Nos. 21-401 and 21-518

In the Supreme Court of the United States

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

v.

LUXSHARE, LTD.

ALIXPARTNERS, LLP, ET AL., PETITIONERS

v.

THE FUND FOR PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND SECOND CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Section 1782 of Title 28 of the United States Code provides that a federal district court "may order" a person who "resides or is found" in the district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). The question presented is as follows:

Whether Section 1782 authorizes a district court to order the production of testimony or other evidence for use in an ad hoc arbitration, before a nongovernmental arbitral panel, to which the parties have consented.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of 28 U.S.C. 1782, which authorizes federal district courts to provide foreign and international tribunals and interested persons with assistance in obtaining evidence for use in "a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). Section 1782 plays an important role in encouraging

international cooperation, facilitating the resolution of disputes in foreign governmental and intergovernmental tribunals, and fostering international comity. The United States utilizes Section 1782 to facilitate the execution of letters rogatory and other requests for evidence. The application of Section 1782 to investor-state arbitrations is a matter of particular concern to the United States, which is a party to many international agreements that authorize investor-state arbitration.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

A. Statutory Background

1. Section 1782 of Title 28, captioned "Assistance to foreign and international tribunals and to litigants before such tribunals," authorizes district courts to order testimony or the production of documents or things "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). The current provision is the culmination of "congressional efforts," dating back more than 165 years, "to provide federal-court assistance in gathering evidence for use in foreign tribunals." *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

Historically, a principal mechanism for a court in one country to obtain evidence or testimony of a witness in another was a letter rogatory, a "request by a domestic court to a foreign court to take evidence from a certain witness." *Intel*, 542 U.S. at 247 n.1 (quoting Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 519

(1953) (Jones)). Such "[r]equests rest entirely upon the comity of courts toward each other." 22 C.F.R. 92.54.

In 1855, after the Attorney General concluded that federal courts lacked authority to execute letters rogatory, 7 Op. Att'y Gen. 56, 56-57, Congress enacted legislation authorizing them to do so. Jones 540 & n.75 (citing Act of Mar. 2, 1855 (1855 Act), ch. 140, 10 Stat. 630). Over the next century, Congress enacted several additional measures addressing assistance in obtaining testimony for use in foreign courts. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103; Act of June 25, 1948 (1948 Act), ch. 646, § 1782, 62 Stat. 949; Act of Feb. 27, 1877 (1877 Act), ch. 69, 19 Stat. 241 (Rev. Stat. § 875 (1877)); Act of Mar. 3, 1863 (1863 Act), ch. 95, § 1, 12 Stat. 769; see *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 564 n.5 (6th Cir. 1975); Jones 540-542. By the 1950s, federal courts were authorized to compel the testimony of any witness in the United States to be used in "any judicial proceeding pending in any court in a foreign country with which the United States is at peace." 28 U.S.C. 1782 (1958); see Jones 541-542.

2. In 1958, "prompted by the growth of international commerce," *Intel*, 542 U.S. at 248, Congress created a Commission on International Rules of Judicial Procedure (Rules Commission), which it directed to recommend improvements to "existing practices of judicial assistance and cooperation between the United States and foreign countries." Act of Sept. 2, 1958 (1958 Act), Pub. L. No. 85-906, § 2, 72 Stat. 1743. Congress charged the Rules Commission with, *inter alia*, "draft[ing] and recommend[ing] * * * any necessary legislation" (1) to render "more readily ascertainable, efficient, economical, and expeditious" those "procedures necessary or

incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law"; and (2) to make "similar[] improve[ments]" in "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Ibid.*

In 1963, the Rules Commission submitted draft legislation to address various aspects of judicial assistance. See *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2, 15-52 (1963) (1963 Report). The following year, Congress unanimously enacted the Rules Commission's proposals. Act of Oct. 3, 1964 (1964 Act), Pub. L. No. 88-619, 78 Stat. 995; see *Intel*, 542 U.S. at 248.

Of particular relevance, the 1964 Act revised Section 1782, newly captioned "Assistance to foreign and international tribunals and to litigants before such tribunals." § 9(a), 78 Stat. 997 (28 U.S.C. 1782 (1964)) (emphasis omitted). In place of the prior language authorizing assistance for a "judicial proceeding pending in any court in a foreign country with which the United States is at peace," 28 U.S.C. 1782 (1958), revised Section 1782 permitted district courts to order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal," either "pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal," or "upon the application of any interested person." 1964 Act § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a) (1964)).

The Rules Commission explained that "[t]he word 'tribunal' [wa]s used to make it clear that assistance is not confined to proceedings before conventional courts." 1963 Report 45. "For example," the Rules Commission observed, "it [wa]s intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries," from which "[a] rather large number of requests for assistance emanate[d]." *Ibid.* "In view of the constant growth of administrative and quasi-judicial proceedings all over the world," the Rules Commission explained, "the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court." *Ibid.*; see S. Rep. No. 1580, 88th Cong., 2d Sess. 7-8 (1964) (Senate Report); H.R. Rep. No. 1052, 88th Cong., 1st Sess. 9 (1963) (House Report); see also *Intel*, 542 U.S. at 249.

Revised Section 1782 additionally stated that an order granting an application "may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing." 1964 Act § 9(a), 78 Stat. 997 (28 U.S.C. 1782(a) (1964)). "To the extent that the order does not prescribe otherwise," amended Section 1782 stated, "the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." *Ibid.*

Other provisions of the 1964 Act addressed related procedural issues. New Section 1696 vested district courts with discretion to grant or deny requests for assistance in effecting service of documents "issued in

connection with a proceeding in a foreign or international tribunal," but specified that such service "does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal." § 4(a), 78 Stat. 995 (28 U.S.C. 1696). Amendments to Section 1781 authorized the State Department to receive (and return) "a letter rogatory issued, or request made, by a foreign or international tribunal" to a "tribunal, officer, or agency in the United States," or a letter rogatory or request from "a tribunal in the United States" to a "foreign or international tribunal, officer, or agency." § 8(a), 78 Stat. 996 (28 U.S.C. 1781(a)).

The 1964 Act also repealed prior enactments that had authorized judicial assistance to certain international, state-to-state tribunals and claims commissions addressing claims in which the United States or its nationals were interested. See § 3, 78 Stat. 995 (repealing 22 U.S.C. 270-270g (1958)). Those prior provisions, enacted in the 1930s, had authorized those tribunals and their commissioners to administer oaths in proceedings involving such claims and permitted U.S. agents before the international tribunal to invoke the assistance of a district court in compelling the production of documents. Act of July 3, 1930, ch. 851, 46 Stat. 1005, as amended by Act of June 7, 1933, ch. 50, 48 Stat. 117 (22 U.S.C. 270-270g (1958)). Those provisions were viewed as inadequate, and the 1964 Act addressed those deficiencies by bringing those state-to-state bodies within the same Section 1782 rubric as agencies of foreign states. See Senate Report 3-4, 8; 1963 Report 36-37.

