No. 21-401

In the Supreme Court of the United States

ZF AUTOMOTIVE US, INC., GERALD DEKKER, AND CHRISTOPHE MARNAT,

Petitioners,

v.

LUXSHARE, LTD.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

The core problem with Luxshare's interpretation of 28 U.S.C. § 1782 is its failure to focus on the full operative phrase at issue—"foreign tribunal." Instead of treating that phrase as a unified whole, Luxshare urges the Court to chop it up into its constituent pieces, consider each word in isolation, and glue together the broadest possible dictionary definitions. What's more, Luxshare insists that the Court ignore other standard tools of construction—like statutory history—that undermine its acontextual interpretation.

Luxshare's approach is misguided. "[C]onstruing 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) (alteration in original) (citation omitted), but instead requires examining the relevant statutory language, in context, at the time of enactment. Here, the public meaning of the unified phrase "foreign tribunal"—like "foreign leader," "foreign country," and "foreign flag"—is limited to governmental associations. As a recent—and comprehensive—corpus linguistics study confirms, that is how the phrase has always been used, both in ordinary and legal speech. Indeed, Luxshare has not identified a single instance in which Congress, this Court, or anyone else has ever used "foreign tribunal" to refer to a private entity—let alone to a private commercial arbitration panel.

Even if Section 1782's text were ambiguous, the broader structure, history, and purpose would powerfully confirm its focus on government entities. The 1958 Act creating the Rules Commission, the

Commission's final report, and the 1964 Act's direct legislative history all show that Congress used the phrase "foreign tribunal" to capture certain non-court governmental adjudicators such as administrative agencies and investigating magistrates. Luxshare points to nothing in the history suggesting that Congress intended—or that anyone ever understood—Section 1782 to encompass purely private arbitrations. And although Luxshare tries to argue that pushing federal courts to meddle in overseas private arbitrations furthers America's foreign policy and business interests, in fact the opposite is true, as the United States and Chamber of Commerce amicus briefs make clear.

This Court should interpret Section 1782's unified phrase "foreign tribunal" to encompass any adjudicative or quasi-adjudicative entity of a foreign government. And it should reject Luxshare's expansion of that phrase to cover purely private commercial arbitration. The district court's discovery order should be reversed.

ARGUMENT

Luxshare rightly acknowledges (at 7, 26, 33) that the DIS arbitral panel here is not an "international tribunal" under Section 1782. Instead, it argues (at 12-13) that discovery is appropriate because a private commercial arbitration panel qualifies as a "foreign" tribunal. All three other parties in these consolidated cases—including the respondent in *AlixPartners*—disagree with that position, as does the United States. ZF Br. 20-22; AlixPartners Br. 21-22; Fund for Protection of Investors' Rights in Foreign States (Fund) Br. 34 ("'Foreign tribunal' means an adjudicatory or quasi-adjudicatory body of a foreign

state."); U.S. Br. 17-18. This Court should reject it as well.

A. Luxshare's Textual Arguments Fail

Luxshare's piecemeal textual analysis ignores that "two words put together may assume a more particular meaning than those words in isolation." *AT&T*, 562 U.S. at 406. When properly considered as a whole, the unified phrase "foreign tribunal" carries a governmental connotation that excludes private commercial arbitrations. Luxshare's efforts to avoid that plain meaning all fail.

1. Luxshare Offers No Plausible Interpretation Of The Unified Phrase "Foreign Tribunal"

A "foreign tribunal" is a court or other governmental body convened to adjudicate disputes and render justice. ZF Br. 19. That interpretation tracks the ordinary meaning of the words "foreign" and "tribunal," taken on their own. *Id.* at 18-19. More importantly, it follows from common usage, under which pairing the word "foreign" with a noun having a potential sovereign or governmental connotation typically signals that the noun belongs to a foreign government. *Id.* at 20. Petitioners' opening brief gave multiple examples of such usage, explaining how phrases like "foreign leader," "foreign flag," and "foreign official" virtually always refer to leaders, flags, and officials *of foreign governments*, not merely those located abroad. *Id.* at 21.

