of its proceedings are maintained in confidence, and its decisions and award are confidential and will remain so unless both parties agree otherwise. Moreover, as even the decision below recognized, "[t]he three arbitrators selected are all private parties—two arbitration lawyers and one law professor—which is suggestive of a 'private' arbitration" (Pet. App. 20a). Nothing in the Treaty renders any aspect of the panel's work public.

Respondent also finds significance in the fact that the ad hoc panel on occasion refers to itself as a "tribunal." Resp. Br. at 15. That "fact," however, has no bearing on what the phrase "foreign or international tribunal" was intended to mean when Congress amended the statute. *Cf. Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements. On the contrary, courts have long looked to the contents of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply") (emphasis in original); *see also Child Labor Tax Case*, 259 U.S. 20, 38 (1922) (holding that a penalty is not a tax simply because one calls it such).

## III. RESPONDENT'S ATTEMPT TO HARMONIZE ITS CONSTRUCTION OF § 1782 WITH THE FEDERAL ARBITRATION ACT FAILS.

Respondent argues that there is no "conflict" arising from its interpretation of § 1782 and the limited availability of discovery under the FAA. According to Respondent, "district courts can wield their discretion" to determine whether a § 1782 request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." Resp. Br. at 32 (quoting *Intel*, 542 U.S. at 265). Respondent concludes that no "unjust windfall to international litigants" would result. *Id.* Respondent is wrong.

Respondent misstates Petitioners' argument (as well as the arguments advanced by both Petitioner ZF Automotive and the United States). Respondent's expansive interpretation of § 1782 would enable district courts to order discovery for arbitrations conducted outside the United States that would be unavailable under the FAA to parties in domestic arbitrations. *See* AlixPartners Br. at 27–29; ZF Automotive Br. at 37–40; U.S. Br. at 25–27. Respondent does not and cannot explain why Congress would have intended to empower parties in foreign ad hoc arbitrations to secure greater discovery than parties to domestic arbitrations.

Respondent cites *Intel* for the proposition that a § 1782 applicant need not prove that the discovery sought would be available in an analogous domestic proceeding. But this holding is irrelevant to Petitioners' argument. *Intel* nowhere indicates that Congress meant to establish a statutory regime

through which district courts can order broader discovery through § 1782 than for FAA arbitrations seated within its borders. Nor is such a result plausible: it would be absurd for Congress to subject U.S. nationals to greater discovery burdens only for arbitrations seated outside the country.

## CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted.

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