3. In 1996, Congress added to the end of Section 1782(a)'s first sentence the phrase "including criminal

investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486.

B. The Present Controversies

1. a. Respondent in No. 21-401 (Luxshare, Ltd.) is a Hong Kong company that acquired a business unit from petitioner ZF Automotive US, Inc., a Michigan subsidiary of a German corporation. 21-401 Pet. 6; 21-401 Pet. App. 2a. Luxshare alleges that it later learned that ZF Automotive had fraudulently concealed material facts in connection with the sale, and that the alleged fraud inflated the sale price. 21-401 Pet. App. 2a.

b. The parties' sale agreement "provides that 'all disputes arising under or in connection with th[e] Agreement . . . shall be exclusively and finally settled by three (3) arbitrators" in Munich, Germany, "in accordance with the Arbitration Rules of the German Institution of Arbitration e.V,'" which is known as "DIS." 21-401 Pet. App. 3a (brackets omitted); see *id.* at 2a-3a. In anticipation of commencing a DIS arbitration against ZF, Luxshare filed an ex parte application under Section 1782 in the Eastern District of Michigan, seeking an order authorizing it to take discovery from ZF Automotive and two of its officers (collectively ZF) for use in the arbitration. *Id.* at 3a. The district court granted the application, and Luxshare served subpoenas on ZF. *Id.* at 3a, 20a.

ZF moved to quash the subpoenas, contending (as relevant) that a DIS arbitration is not a "foreign tribunal within the meaning of Section 1782." 20-51245 D. Ct. Doc. 6, at 11 n.4 (Dec. 4, 2020). A magistrate judge denied the motion in relevant part. 21-401 Pet. App. 22a-56a. The magistrate judge concluded that, under Sixth Circuit precedent, the term "'foreign or inter-

national tribunal'" in Section 1782 "encompasses private commercial arbitral tribunals." *Id.* at 29a (citing *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019); other citation omitted). ZF objected to the magistrate judge's decision, but the district court overruled those objections. *Id.* at 1a-19a.

c. ZF appealed and moved for a stay of the district court's order, which the Sixth Circuit denied. 21-401 J.A. 21-25. ZF filed a petition for a writ of certiorari before judgment, and this Court stayed the district court's order pending its consideration of the case. 142 S. Ct. 416.

2. a. Respondent in No. 21-518 (Fund) is a Russian corporation and the assignee of an investor in AB bankas SNORAS (Snoras), a private bank in Lithuania. 21-518 Pet. App. 4a. In 2011, Lithuanian authorities investigated Snoras and determined that it was unable to meet its obligations. *Ibid.* The Bank of Lithuania nationalized Snoras and appointed petitioner Simon Freakley as its temporary administrator. *Ibid.* Lithuanian authorities commenced bankruptcy proceedings against Snoras, and a Lithuanian court declared Snoras bankrupt. *Ibid.*

The Fund commenced an arbitration against Lithuania pursuant to a bilateral investment treaty between Lithuania and the Russian Federation. 21-518 Pet. App. 4a-6a; see Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (June 29, 1999) (Russia-Lithuania Treaty) (21-518 Pet. App. 56a-70a); 20-2653 C.A. App. 14, 23-24. Article 10 of the Russia-Lithuania Treaty addresses the procedure for resolving "any

dispute between one Contracting Party and [an] investor of the other Contracting Party concerning" certain investments in the first Contracting Party's territory. 21-518 Pet. App. 64a (art. 10(1)). It states that, if the parties cannot resolve their dispute within six months, "the dispute, at the request of either party and at the choice of an investor, shall be submitted to" either:

> a) [a] competent court or court of arbitration of the Contracting Party in which territory the investments are made;
>
> b) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> c) the Court of Arbitration of the International Chamber of Commerce; [or]
>
> d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Id. at 64a-65a (art. 10(2)); see *id.* at 65a (art. 10(3)) (resulting decision is "final and binding on both parties"). The Fund elected the last option: an ad hoc arbitration under the UNCITRAL rules before a panel of three private individuals, with each party choosing one arbitrator and those two arbitrators choosing the third. *Id.* at 6a, 20a.

b. The Fund filed an application under Section 1782 in the Southern District of New York, seeking an order permitting it to obtain discovery from Freakley and his current employer, AlixPartners LLP (collectively AlixPartners), for use in the Fund's arbitration against Lithuania. 21-518 Pet. App. 7a & n.11. The district court granted the application. *Id.* at 41a-51a.

AlixPartners moved for reconsideration in light of the Second Circuit's intervening decision in *In re Guo*,

965 F.3d 96 (2020). 21-518 Pet. App. 9a. In *Guo*, the Second Circuit "reaffirmed" its precedent recognizing that Section 1782 does not authorize discovery assistance for "private commercial arbitrations." *Ibid.*; see *Guo*, 965 F.3d at 107. But the *Guo* panel had stated that "[a] closer inquiry is required where, as [in *Guo*], the arbitral body was originally created through state action, yet subsequently evolved such that it arguably no longer qualifies as a" foreign or international tribunal. 965 F.3d at 107. *Guo* thus articulated a "functional approach" that "consider[s] a range of factors, including the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties' contract controls the panel's jurisdiction." *Ibid.* The court stated that the ultimate "inquiry is whether the body in question possesses the functional attributes most commonly associated with private arbitration." *Ibid.* Applying that approach, the *Guo* court concluded that arbitrations before the China International Economic and Trade Arbitration Commission are "outside the ambit of § 1782." *Ibid.*; see *id.* at 107-108. In this case, the district court denied reconsideration on the basis of *Guo*. 21-518 Pet. App. 34a-40a.

c. The Second Circuit affirmed. 21-518 Pet. App. 1a-33a. Applying *Guo*'s "'functional approach,'" the court concluded that the Fund's arbitration against Lithuania "qualifies as a 'foreign or international tribunal' under § 1782." *Id.* at 14a, 22a (citation omitted). The Second Circuit began by addressing four "factors [it had] laid out in *Guo*": (1) the arbitral panel's "degree of state affiliation and functional independence"; (2) the "degree to which a state possesses the authority to intervene to alter the outcome of [the] arbitration"; (3) the "nature of the [panel's] jurisdiction"; and (4) the "ability of the

parties to select their own arbitrators." *Id.* at 15a-16a (quoting *Guo*, 965 F.3d at 107-108).

As to the first factor, the Second Circuit acknowledged that the arbitral panel "functions independently from the governments of Lithuania and Russia"; the arbitrators "have no official affiliation with" either government or any "intergovernmental entity"; the panel "receives zero government funding"; and the proceedings are kept confidential unless the parties agree otherwise. 21-518 Pet. App. 17a. The court "[n]evertheless" found that this factor "weigh[ed] in favor" of treating the panel as a foreign or international tribunal because the "arbitration format" was "expressly contemplated by the Treaty" and employs rules "developed by UNCITRAL, an international body." *Id.* at 17a-18a.