Luxshare's only response is a half-hearted sentence asserting that, in these phrases, "it is the noun . . . that brings the sovereign connotation." Luxshare Br. 27. But that's just wrong. The nouns "leader," "flag," and "official," do *not* invariably

connote sovereignty, as petitioners have explained. ZF Br. 21 (giving examples). A "leader" can be a prime minister or a CEO. A "flag" can bear the symbol of a nation, university, sports team, or film festival. And an "official" can refer to a civil servant, football referee, or union representative. Each can bear a range of meanings—some governmental, some not. But when modified by "foreign," each phrase takes on a governmental connotation. So too with "foreign tribunal."

Luxshare invokes (at 27) phrases like "foreign films," "foreign cars," "foreign cuisine," and "foreign document," to argue that "foreign" can sometimes be used without governmental connotations. But no one disputes that. Our point is that when "foreign" modifies a noun with potential governmental connotations—like "tribunal"—the unified phrase captures that governmental sense. None of Luxshare's examples involves such nouns.[1]

Notably, Luxshare fails to offer a single example of any source, at any time in the run-up to the 1964 Act, using the phrase "foreign tribunal" to encompass private entities (like commercial arbitral panels). That failure is especially significant given Luxshare's

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[1] Luxshare notes (at 27) that Congress used the phrase "foreign document" in another provision of the 1964 Act, codified at 18 U.S.C. § 3491. But "document" does not itself have sovereign connotations, and so it is unsurprising that the phrase "foreign document" uses "foreign" in the merely location-based sense. In any event, the 1964 Act also used the phrase "[f]oreign official documents" in an exclusively governmental sense, to refer to "official record or document *of a foreign country*." 28 U.S.C. § 1741 (emphasis added); *see* ZF Br. 21-22. That usage is inconsistent with Luxshare's theory of what "foreign" means, both generally and in the 1964 Act.

seemingly exhaustive review of dictionaries, judicial decisions, statutes, treaties, foreign and domestic arbitral rules, and academic articles. *See* Luxshare Br. 12-16, 24-28.

Recent scholarship explains why Luxshare cannot cite any real-life example supporting its interpretation. In a recent academic study, two experts in corpus linguistics analyzed the phrase "foreign tribunal" using a series of pre-1964 databases, including (1) the Corpus of Historical American English (which includes tens of thousands of documents and 298 million words), (2) the Corpus of Supreme Court Opinions of the United States, (3) all federal court opinions available on Westlaw, (4) the U.S. Code, and (5) HeinOnline's Core U.S. Journals database. James C. Phillips & Jesse Egbert, *A Corpus Linguistic Analysis of "Foreign Tribunal"* 18-23, SSRN (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4052948.

The study's findings are striking: Despite identifying 259 instances in which "foreign tribunal" was used to reference "a tribunal that operates under government authority," the study uncovered *no* instance in which that phrase was ever used to refer to "a tribunal that operates under non-governmental/private authority, such as private arbitration." *Id.* at 19-25, 28-29. As the authors concluded, "The data are about as one-sided as we've ever seen in doing corpus linguistic analysis." *Id.* at 25. Indeed, "the linguistic question is very clear: the term *foreign tribunal* seldom referred to a private arbitration body in American English prior to 1965, and the entity that was referred to as conducting

arbitration was usually called something other than a *tribunal*." *Id.* at 29; *see also* ZF Br. 23-25 & n.9.

2. Luxshare's Isolated Interpretation of "Tribunal" Fails On Its Own Terms

Instead of confronting the whole phrase "foreign tribunal," Luxshare addresses the statutory language piecemeal. Specifically, it (1) emphasizes that "tribunal" can bear a broader meaning than governmental adjudicators; (2) presumes that the word "foreign" bears its broadest meaning—denoting geographic location rather than governmental affiliation; and (3) concludes that the unified phrase therefore includes private commercial arbitration. This splintered analysis gives Section 1782 an impossibly broad scope.

a. According to Luxshare, "tribunal" can refer to "[a]nything having the power of determining or judging" or "a person or body of persons having authority to hear and decide disputes so as to bind the disputants." Luxshare Br. 13-14 (alteration in original) (citation omitted). These certainly are among the dictionary definitions of "tribunal," *see* ZF Br. 19-20, but they cannot apply to Section 1782.

Luxshare's definitions have no plausible limiting principle. *Id.* They encompass student disciplinary committees, Facebook's Oversight Board, the host-judges of the Great British Bake Off television program, and innumerable other persons that resolve disputes between private individuals. Congress did not authorize federal court discovery for disputes before these entities. Yet Luxshare proposes no definition narrow enough to avoid that result.

b. Faced with the overbreadth of its own definition, Luxshare detours away from text and

latches on to out-of-context language from *Intel* for a limiting principle to cabin its expansive definition. Luxshare contends that under *Intel*, Section 1782 encompasses any "quasi-judicial" entity that "acts [1] as a 'first-instance decisionmaker,' in [2] a 'proceeding that leads to a dispositive ruling,' that [3] is 'reviewable in court.'" Luxshare Br. 19 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246-47, 255, 258 (2004)).

Luxshare misses the point of *Intel*. That case was not deciding the issue presented here—whether a "foreign tribunal" includes both governmental and non-governmental bodies. Rather, *Intel* addressed whether the Directorate-General for Competition of the European Commission—undoubtedly a governmental entity—was sufficiently *adjudicatory* to qualify as a tribunal under Section 1782.

Intel answered that question in the affirmative, but only insofar as the relevant proceeding would lead to "a *final administrative action* both responsive to [a] complaint and reviewable in court." 542 U.S. at 255 (emphasis added). In so holding, *Intel* drew from the 1958 Act instructing the Rules Commission to "recommend procedural revisions 'for the rendering of assistance to foreign courts and quasi-judicial *agencies*.'" *Id.* at 257-58 (emphasis altered) (quoting Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (1958)). And further illustrating its focus on governmental organizations and agencies, *Intel* contemplated that evidence produced under Section 1782(a) would be received by a "foreign government," "court," or "agency." *Id.* at 264. In short, *Intel* discussed *which* government bodies count as "foreign tribunals," not whether *non*-government bodies count.

Although *Intel* highlighted various features of the European Commission, the Court did not treat those factors as establishing a definitive test, even for what counts as a sufficiently adjudicatory *governmental* tribunal. And even taken on its own terms, it is far from clear whether a private commercial arbitration would even satisfy the third factor that Luxshare plucks from *Intel*'s discussion, requiring that a tribunal's decision be "reviewable in court." After all, courts are typically barred from reviewing the substantive correctness of arbitral rulings, and instead are limited to considering whether the proceeding was infected by fraud, corruption, or a complete denial of minimum standards of due process. *See, e.g.*, 9 U.S.C. § 10(a); German Code of Civil Procedure § 1059.

c. Luxshare's other arguments about Section 1782's text also fail.

First, because Luxshare's ultra-broad definition of "tribunal" cannot reasonably apply to Section 1782, it makes no difference that judicial decisions occasionally use "tribunal" to encompass private arbitral tribunals. *See* Luxshare Br. 14 & n.1. Petitioners are not arguing that the single word "tribunal" is definitionally incapable of encompassing an arbitral tribunal, but rather that (1) the relevant phrase here is "foreign tribunal," not "tribunal" alone, and (2) applying the broadest dictionary definitions of "tribunal" leads to implausible results.

In any event, Luxshare overstates its point. As noted above, Luxshare does not identify a single judicial use of the unified phrase "foreign tribunal." And most of its cited cases either (1) significantly post-date the 1964 Act, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27

(1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); (2) do not involve private commercial arbitration, *see NLRB v. Radio & Television Broad. Eng'rs Union, Local 1212*, 364 U.S. 573, 580 (1961) (labor dispute); (3) use distinct terms such as "*arbitration* tribunal," *see United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (emphasis added); or (4) use "tribunal" in context with extensive discussion making clear it is referring to an arbitral panel, *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956). Luxshare's cases thus offer little guidance as to the original public meaning of the phrase "foreign tribunal" in 1964.

Even more crucially, Luxshare does not identify a single *statute* where Congress has used "tribunal" broadly enough to encompass private commercial arbitration—much less any use of "foreign tribunal" that way. Congress has, however, regularly used "tribunal" to refer to courts and quasi-judicial agencies. ZF Br. 22-23 & nn.6-7. When Congress wants to address arbitration, it knows how to do so—it speaks of "arbitration proceedings" before "arbitrators" or "umpires" rather than "tribunals." *Id.* Indeed, in other statutes when Congress has sought to include arbitrations along with "tribunals," it has done so expressly. *See* 5 U.S.C. § 552b(c)(10) (discussing an "agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, *or an arbitration*" (emphasis added)). And although Luxshare cites (at 15) the internal rules of various arbitration bodies, none of those rules use the full "foreign tribunal" phrase at issue here.