As to the second factor, the Second Circuit recognized that "[s]tate authority to influence or control an arbitration pursued under th[e] [Russia-Lithuania] Treaty is limited, if not non-existent." 21-518 Pet. App. 18a. The court observed that the Treaty itself precludes Russia and Lithuania from "alter[ing] the outcome," and the Fund waived its right to bring the dispute before a Lithuanian court. *Ibid.* But the court found this factor "neutral," citing the Treaty. *Id.* at 19a.

As to the third factor, the Second Circuit stated that the arbitral panel "derives its adjudicatory authority from the Treaty," which "weigh[ed] heavily in favor" of deeming the arbitration a "'foreign or international tribunal'" under Section 1782. 21-518 Pet. App. 19a-20a.

As to the fourth factor, the court of appeals acknowledged that the parties selected the arbitrators, who are private individuals. 21-518 Pet. App. 20a. The court found that fact to "weigh[] against" classifying the

arbitration as a foreign or international tribunal, but deemed it "not determinative." *Id.* at 21a.

The court of appeals then noted two "additional 'functional attributes'" that "suggest[ed] that the arbitral panel is a 'foreign or international tribunal'": Lithuania, "a foreign State, is one of the parties"; and the "arbitral panel was assembled pursuant to [the Russia-Lithuania] Treaty," which "serves numerous foreign policy goals." 21-518 Pet. App. 21a-22a.

SUMMARY OF ARGUMENT

I. Section 1782 permits a district court to order a witness to testify or to produce a document or thing for use in "a proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). Properly construed in light of the statutory phrasing, context, and history, that text does not encompass arbitration, before a nongovernmental panel, to which the parties have consented.

A. When the operative statutory language was enacted, "tribunal" commonly referred to governmental adjudicators. Some dictionaries alternatively accorded "tribunal" a more general meaning that reached nearly any person who resolves disputes, but that meaning fits poorly in Section 1782. The statute employs the phrase "proceeding in a foreign or international tribunal," which as a whole most naturally refers to a proceeding in a governmental body. Other language in Section 1782 and other provisions enacted or amended contemporaneously use the phrase "foreign or international tribunal" to refer to government adjudicators.

Section 1782's history powerfully confirms that understanding. For more than a century before the 1964 Act, Section 1782 and its precursors authorized discovery assistance only for proceedings in foreign courts. Other statutes provided for assistance in matters before

state-to-state claims commissions. Congress charged the Rules Commission with proposing revisions to improve judicial assistance to "foreign courts and quasi-judicial agencies." 1958 Act § 2, 72 Stat. 1743. The Rules Commission's proposal, which Congress enacted unanimously, replaced "court" with "foreign or international tribunal," 28 U.S.C. 1782(a), for the limited purposes of (1) encompassing quasi-judicial bodies of foreign states along with conventional courts and (2) putting state-to-state bodies on the same footing.

B. So construed, Section 1782 does not authorize discovery assistance for an arbitration, before a nongovernmental adjudicator, to which the parties have consented, whether in a contract or a treaty. A panel in a private commercial arbitration (at issue in No. 21-401) is not a governmental adjudicator, and such an arbitration bears little resemblance to the tribunals previously covered by Section 1782 and its precursors or those added by the 1964 Act. Construing Section 1782 to authorize discovery for private arbitration would require imputing to Congress in 1964 an intent to accord parties to foreign arbitrations greater access to discovery than federal law has long afforded for parties to domestic arbitrations.

Investor-state arbitration before a nongovernmental arbitral panel (at issue in No. 21-518) lies outside Section 1782 for similar reasons. The arbitral panel's role derives from the parties' consent, not governmental authority. Such investor-state arbitrations are governed by similar or even substantively the same arbitral rules as private commercial arbitrations. Congress in 1964 could not have envisioned Section 1782's application to investor-state arbitration, which did not yet exist. And extending U.S. discovery assistance to that context would

risk jeopardizing certain advantages that investor-state arbitration has made possible.

II. The Sixth and Second Circuits' contrary approaches should be rejected. The Sixth Circuit adopted the broadest possible meaning of "tribunal" in isolation based on dictionaries and usage in other legal settings. But the court overlooked or discounted key aspects of Section 1782's phrasing, context, and history. The court improperly reasoned that the broadest definition must control because Congress did not unambiguously reject it. And the court's approach lacks a limiting principle.

The Second Circuit has skewed Section 1782 in a different manner. It has articulated a freeform, multifactor standard for determining whether a proceeding before a particular decisionmaker abroad is sufficiently akin to a private commercial arbitration to be outside Section 1782's scope. That approach lacks a sound basis in the statute, would invite uncertainty and unpredictability for parties, and would create difficulties for district courts.

ARGUMENT

I. SECTION 1782 DOES NOT AUTHORIZE JUDICIAL ASSISTANCE TO OBTAIN DISCOVERY FOR USE IN AN ARBITRATION, BEFORE A NONGOVERNMENTAL ADJUDICATOR, TO WHICH THE PARTIES CONSENT

Section 1782 authorizes a district court to order a person who "resides or is found" in the district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). The statutory phrasing, context, and history all demonstrate that Section 1782 authorizes discovery assistance only in aid of a proceeding before a governmental body. An arbitration before a nongovernmental adjudicator—

i.e., one whose role in deciding the dispute rests on the parties' consent, not on any nation's sovereign authority—is not a "proceeding in a foreign or international tribunal." *Ibid.*

A. A "Foreign Or International Tribunal" Under Section 1782 Is A Governmental Adjudicator That Exercises Authority On Behalf Of One Or More Nation-States

In construing any statute, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Properly viewed in light of the statutory phrasing, context, and history, the term "foreign or international tribunal" in Section 1782 refers to a governmental adjudicator and excludes private arbitrators.

1. The statutory phrasing and context show that "foreign or international tribunal" refers to a governmental adjudicator

Beginning with the word "tribunal" alone, Section 1782 does not define that term. Accordingly, courts should first "ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted" it in 1964. *Food Mktg. Inst.*, 139 S. Ct. at 2362 (citation omitted). At that time, legal and nonlegal dictionaries commonly defined a "tribunal" in ways that connote a judicial, *i.e.*, governmental, forum. See, *e.g.*, *Black's Law Dictionary* 1677 (4th ed. 1951) ("The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise."); *Webster's New International Dictionary of the English Language* 2707 (2d ed. 1960) (*Webster's Second*) ("[T]he seat of a judge; the bench on which a judge and his associates sit

for administering justice; a judgment seat; * * * [h]ence, a court or forum of justice."); see also *Servotronics, Inc.* v. *Rolls-Royce PLC*, 975 F.3d 689, 693 (7th Cir. 2020) (citing additional contemporaneous dictionaries), cert. dismissed, 142 S. Ct. 54 (2021).