Second, Luxshare is wrong to argue (at 24) that the definitions of "foreign tribunal" advanced by petitioners and the government ("courts and similar governmental bodies"; "governmental judicial and non-judicial adjudicators") are inconsistent with any definition of "tribunal." In 1964, dictionaries defined "tribunal" as "a court *or forum of justice*." *Webster's Third New International Dictionary of the English Language* 2441 (1961) (emphasis added). Government adjudicatory bodies charged with rendering justice to members of the public fit comfortably within that definition. Private commercial arbitral panels established by contract to resolve one-off private disputes do not.

Finally, Luxshare incorrectly accuses (at 18) petitioners and the United States of advocating a "plain-statement rule" under which "arbitral tribunals are excluded unless Congress expressly references them." Petitioners are not asking for any special rule of construction; all they want is for this Court to apply standard interpretive tools to the *full* phrase at issue here—"foreign tribunal." Luxshare's refusal to confront that full phrase speaks volumes.

3. The Fourth Circuit's Interpretation Is Wrong

As a fallback, Luxshare briefly argues that even if petitioners are right that a "foreign tribunal" is a government entity, private arbitral panels nonetheless qualify because they "exercis[e] government-conferred authority." Luxshare Br. 23. The Fourth Circuit adopted that view when ruling that Section 1782 encompasses private arbitration in *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 211-16 (4th Cir. 2020).

But private commercial arbitration is not the product of government-conferred authority. An arbitral panel's authority to adjudicate a particular dispute comes from the parties' private contract—not any grant by the government. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). Here, for instance, the source of a future DIS panel's authority to resolve the conflict between petitioners and Luxshare is the parties' Master Purchase Agreement, not any decision by the German government. Moreover, the rules that will govern that proceeding are not set by any government, but by DIS itself. *See* ZF Br. 9-11, 52-53. DIS is a non-governmental body that "work[s] independently of public or private organisations." DIS, *About Us*, https://www.disarb.org/en/about-us/about-us (last visited Mar. 10, 2022).

Luxshare and the Fourth Circuit portray arbitral panels as exercising "government-conferred authority," whenever a government plays any role in the arbitral process, even simply by generally regulating arbitration or authorizing judicial enforcement of arbitral awards. *Boeing*, 954 F.3d at 213-14; Luxshare Br. 22-23. But this approach would render the governmental/private distinction meaningless.

Luxshare may be right (at 22) that "national and international law play a vital role in regulating commercial arbitration tribunals." But a wide array of private activities are similarly regulated by the government, many of them far more closely and with less flexibility than private commercial arbitration procedures. Such activities, from hiring and firing employees, to maintaining power plants, to disposing of hazardous waste, do not become "governmental"—

and the individuals performing them do not exercise "government-conferred authority"—simply because they are subject to regulation. Likewise, although courts have authority to interpret and enforce private contracts—and states regulate contracts through common law and statutes such as the UCC—that doesn't mean every contract between private parties is an expression of "government-conferred authority." Luxshare's backup argument fails.

B. The Broader Statutory Context Supports Petitioners

Petitioners have explained that Section 1782(a)'s broader text, along with Sections 1781 and 1696, reinforce that "foreign tribunals" are government bodies. ZF Br. 27-31. Luxshare nitpicks these contextual clues, emphasizing that none of them *explicitly* limits the scope of Section 1782's discovery authorization. Even so, the neighboring provisions help confirm petitioners' interpretation.

1. Section 1782(a) authorizes district courts to "prescribe the practice and procedure" for producing evidence, including by prescribing (1) the "practice and procedure of the foreign country" for foreign tribunals, and (2) the "practice and procedure of . . . the international tribunal" for international tribunals. *Id.* at 27-28 (citation omitted). Luxshare says this language is irrelevant because its "permissive wording" makes it an "optional borrowing provision." Luxshare Br. 28 (citation omitted).

Luxshare misses the point. What matters is that Section 1782(a) assumes that "foreign tribunals" will be subject to the "practice and procedure of the foreign country," which makes sense only if "foreign tribunals" refers to government entities. After all,

private arbitral panels apply the rules chosen by the parties' agreement—*not* the "practice and procedure of the foreign country" in which they sit. Although Section 1782(a) allows a district court to apply a different set of rules, Congress plainly envisioned that "foreign tribunals" would apply the governing law of the foreign country in which they sit. That understanding is inconsistent with treating private arbitral panels as "foreign tribunals."

2. Section 1781 authorizes the State Department to transmit letters rogatory and other requests for international judicial assistance, using the term "tribunal" in ways that necessarily refer to *governmental* tribunals. ZF Br. 28-29. Luxshare presents (at 30) a strained argument that "tribunal" in Section 1781 could potentially apply to private commercial arbitrations, hypothesizing that an arbitrator might seek assistance from the State Department in transmitting a request to a district court, or even "request amicus assistance [in a private arbitration] from the Department of Justice." But it provides no reason to believe these far-fetched scenarios have ever come to life.

Moreover, Luxshare ignores the reciprocal provision in Section 1781(a)(2), which contemplates "a tribunal in the United States" issuing letters rogatory or requests to a "foreign or international tribunal, officer, or agency." Why would a U.S. "tribunal" ever issue a letter rogatory or request to a private commercial arbitral panel in another country, let alone do so through the State Department? Even under Luxshare's reading, this provision's use of "foreign tribunal" plainly refers to governmental bodies. The same term means the same thing in Section 1782.

3. Section 1696(a) permits district courts to order service of certain documents and clarifies that this does not "require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal." *See* ZF Br. 30-31. But the word "award"—the term of art associated with arbitration in the U.S. Code—is conspicuously absent from this provision. Luxshare says (at 30-31) this semantic choice means nothing because courts and arbitration bodies occasionally use "judgment," "decree," or "order"—rather than "award"—to refer to arbitration decisions. But *Congress* speaks always of "awards" when referring to commercial arbitration, in contrast to the "order" or "decree" of a court. ZF Br. 30-31 & n.12. Here, Congress's omission of "award" suggests that Section 1696's phrase "foreign or international tribunal" excludes commercial arbitrators.

C. Luxshare Has No Meaningful Answer To Section 1782's History

Petitioners have explained how Section 1782's history shows that "foreign tribunal" does not cover private commercial arbitrations. ZF Br. 31-45. Luxshare has no compelling answer.

1. Luxshare starts (at 8) by asking the Court to ignore the history because "statutory text, context, and structure" unambiguously favor its position. Of course, history cannot trump clear text. But here, text and structure establish that a "foreign tribunal" does *not* include private commercial arbitrations. *See supra* at 3-14. History is a perfectly appropriate tool to confirm that analysis. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319, 332 (2011) ("[T]his is a case in

which text, context, and history point to the same bottom line.").

2. Moving to substance, petitioners' brief analyzed the historical context from which the modern Section 1782 emerged. It emphasized (1) the statutory antecedents providing international judicial assistance to promote comity with foreign states, (2) the 1958 Act creating the Rules Commission, (3) the Commission Report recommending the statutory language that would become Section 1782, and (4) the House and Senate Reports on the 1964 Act. ZF Br. 31-37.

Luxshare wants to ignore significant aspects of this history. For example, it asks this Court (at 35) to disregard the text of the 1958 Act expressly charging the Rules Commission with improving "the procedures of our State and Federal tribunals for the rendering of assistance to *foreign courts and quasi-judicial agencies*." 1958 Act, § 2, 72 Stat. at 1743 (emphasis added). According to Luxshare (at 35), the 1958 Act is irrelevant because it "long predate[d] the 1964 amendments." But the 1958 Act codified the Commission's mission as to the very statutory language at issue here—and the Commission executed that mission by drafting the revised Section 1782. Halliburton Co. Amicus Br. 6-11. Congress's instructions sensibly inform the meaning of the Commission's work.

Luxshare takes a similar approach to the Commission Report and House and Senate Reports. Most strikingly, Luxshare ignores the statements in those sources explaining that the term "foreign tribunal" was added to Section 1782 in order to authorize discovery for use "before a foreign administrative tribunal or quasi-judicial agency" and

not just in foreign courts. S. Rep. No. 88-1580, at 7-8 (1964); ZF Br. 35-37.