Some dictionaries also provided alternative, more expansive definitions of "tribunal" that could encompass nongovernmental adjudicators. For example, *Webster's Second* alternatively defined the term as "a person or body of persons having authority to hear and decide disputes so as to bind the disputants," and "[t]hat which decides or judges; something which determines or directs a judgment or course of action; as, the *tribunal* of public opinion or of one's own conscience." *Webster's Second* 2707. But those more general, colloquial meanings of "tribunal" fit poorly in the context of Section 1782.

"Statutory interpretation requires more than concentration upon isolated words," *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970), and "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities,'" *FCC* v. *AT&T Inc.*, 562 U.S. 397, 407 (2011) (brackets and citation omitted); see, *e.g.*, *Bloate* v. *United States*, 559 U.S. 196, 205 n.9 (2010). Instead, "[s]tatutory construction * * * is a holistic endeavor," and "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"—including where "the same terminology is used elsewhere in a context that makes its meaning clear," or "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). When a term "ha[s] more than one meaning,"

courts therefore "must use the context in which [the] word appears to determine its aptest, most likely sense." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 418 (2012).

To begin, Section 1782's phrasing counsels strongly against interpreting "tribunal" in its broadest sense to refer to any decisionmaker. Multiple words appearing in a phrase "together may assume a more particular meaning than those words in isolation." *AT&T*, 562 U.S. at 406 (explaining that "'[p]ersonal' in the phrase 'personal privacy' conveys more than just 'of a person,'" and instead "suggests a type of privacy evocative of human concerns"). In Section 1782, "tribunal" is part of the phrase "proceeding in a foreign or international tribunal." 28 U.S.C. 1782(a). By far the most natural reading of that complete phrase denotes a *governmental* body. The term "proceeding" and the modifiers "foreign" and "international" signal that Congress used "tribunal" in its more formal, legal sense: an adjudicator administering justice, not more broadly a decisionmaker of any kind. And in conjunction with "tribunal," the terms "foreign" and "international" most naturally refer to a body of one or more nation-states, not to any entity with some cross-border connection. In everyday speech, the phrase "foreign leader" denotes an official of a foreign state, not a team captain of a European football club. So, too, "foreign or international tribunal" most naturally refers to the judicial or quasi-judicial body of a "foreign" country, or an "international" state-to-state commission or similar adjudicatory body established by two or more nations—not a group of football referees discussing a penalty on the pitch.

The surrounding context reinforces that reading. Other language in Section 1782(a) added by the 1964 Act provides that a district court "may prescribe the practice and procedure" for production of testimony or other evidence, "which may be in whole or part the practice and procedure of the foreign country or the international tribunal." 28 U.S.C. 1782(a). That proviso makes perfect sense for judicial and quasi-judicial governmental bodies of a foreign country, or an intergovernmental agency established by multiple nations, which will typically have established procedures applicable to cases within their jurisdiction. But it would be puzzling if applied to a private adjudicator. See *Servotronics*, 975 F.3d at 695.

Two other provisions added or amended by the 1964 Act further indicate that "foreign or international tribunals" means judicial and quasi-judicial agencies. Section 1696, captioned "Service in foreign and international litigation," authorizes a district court, on receipt of "a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person," to order service "of any document issued in connection with a proceeding in a foreign or international tribunal." 28 U.S.C. 1696(a). Section 1696 contemplates that such a tribunal is capable of issuing "a judgment, decree, or order." *Ibid.* ("Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal."). And Section 1781 grants express (but nonexclusive) authority to the State Department "to receive a letter rogatory issued, or request made, by a foreign or international tribunal," and to transmit a letter from a U.S. court to such a tribunal. 28 U.S.C. 1781(a). The

subject matter of both provisions—"[s]ervice-of-process assistance and letters rogatory"—"are matters of comity between governments, which suggests that the phrase 'foreign or international tribunal'" refers to a governmental adjudicator. *Servotronics*, 975 F.3d at 695. Congress's use of "the same terminology * * * in a context that makes its meaning clear" confirms that "foreign or international tribunal" in Section 1782 refers to governmental adjudicators. *United Sav. Ass'n.*, 484 U.S. at 371; see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006).

2. The statutory history confirms that Section 1782 encompasses only governmental adjudicators

The evolution of what is now Section 1782 confirms that interpretation. For more than a century before the 1964 Act, the provision and its precursors authorized judicial assistance only in connection with proceedings in foreign *courts*. The first statute authorizing such assistance permitted a circuit court to appoint a commissioner to examine witnesses at the request of "any court of a foreign country." 1855 Act § 2, 10 Stat. 630. Subsequent enactments similarly referred to foreign "court[s]." 1863 Act § 1, 12 Stat. 769; 1877 Act, 19 Stat. 241; 1948 Act § 1782, 62 Stat. 949. Immediately prior to the 1964 Act, Section 1782 authorized taking "[t]he deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace." 28 U.S.C. 1782 (1958).

The 1964 Act revised Section 1782 in various respects, including regarding what types of proceedings abroad may be the object of domestic judicial assistance. But Congress's replacement of the phrase "any judicial proceeding pending in any court in a foreign

country," 28 U.S.C. 1782 (1958), with the phrase "a proceeding in a foreign or international tribunal," 28 U.S.C. 1782(a), embodied only a measured expansion of the provision's scope to capture quasi-judicial agencies of foreign states (such as investigating magistrates) and certain inter-governmental bodies (such as state-to-state claims commissions), which were of concern at the time, see 1963 Report 45.

The 1964 Act's revision of Section 1782 was the work of the Rules Commission, which Congress had established and charged with drafting legislation to improve judicial assistance that domestic courts provide to, and receive from, foreign courts and certain analogous agencies. The statute establishing the Rules Commission tasked it with "draft[ing] and recommend[ing] to the President any necessary legislation" to render "more readily ascertainable, efficient, economical, and expeditious" the "procedures necessary or incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory," including service of documents and obtaining evidence. 1958 Act § 2, 72 Stat. 1743. The Rules Commission was further charged with drafting legislation to "similarly improve[]" "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Ibid.*

The Rules Commission carried out that task, proposing the text that became the 1964 Act. See 1963 Report 1-52. The Rules Commission explained that "[t]he word 'tribunal' [wa]s used" in the proposed revision of Section 1782 "to make it clear that assistance is not confined to proceedings before conventional courts." *Id.* at 45. As an "example," the Rules Commission observed

that "[a] rather large number of requests for assistance emanate from investigating magistrates," and the word "tribunal" was designed to provide district courts with "discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries." *Ibid.* More generally, "[i]n view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court." *Ibid.* The effect of the Rules Commission's proposal to encompass "foreign * * * tribunal[s]," *id.* at 44, was to modify the particular types of foreign governmental bodies for which discovery assistance under Section 1782 is available, not to expand the provision to encompass nongovernmental bodies.

The Rules Commission's proposal also added "international tribunal[s]" to Section 1782 to address a different deficiency in then-existing law. 1963 Report 44; see *id.* at 36-37, 45. In 1930, "in direct response to problems that arose in an arbitration proceeding between the United States and Canada"—a state-to-state arbitration—Congress had enacted 22 U.S.C. 270-270c (1958), which authorized members of "international tribunals to administer oaths, to subpoena witnesses or records, and to charge contempt." *National Broad. Co.* v. *Bear Stearns & Co.*, 165 F.3d 184, 189 (2d Cir. 1999) (*NBC*). In 1933, "to accommodate proceedings before" another "intergovernmental" body—the United States-German Mixed Claims Commission—Congress enacted 22 U.S.C. 270d-270g (1958), which authorized U.S. agents before such bodies to seek judicial assistance in obtaining evidence. *NBC*, 165 F.3d at 189.

The Rules Commission explained that the existing provisions addressing those intergovernmental bodies were "inadequate." 1963 Report 36. It found that existing law "improperly limit[ed] the availability of assistance to the United States agent before an international tribunal" and afforded less assistance to litigants before bodies such as the United States-German Mixed Claims Commission than litigants in courts of foreign countries. *Id.* at 36-37. The 1964 Act put such intergovernmental bodies on the same footing as foreign states' courts by repealing those prior provisions and "making the assistance provided by proposed Section 1782 * * * available in proceedings before international tribunals." *Id.* at 37.

Cognizant of the Rules Commission's rationales for making those measured changes, see House Report 5-6, 9-10; Senate Report 3-4, 7-8, Congress unanimously enacted the Rules Commission's proposal. 1964 Act §§ 3, 9(a), 78 Stat. 995, 997; *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004). Considered against that statutory history, the phrase "proceeding in a foreign or international tribunal" in Section 1782 evinces Congress's intent to allow domestic discovery assistance only for proceedings before judicial or quasi-judicial bodies of foreign states or state-to-state bodies.

That analysis and conclusion accord with *Intel*, *supra*, the only decision by this Court construing Section 1782. As relevant here, the Court in *Intel* concluded that Section 1782 authorized judicial assistance to obtain documents for use before the European Commission's Directorate General for Competition "to the extent that it acts as a first-instance decisionmaker." 542 U.S. at 258; see *id.* at 257-258. The Directorate General was responsible for enforcing European competition

laws; it would first investigate an alleged violation and decide whether to pursue a complaint, and then would either "issue a decision finding infringement and imposing penalties" or "dismiss the complaint," with its decision subject to judicial review. *Id.* at 255 (brackets and citation omitted).

In concluding that the Directorate General was a "foreign or international tribunal," the Court in *Intel* emphasized Congress's instruction to the Rules Commission in the 1958 Act "to recommend procedural revisions 'for the rendering of assistance to foreign courts *and quasi-judicial agencies*.'" 542 U.S. at 257-258. The Court observed that "Congress understood th[e] change" from "'any judicial proceeding'" in the prior version of Section 1782 to "'a proceeding in a foreign or international tribunal'" as "'provid[ing] the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'" *Id.* at 258 (brackets and citation omitted).

B. An Arbitration Before A Nongovernmental Adjudicator To Which Parties Consent, Whether In A Contract Or A Treaty, Is Not A "Proceeding In A Foreign Or International Tribunal" Within The Meaning Of Section 1782

So construed, Section 1782 does not authorize a court to order discovery for use in an arbitration, before a nongovernmental adjudicator, to which the parties have consented. That is equally true of a private commercial arbitration, as in No. 21-401, and of an investor-state arbitration before a nongovernmental adjudicator, as in No. 21-518.

1. Section 1782 does not encompass private commercial arbitration

A private commercial arbitration—in which private parties agree in a contract to arbitrate disputes before a nongovernmental adjudicator under a particular arbitral regime—is not a "proceeding in a foreign or international tribunal," 28 U.S.C. 1782(a). Such an arbitral body by definition is not a governmental adjudicator exercising one or more nation-states' authority; its role in resolving a dispute arises from the parties' consent.

In No. 21-401, for example, the parties agreed in their sale agreement to resolve disputes by arbitration before a three-member arbitral panel of the DIS—a nongovernmental entity—pursuant to the DIS rules. 21-401 Pet. App. 3a. The DIS panel is neither an organ of any foreign state nor an entity empowered by multiple states to resolve state-to-state disputes. It is brought into being by the parties for purposes of resolving their specific dispute; each party chooses one arbitrator, and those two arbitrators choose the third (presiding) arbitrator. DIS Arbitration R. 12.1, 12.2 (2018).

Indeed, whatever precise array of tribunals Congress intended Section 1782 to encompass, no sound basis exists to conclude that it extends to private commercial arbitrations. Before 1964, Section 1782 encompassed only foreign courts, and nothing in the text or context of the 1964 Act evinces any intent to extend Section 1782's discovery tools to private commercial arbitration. Such arbitration bears little resemblance to the types of judicial proceedings that Section 1782 and its precursors had long covered, or to the examples of standing quasi-judicial agencies that the Rules Commission and Congress considered and that this Court addressed in *Intel*. See pp. 19-23, *supra*. And "[t]here

is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration" in particular. *Republic of Kazakhstan* v. *Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999).

Moreover, construing Section 1782 to authorize discovery assistance for a private commercial arbitration would require imputing to Congress in 1964 an intent to provide for more expansive discovery in foreign disputes than what was (and is) permitted domestically under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, and would create tension between the two statutes. *Servotronics*, 975 F.3d 695-696. "The methods for obtaining evidence under § 7 [of the FAA] are more limited than those under § 1782." *NBC*, 165 F.3d at 187. For example, Section 7 of the FAA, 9 U.S.C. 7, "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses." *NBC*, 165 F.3d at 187. In addition, Section 7 "confers enforcement authority only upon the 'district court for the district in which such arbitrators, or a majority of them, are sitting.'" *Ibid.* It does not permit the arbitrator to order discovery in jurisdictions where parties reside but where the arbitral panel does not sit. Nor does the FAA "grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery." *COMSAT Corp.* v. *National Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999). Those limitations are by design: by reducing the opportunities for lengthy discovery, they enable arbitrations to be less protracted and costly.

Section 1782, in contrast, contains none of those limitations. Section 1782 "permits both foreign tribunals *and litigants* (as well as other 'interested persons') to obtain discovery orders from district courts." *Servotronics*, 975 F.3d at 695. And Section 1782 is not confined to discovery in the district where the arbitrators (or a majority of them) are sitting, or to discovery from the parties. Instead, it empowers a court to order testimony or production of other evidence from any person who "resides or is found" in the district. 28 U.S.C. 1782(a). It is "hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations." *Servotronics*, 975 F.3d at 695.

To be sure, Section 1782 does not mechanically confine judicial assistance to circumstances where domestic law would allow the same discovery. See *Intel*, 542 U.S. at 263. In that sense, Section 1782 "does not direct United States courts to engage in [a] comparative analysis to determine whether analogous proceedings exist here." *Ibid.* But in ascertaining which of two competing interpretations best reflects Congress's intent, the Court should take into account that one interpretation produces such a stark asymmetry.