Luxshare again deflects, stating (at 36) that "[w]hat matters" here is Section 1782's text. But no one disputes that the text ultimately governs. The Commission Report and House and Senate Reports are nonetheless helpful aides to interpretation. Indeed, they are direct evidence of the contemporary meaning of "foreign tribunal"—and they fully accord with petitioners' textual analysis. *See* John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 737 (1997) (endorsing limited use of legislative history for this purpose).

Luxshare's other pleas to ignore probative evidence also fail. Luxshare seeks (at 35) to dismiss the *Draft Convention on Judicial Assistance* (the Harvard Convention)—which said that the "term 'tribunal'" "includes all courts and limited number of administrative agencies" and "must be an authority created by the State or a political subdivision," 33 Am. J. Int'l L. Supp. 11, 36 (1939)—because that document was "merely a 'starting point' for the Rules Commission's work." But that "starting point" is surely relevant in revealing Section 1782's linguistic roots. *See* U.S. Chamber of Commerce et al. Amici Br. 26-27 ("Chamber Br.") (discussing "strikingly similar" structure and terminology of Harvard Convention and 1964 amendments).

Finally, Luxshare is also wrong to dismiss statements by DOJ official Harry Jones—who later served as Director of the Rules Commission—using the terms "tribunal" and "foreign tribunal" to refer to governmental bodies. True, Jones used these terms in connection with a proposed treaty, whereas the Rules Commission ultimately proceeded via

legislation. *See* Luxshare Br. 36. But so what? Jones's language still reveals how prominent international lawyers directly involved with drafting Section 1782 understood the statute's essential terms.

3. Rather than address the key statements revealing the contemporaneous meaning of "foreign tribunal" in 1964, Luxshare offers its own account of the history. Luxshare's core point (at 32-33) appears to be that the 1964 Act was motivated by the growth of international commerce. That is true (at least in part), but it has little bearing on what Congress or the public would have understood Section 1782's reference to "foreign tribunal" to mean when enacted.

On that point, Luxshare cites no historical evidence directly supporting its position. Indeed, it is striking that Luxshare does not identify a single court, party, scholar, or lawyer before the 1990s asserting that Section 1782 *does* cover private arbitrations. That reinforces petitioners' textual argument, which is that no one actually used the term "foreign tribunal" in that way. *Supra* at 3-6.

The only example Luxshare even tries to invoke along these lines is Professor Hans Smit's 1965 statement that Section 1782's reference to "tribunal" includes "investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies." Luxshare Br. 35 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n.71 (1965), and adding emphasis). But Luxshare misinterprets Professor Smit's comment. As the Second Circuit has explained, "Professor Smit's reference to 'arbitral tribunals' does not necessarily encompass private tribunals." *Guo v. Deutsche Bank Sec. Inc. (In re Guo)*, 965 F.3d 96, 105 (2d Cir. 2020).

Rather, as petitioners' brief explained (at 42 n.13), Professor Smit was likely referring to the sorts of *international arbitral tribunals* undeniably covered by Section 1782's reference to "international tribunal." *See Guo*, 965 F.3d at 105 (noting that Professor Smit's 1965 article "can thus be read . . . as referring solely to state-sponsored arbitral bodies"); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020). That reading tracks Professor Smit's 1962 article explaining "that 'an international tribunal owes both its existence and its powers to an international agreement.'" *Guo*, 965 F.3d at 105. It is also consistent with the other decisionmaking bodies listed in the 1965 quotation ("investigating magistrates," "administrative . . . tribunals," and "quasi-judicial agencies"), all of which are governmental. *See generally United States v. Williams*, 553 U.S. 285, 294 (2008) (discussing "commonsense canon of *noscitur a sociis*"); Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 Am. Rev. Int'l Arb. 61, 73 (2009) (Rothstein).

4. Luxshare's historical argument is also at odds with the state of arbitration law in 1964. Forty years earlier, Congress enacted the Federal Arbitration Act ("FAA") to create a robust federal policy favoring domestic arbitration—and yet it withheld sweeping discovery assistance from those proceedings. ZF Br. 38-39. Luxshare acknowledges that the discovery available under its reading of Section 1782 is dramatically broader than what the FAA provides for domestic arbitrations, but it offers no coherent reason *why* the 1964 Congress would have favored foreign over domestic arbitrations in that way. Instead,

Luxshare declares (at 43-44) that the discrepancy simply "reflects a choice by Congress." *But see Servotronics*, 975 F.3d at 695.

Moreover, Luxshare does not deny that attributing such a choice to Congress would produce an outright conflict for a subset of nominally "foreign" arbitrations. That is because U.S. implementing legislation for the New York Convention and Panama Convention expressly provides that some arbitrations qualifying as "foreign tribunals" under Luxshare's reading are subject to the FAA's more restrictive discovery rules. *See id.* at 695-96; *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999); 9 U.S.C. §§ 208, 307; ZF Br. 43. Luxshare does not explain how its reading avoids the problem of simultaneously subjecting this subset of foreign arbitrations to two completely different discovery regimes.[2]

Luxshare is also incorrect (at 42) that this Court's decision in *Intel* somehow "preclude[s]" considering the incongruity between foreign and domestic arbitration flowing from its interpretation of Section 1782. *Intel* held that district courts should not assess a Section 1782 request, authorized under foreign law, by determining whether similar discovery would be authorized under an analogous federal law. 542 U.S. at 263. That has no bearing on the question here,

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[2] In *AlixPartners*, the Fund argues (at 10, 31 & n.17) that the New York and Panama Conventions only address enforcement of existing arbitral awards, and so only the FAA's provisions about enforcement apply. But the implementing statutes are not so limited: They expressly apply *all* of "Chapter 1" to such arbitrations, 9 U.S.C. §§ 208, 307, and Chapter 1 includes the FAA's discovery procedures, *id.* § 7.

which does not involve "comparative analysis" with foreign law at all.

5. Luxshare also fails to effectively rebut the commonsense point that the United States government's active *disfavor* of foreign private arbitration in 1964 is incompatible with Luxshare's argument that Congress privileged foreign private arbitrations over domestic ones. ZF Br. 40-42. That disfavor is most plainly reflected in the government's significant delay in ratifying the New York Convention that would have made foreign arbitral awards directly enforceable in domestic courts.

Luxshare says the opposition to ratification in 1964 rested merely on a "technical concern," citing only the 1970 House report ultimately acceding to the Convention. Luxshare Br. 34 (citing H.R. Rep. No. 91-1181, at 1 (1970)). But in fact, the contemporary report of the U.S. delegation to the United Nations conference that considered the Convention reflects serious and wide-ranging concerns as to "whether the United States 'cares to endorse some of the principles written into the convention,' including its key provisions that 'countenance separation of the arbitration process from contact with national laws and more immediately from supervision by the national courts." Rothstein, *supra*, at 73 (quoting 1958 Report of the U.S. Delegation to the United Nations Conference on International Commercial Arbitration, *reproduced in* 19 Am. Rev. Int'l Arb. 91, 117 (2009)).

Even the treatise on which Luxshare principally relies acknowledges that "historic distrust of arbitration"—including by a Deputy Legal Adviser at the State Department who was "an out-spoken opponent of arbitration"—"led to an initial

recommendation from the U.S. delegation against ratifying the convention." Gary B. Born, *International Commercial Arbitration* § 1.04[A][1][b] at 104 n.716 (2d ed. 2014); *see also* Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 128-29 (2018) (explaining that the Convention was ratified in 1970 only after the State Department, "which previously opposed U.S. accession," changed position). And putting all this aside, it remains undeniable that in 1964 foreign commercial arbitration awards were not directly enforceable in U.S. courts, and would not be until 1970—once again, rendering it highly unlikely that Congress would have opened federal courthouse doors to broad discovery in aid of such proceedings. ZF Br. 40-42.

6. Finally, Luxshare offers no meaningful response to petitioners' showing that for many years after its passage, Section 1782 was widely understood *not* to have authorized discovery for private commercial arbitration. ZF Br. 42-44. Luxshare purports (at 37 n.9) not to understand "why it is pertinent" that *no* commentator from 1958 until the dawn of the 1990s—including academic journals, books, symposia, or a draft international convention on arbitral procedure—ever hinted that Section 1782 could encompass private commercial arbitration. But the reason is plain: Surely if the original public meaning of "foreign tribunal" actually encompassed private arbitration—and thereby dramatically changed the posture of U.S. courts toward such arbitration—*someone* would have noted that fact. And presumably at least one party to an arbitration would have sought Section 1782 discovery before the

1990s. *See generally* Rothstein, *supra*, at 61 n.1, 75-76.