Extending Section 1782 to nongovernmental arbitration would also result in inconsistent standards in the context of certain foreign arbitrations subject to the FAA "by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 I.L.M. 1046 * * * , and the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336."

NBC, 165 F.3d at 187; see 9 U.S.C. 208, 307. It would be incongruous to construe a general federal statute that governs international judicial assistance—and that permits broad assistance in obtaining discovery—to override a separate, arbitration-specific statute authorizing narrower assistance in that context.

2. Section 1782 does not encompass an investor-state arbitration before a nongovernmental arbitral panel

a. The same conclusion applies to investor-state arbitrations conducted before nongovernmental arbitrators, such as the arbitration in No. 21-518. Investor-state arbitration is comparatively a recently developed method for resolving disputes between investors and foreign host states in which they have invested or sought to invest, employing similar or even substantively the same procedures as private commercial arbitrations.

Historically, the predominant mechanism for an investor to resolve a dispute with a host state was diplomatic protection. An investor's home state would "treat[] an injury to [its] national caused by an act or omission of the host State as an international wrong against that national's home State, for which the home State was entitled—but not bound—to seek reparation in its own name." O. Thomas Johnson Jr. et al., *From Gunboats to BITs: The Evolution of Modern Investment Law*, Y.B. on Int'l Investment L. & Pol'y 651 (2011) (Johnson). Representatives from each state would then seek to negotiate resolution of the foreign national's claim. Adjudication of claims subject to diplomatic protection often took the form of resolution before mixed-claims commissions established by treaties between the host and home states, Johnson 653, such as the Jay Treaty between the United States and Great

Britain, see Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105. By the mid-1900s, at least 60 such commissions (such as the U.S.-German Mixed Claims Commission) had been established. James Crawford, *Brownlie's Principles of Public International Law* 595 & n.28 (9th ed. 2019).

Diplomatic protection, however, did not always provide a complete solution. Because the negotiations occurred between sovereigns, whose broader foreign relations were at stake, no guarantee existed that a particular investor's claim would ultimately be settled. Exercising diplomatic protection also consumed significant diplomatic resources, risked politicizing disputes, and was not always peaceful. See Johnson 651-653.

Investor-state arbitration arose as an alternative dispute-resolution model that did not require direct participation by the investor's home state. Following the formation of the United Nations, the development of international economic institutions, and a substantial rise in foreign investment, the International Center for the Settlement of Investment Disputes (ICSID) was established "to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States." Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 1(2), Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090 (ICSID Convention). Several years thereafter, bilateral investment treaties—international agreements that set conditions for private investment by individuals or companies—"began to include * * * [a] provision for compulsory arbitral jurisdiction over disputes between investors and host States, available to the investor without any intervention on the

part of his government." Johnson 669, 677, 679. Those agreements typically provide for arbitration under one or more established arbitral frameworks, such as the ICSID Convention, as well as other regimes that are also utilized in private commercial arbitrations, such as the International Chamber of Commerce, the Stockholm Chamber of Commerce, and ad hoc arbitration pursuant to the UNCITRAL rules.[1] The United States is a party to many international agreements, including bilateral investment treaties and free-trade agreements, that provide for arbitration.

Investor-state arbitration offers several advantages relative to diplomatic protection. Because investors may commence an arbitration directly against the host state, they generally need not rely on diplomatic efforts by their home state. Instead, a claimant can present its claims directly to an experienced and neutral arbiter. Investor-state arbitration also has helped to depoliticize the dispute-resolution process and reduce friction between nations. Johnson 669. In addition, investor-state arbitration generally allows the parties to determine the procedural rules that will govern the arbitration.

b. Like private commercial arbitrations, investor-state arbitrations before nongovernmental arbitral panels are not "proceedings in a foreign or international

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[1] See Investment Policy Hub, United Nations Conf. on Trade and Dev. (UNCTAD), *International Investment Agreements Navigator: Mapping of IIA Content*, https://perma.cc/5C9S-RKK8 (searchable index of international investment agreements identifying arbitral and other dispute-resolution regimes for which they provide); UNCTAD, *IIA Mapping Project* 21, https://perma.cc/G6YU-ZX9S (identifying fora other than arbitration under the ICSID and UNCITRAL rules covered by various agreements).

tribunal" under Section 1782. 28 U.S.C. 1782(a). Investor-state arbitration does not entail adjudication of a claim by a foreign court or quasi-judicial agency of the kind Congress contemplated in the 1964 Act. Nor does it entail state-to-state claim resolution by a body, such as a mixed-claims commission, created by two or more states to do so. Instead, the parties—an investor and a host state—submit their dispute for resolution by a non-judicial body. As in a private commercial arbitration, the role of an investor-state arbitration panel in deciding a dispute derives from the parties' consent. See, *e.g.*, UNCITRAL Arbitration R. art. 1.1 (2013); ICSID Convention art. 25(1) (2006).[2]

In No. 21-518, for example, Lithuania consented in the Russia-Lithuania Treaty to resolve disputes with Russian investors in, at the investor's option, either a court of Russia or Lithuania or in one of several specified arbitral fora. 21-518 Pet. App. 64a-65a (art. 10(2)). The Fund elected an ad hoc arbitration under the UNCITRAL rules before a panel of private individuals chosen by the parties. *Id.* at 6a, 20a. The panel "functions independently" of any government, neither Russia nor Lithuania can "alter the outcome" once the panel rules, and the Fund has waived its right to bring the dispute to a Lithuanian court. *Id.* at 17a-18a.

Congress could not have envisioned the application of Section 1782 to such investor-state arbitrations,

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[2] Although the statute implementing the ICSID Convention states that "[a]n award of an arbitral tribunal rendered pursuant to [that Convention] shall create a right arising under a treaty of the United States," 22 U.S.C. 1650a(a), the "jurisdiction" of an ICSID arbitral panel to decide an investor-state dispute rests on the "consent" of the "parties to the dispute," ICSID Convention art. 25(1) (2006), not on the Convention by itself, see *id.* Pmbl.

which did not exist in 1964. To the government's knowledge, the first international agreements containing provisions for investor-state arbitration were not adopted until several years later.[3] And extending judicial assistance under Section 1782 to investor-state arbitration would risk jeopardizing the advantages that it affords.[4]

For example, injecting broad discovery, aided by the assistance of U.S. courts, into investor-state arbitrations could upset settled expectations of investors and foreign states. Arbitral rules commonly selected by parties to investor-state arbitrations often reserve to the arbitral panel any determinations regarding discovery. See, *e.g.*, UNCITRAL Arbitration R. art. 27.3 (2013); ICSID Convention Arbitration R. 34 (2006); London Court of Int'l Arbitration R. art. 22.1(iii) and (iv) (2020). In practice, panels "generally seek to exercise their discretion with respect to discovery via reference to pre-existing international standards or guidance

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[3] See, *e.g.*, Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 11 n.6 (2012), https://perma.cc/7A3J-R7KT.