Taken as a whole, the historical evidence reinforces Section 1782's text and structure and confirms that Congress did not authorize discovery for use in private arbitrations. Luxshare cannot ignore this history or wish it away.

D. Congress Would Not Have Intended The Negative Results Of Extending Section 1782 To Private Arbitration

Luxshare charges petitioners (at 38) with asking this Court to reject Section 1782's ordinary meaning in favor of "policy-talk." But our point is not that policy trumps plain meaning; rather, the host of policy problems posed by Luxshare's reading underscores the importance of interpreting Section 1782 consistently with text, structure, and history to reach only those adjudicators with governmental authority.

When deciding between competing interpretations, this Court regularly rejects the one that not only is textually implausible, but also "leads to results that Congress is most unlikely to have wanted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). That approach makes sense: When a term in isolation *could* bear another meaning, but that reading would create untenable results, Congress is unlikely to have used the term in that sense.

Here, adopting Luxshare's interpretation would dramatically increase the burden on district courts. ZF Br. 45-49. Luxshare contends otherwise (at 44) by downplaying the absolute number of Section 1782 applications each year, noting that *only* 208 Section 1782 applications were filed in 2017. But Luxshare ignores both the rapid growth rate in those numbers

(four-fold in approximately a decade), and that the 2017 statistics predate the Sixth Circuit's decision in *Abdul Latif Jameel Transportation Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019)—the first circuit decision permitting Section 1782 applications for foreign commercial arbitrations. Now that the Sixth and Fourth Circuits have thrown open the doors to such requests, the number of applications will only accelerate—and even more so if Luxshare's interpretation is accepted by this Court.

Broadening Section 1782's scope would also undermine private contracts and the streamlining benefits of arbitration. Luxshare implausibly responds (at 38-39) that speed, efficiency, and avoiding American-style discovery disputes are not "significant differentiators" for businesses opting for arbitration over litigation. Common sense and this Court's precedents—not to mention businesses and arbitrators themselves—say otherwise. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (recognizing that "lower costs," and "greater efficiency and speed" are among the primary "benefits of private dispute resolution"); Chamber Br. 21-23; Xu Guojian et al. Amici Br. 10-11.

Luxshare's interpretation would also uniquely disfavor American companies and citizens, subjecting them to asymmetrical and far-reaching discovery requests. ZF Br. 49; Chamber Br. 2, 11-12, 18-20. And it would give enhanced preferential treatment to wholly foreign disputes. There is no good reason why federal law should treat as different two identical discovery requests, both submitted to a U.S. court, by *granting* a request if the arbitration is taking place abroad but *denying* it if the arbitration is domestic.

Luxshare's mitigating proposals solve none of these problems. Suggesting (at 46-47) that U.S. courts should condition discovery on reciprocal exchange, for example, merely threatens to enmesh domestic courts in managing foreign pre-arbitral discovery even further. And as *amici* have highlighted, that purported solution makes even less sense when discovery is sought from non-parties to the arbitration, who have nothing to gain from such reciprocity and face burdensome discovery they cannot effectively combat. *See* Inst. of Int'l Bankers Amicus Br. 3-10; Chamber Br. 21-23. The only effective solution is to recognize that district courts lack authority to get involved in such disputes in the first place.

Finally, Luxshare's contention (at 47) that the government's policy concerns regarding investor-state arbitrations do not apply here makes no sense. Of course, if this Court concludes that the arbitration at issue in *AlixPartners* qualifies as an "international tribunal," that conclusion does not mean that the arbitration at issue in this case is perforce a "foreign tribunal." ZF Br. 50-53. But Luxshare has identified no reading of Section 1782 under which private commercial arbitrations are covered but investor-state arbitrations are not. Nor has the United States or AlixPartners, despite their obvious incentive for doing so. No such reading is remotely plausible.

In other words, any holding that Section 1782 encompasses private arbitrations like that between ZF and Luxshare inevitably means that ad hoc investor-state arbitrations like that between the Fund and Lithuania in *AlixPartners* are covered too. Adopting Luxshare's position would thus entail all the harmful policy consequences emphasized by the

United States. *See* U.S. Br. 31-35. Those results can be avoided by interpreting Section 1782—in line with its text, structure, and history—to exclude private arbitrations.

CONCLUSION

The district court's discovery order should be reversed.

Respectfully submitted,

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