[4] The application of Section 1782 to a particular request for discovery assistance for use in an investor-state arbitration would depend on additional questions. For example, whether a party to an arbitration with a foreign state could seek discovery assistance under Section 1782 would depend on whether the person from whom the evidence was sought was "a person [who] resides or is found" in the district, 28 U.S.C. 1782(a); cf. *Al Fayed* v. *CIA*, 229 F.3d 272, 277 (D.C. Cir. 2000) (concluding that the United States is not a "person" under Section 1782), and might implicate questions of foreign sovereign immunity, cf. 28 U.S.C. 1602 *et seq.* Whether a foreign state could request judicial assistance under Section 1782 would depend on whether it was an interested "person" with respect to the arbitral proceeding. 28 U.S.C. 1782(a).

documents," Esmé Shirlow, *E-Discovery in Investment Treaty Arbitration: Practice, Procedures, Challenges and Opportunities*, 11 J. Int'l Disp. Settlement 549, 556 (2020)—such as the International Bar Association's Rules on the Taking of Evidence in International Arbitration, which investor-state arbitration panels have "wide[ly] adopt[ed]," Nathan D. O'Malley, *Rules of Evidence in International Arbitration* 9 (2d ed. 2019). Broader discovery under Section 1782 could exacerbate concerns related to the cost and duration of investor-state dispute settlement. And to the extent the FAA's provisions also apply to certain investor-state arbitrations, extending assistance under Section 1782 to those arbitrations would create tension between those two statutes. See pp. 25-27, *supra*.

II. THE SIXTH AND SECOND CIRCUITS' CONTRARY INTERPRETATIONS ARE UNSOUND

The courts of appeals below adopted different, broader interpretations of Section 1782's scope. Both approaches are unsound and should be rejected.

A. In the decision on which the district court in No. 21-401 relied, the Sixth Circuit held that "'tribunal'" in Section 1782(a) encompasses adjudicators "having the authority to issue decisions that bind the parties," even "private commercial arbitral panels established pursuant to contract." *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 723 (*Abdul Latif*); see *id.* at 717-731. The court "focus[ed] on the meaning of 'tribunal'" and acknowledged competing dictionary definitions. *Id.* at 719; see *id.* at 719-720. Instead of determining which meaning better accords with Section 1782's phrasing, context, and history, however, the court turned to case law and commentary in other settings, which it read as employing "tribunal" in

its broadest sense. *Id.* at 720-722. The court then concluded that neither other language in Section 1782 and related provisions, judicial decisions (including *Intel*), nor policy considerations "clearly demand[] a more limited reading." *Id.* at 722; see *id.* at 722-731. That approach misapprehends the inquiry. The question is which meaning of the statutory text better fits the statutory context. No clear-statement rule applies to require adopting the broadest possible meaning of "tribunal" unless Congress unambiguously rejected it.

The Sixth Circuit's approach also lacks a workable limiting principle. The broader dictionary definitions of "tribunal" that the court embraced encompass, for example, "a person or body of persons having authority to hear and decide disputes so as to bind the disputants." *Abdul Latif*, 939 F.3d at 720 (citation omitted). And the court, in dictum, likewise read "foreign or international" to have "a broad meaning" encompassing an adjudication "that is taking place abroad and is not subject to United States laws or rules." *Id.* at 719 n.4. The court's reading of Section 1782 thus might encompass nearly any overseas decisionmaker, and the court identified no principle for determining which ones would be excluded.

B. The Second Circuit has avoided the Sixth Circuit's error of stretching Section 1782 to "the outer limits of [its terms'] definitional possibilities," *AT&T*, 562 U.S. at 407 (citation omitted), and has recognized that a private commercial arbitration is not a "foreign or international tribunal," 21-518 Pet. App. 14a (citation omitted). But the Second Circuit has distorted the statute in a different way by adopting an amorphous, multifactor standard for "distinguish[ing] a private international commercial arbitration from a state-sponsored one," in

which "[n]o single factor" is dispositive. *In re Guo*, 965 F.3d 96, 107 (2d Cir. 2020).

That open-ended approach bears no relation to Section 1782's text and cannot be reconciled with the statutory context or history. And it invites indeterminacy and unpredictability regarding the scope of district courts' authority under Section 1782. A court applying the Second Circuit's approach would likely face fraught, fact-intensive determinations, such as a particular adjudicator's degree of "functional independence" from a foreign state. 21-518 Pet. App. 15a (citation omitted). Those inquiries might require extensive evidentiary submissions and factfinding, all to resolve the threshold question of whether the court may even entertain the Section 1782 application. Parties agreeing to a particular arbitral regime, in turn, would lack certainty regarding the availability of discovery from U.S. courts.

The Second Circuit's application of that approach in No. 21-518 is illustrative of its problems. The court recognized that the arbitral panel is independent of and unaffiliated with any nation, that neither Russia nor Lithuania can countermand its decision, and that the arbitrators are private individuals chosen by the parties. 21-518 Pet. App. 17a-22a. The court nevertheless held that "the arbitral panel is a 'foreign or international tribunal'" because Lithuania is a party and Lithuania's consent to arbitrate appears in a treaty. *Id.* at 21a; see *id.* at 17a-22a. But a nation-state's status as a party to an arbitration before a private body does not transform the tribunal into an organ of that state. Section 1782's application turns on the nature of the adjudicator, not other characteristics of the parties or their dispute. Likewise, a foreign state's consent to adjudication by a

nongovernmental panel does not render that body a governmental adjudicator, regardless of the instrument by which that consent is given. The Second Circuit's contrary approach threatens either to render the Section 1782 inquiry indeterminate or to bring all investor-state arbitrations within the statute. Both outcomes can and should be avoided by construing Section 1782 in accordance with its text, context, and history.

CONCLUSION

The order of the district court in No. 21-401 denying the motion to quash and the judgment of the court of appeals in No. 21-518 should be reversed.

Respectfully submitted.

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APPENDIX

1. 9 U.S.C. 7 provides:

Witnesses before arbitrators; fees; compelling attendance

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

2. 9 U.S.C. 208 provides:

Chapter 1; residual application

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

3. 9 U.S.C. 307 provides:

Chapter 1; residual application

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

4. 22 U.S.C. 270 (1958) provides:

International tribunals; administration of oaths; perjury.

Whenever any claim in which the United States or any of its nationals is interested is pending before an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments, each member of such tribunal or commission, or the clerk or a secretary thereof, shall have authority to administer oaths in all proceedings before the tribunal or commission; and every person knowingly and willfully swearing or affirming falsely in any such proceedings, whether held within or outside the United States, its territories or possessions, shall be deemed guilty of perjury and shall, upon conviction, suffer the punishment provided by the laws of the

United States for that offense, when committed in its courts of justice.

5. 22 U.S.C. 270a (1958) provides:

Same; testimony of witnesses; documentary evidence; subpoenas.

Any such international tribunal or commission shall have power to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it. Any member of the tribunal or commission may sign subpoenas.

6. 22 U.S.C. 270b (1958) provides:

Same; contempts.

Any failure to attend as a witness or to testify as a witness or to produce documentary evidence in an appropriate case may be regarded as a contempt of the authority of the tribunal or commission and shall be punishable in any court of the United States in the same manner as is provided by the laws of the United States for that offense when committed in its courts of justice.

7. 22 U.S.C. 270c (1958) provides:

Same; commissioners to take evidence; procedure.

To afford such international tribunal or commission needed facilities for the disposition of cases pending therein said tribunal or commission is authorized and empowered to appoint competent persons, to be named

as commissioners, who shall attend the taking of or take evidence in cases that may be assigned to them severally by the tribunal or commission and make report of the findings in the case to the tribunal or commission. Any such commissioner shall proceed under such rules and regulations as may be promulgated by the tribunal or commission and such orders as the tribunal or commission may make in the particular case and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence. Either party to the proceeding before the tribunal or commission may appear before the commissioner by attorney, produce evidence, and examine witnesses. Subpoenas for witnesses or for the production of testimony before the commissioner may issue out of the tribunal or commission by the clerk thereof and shall be served by a United States marshal in any judicial district in which they are directed. Subpoenas issued by such tribunal or commission requiring the attendance of witnesses in order to be examined before any person commissioned to take testimony therein shall have the same force as if issued from a district court and compliance therewith shall be compelled under such rules and orders as the tribunal or commission shall establish. Any person appointed as commissioner may be removed at the pleasure of the tribunal or commission by which he is appointed.

8. 22 U.S.C. 270d (1958) provides:

Same; subpoenas; application by agent to United States district court.

The agent of the United States before any international tribunal or commission, whether previously or hereafter established, in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States district court for the district in which such witness or witnesses reside or may be found, for the issuance of subpoenas to require their attendance and testimony before the United States district court for that district and the production therein of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission.

9. 22 U.S.C. 270e (1958) provides:

Same; issuance of subpoenas by United States district court; proceedings thereon; notice to foreign governments; filing transcripts of testimony with agent of United States.

Any United States district court to which such application shall be made shall have authority to issue or cause to be issued such subpoenas upon the same terms as are applicable to the issuance of subpoenas in suits pending in the United States district court, and the clerk thereof shall have authority to administer oaths respecting testimony given therein, and the marshal thereof

shall serve such subpoenas upon the person or persons to whom they are directed. The hearing of witnesses and taking of their testimony and the production of books and papers pursuant to such subpoenas shall be before the United States district court for that district or before a commissioner or referee appointed by it for the taking of such testimony, and the examination may be oral or upon written interrogatories and may be conducted by the agent of the United States or his representative. Reasonable notice thereof shall be given to the agent or agents of the opposing government or governments concerned in such proceedings who shall have the right to be present in person or by representative and to examine or cross-examine such witnesses at such hearing. A certified transcript of such testimony and any proceedings arising out of the issuance of such subpoenas shall be forwarded by the clerk of the district court to the agent of the United States and also to the agent or agents of the opposing government or governments, without cost.

10. 22 U.S.C. 270f (1958) provides:

Same; perjury; contempts; penalties.

Every person knowingly or willfully swearing or affirming falsely in any testimony taken in response to such subpoenas shall be deemed guilty of perjury, and shall, upon conviction thereof, suffer the penalty provided by the laws of the United States for that offense when committed in its courts of justice. Any failure to attend and testify as a witness or to produce any book or paper which is in the possession or control of such witness, pursuant to such subpoena, may be regarded as

a contempt of the court and shall be punishable as a contempt by the United States district court in the same manner as is provided by the laws of the United States for that offense in any other proceedings in its courts of justice.

11. 22 U.S.C. 270g (1958) provides:

District Court of the United States for the District of Columbia a district court of United States

CODIFICATION

Section, act July 3, 1930, ch. 851, § 8, as added June 7, 1933, ch. 50, 48 Stat. 118, has been omitted since the District of Columbia constitutes a judicial district, and the district court of the United States for the District of Columbia is included within the term "United States district court" as used in sections 270d-270f of this title. See sections 88 and 132 of Title 28, Judiciary and Judicial Procedure.

12. 22 U.S.C. 1650a provides:

Arbitration awards under the Convention

(a) Treaty rights; enforcement; full faith and credit; nonapplication of Federal Arbitration Act

An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general juris-

diction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.

(b) Jurisdiction; amount in controversy

The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have exclusive jurisdiction over actions and proceedings under subsection (a) of this section, regardless of the amount in controversy.

13. 28 U.S.C. 1696 provides:

Service in foreign and international litigation

(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

(b) This section does not preclude service of such a document without an order of court.

14. 28 U.S.C. 1781 provides:

Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

15. 28 U.S.C. 1782 (1958) provides:

Testimony for use in foreign country.

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

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

16. 28 U.S.C. 1782 provides:

Assistance to foreign and international tribunals and to litigants before such tribunals

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

take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

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

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

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

SEC. 2. *And be it further enacted,* That where letters rogatory shall have *be* [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

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

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

19. Act of Feb. 27, 1877, ch. 69, 19 Stat. 240, provides in pertinent part:

* * * * *

Section eight hundred and seventy-five is amended by adding at the end of the section the following:

"When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts."

* * * * *

20. Act of June 25, 1948, ch. 646, 62 Stat. 949, provides in pertinent part:

* * * * *

§ 1782. Testimony for use in foreign country

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

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

* * * * *

21. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 provides:

SEC. 93. Section 1782 of title 28, United States Code, is amended by striking out "residing", which appears as the sixth word in the first paragraph, and by striking out from the same paragraph the words "civil action" and in lieu thereof inserting "judicial proceeding".

22. Act of Sept. 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743, provides in pertinent part:

* * * * *

ESTABLISHMENT OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE

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

PURPOSE OF THE COMMISSION

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

our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved, the Commission shall—

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

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

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

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

* * * * *

23. Act of Oct. 3, 1964, Pub. L. No. 88-619, 78 Stat. 995, provides in pertinent part:

* * * * *

SEC. 4. (a) Chapter 113 of title 28, United States Code, is amended by inserting therein, after section 1695:

"§ 1696. Service in foreign and international litigation

"(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request

made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

"(b) This section does not preclude service of such a document without an order of court."

* * * * *

SEC. 8. (a) Section 1781 of title 28, United States Code, is amended to read:

"§ 1781. Transmittal of letter rogatory or request

"(a) The Department of State has power, directly, or through suitable channels—

"(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

"(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

"(b) This section does not preclude—

"(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

"(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner."

* * * * *

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

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

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

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

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

* * * * *