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

BRIEF *AMICI CURIAE* OF DR. XU GUOJIAN, LI HONGJI, ZHU YONGRUI, TANG QINGYANG, AND DR. ZHANG GUANGLEI IN SUPPORT OF PETITIONERS

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January 28, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF AMICI CURIAE[1]

The undersigned *amici curiae* (together, the "Arbitrators") are highly experienced arbitrators based primarily in the People's Republic of China.

Amicus curiae Dr. Xu Guojian is the Distinguished Dean and Professor at the International Law School, Shanghai University of Political Science and Law. Dr. Xu studied law at Southwest China University of Politics and Law, Chongqing, China and Wuhan University, Wuhan, China, for his Bachelor of Laws, Master of Laws and Doctor of Laws respectively, before going to Europe in 1988 to pursue further legal education. Dr. Xu pursued advanced studies at the Swiss Institute of Comparative Law, Lausanne, Switzerland; the Academy of International Law, International Court of Justice, The Hague, Netherlands; the Max-Planck-Institute for Foreign and International Private Law, Hamburg, Germany; and Albert Ludwig University, Freiburg i.Br., Germany. He concluded his doctoral studies at Hamburg University. He has contributed many practice-oriented and academic articles on international commercial arbitration and comparative law in world-renowned professional journals, such as the Journal of International Arbitration, the International and Comparative Law Quarterly, the Lloyd's Maritime and Commercial Law Quarterly, and others. Dr. Xu has extensive experience as a practicing attorney. Dr. Xu's main fields of practice

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[1] Under Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for a party authored any part of this brief, in whole or in part, and no person other than *amici curiae* or their counsel made any monetary contribution towards the preparation or submission of this brief. Written confirmation of consent to this filing has been received from counsel of record for all parties.

include foreign direct investment in China, international merger and acquisitions, technology transfer, intellectual property rights and international commercial arbitration. Dr. Xu is one of the leading arbitration practitioners in China, having represented clients from China, USA, UK, Germany, Switzerland and other countries, and handled numerous international commercial arbitration cases. In addition, he has been appointed as an arbitrator of the China International Economic and Trade Arbitration Commission ("CIETAC"), the Shanghai International Arbitration Center ("SHIAC"), the Shanghai Arbitration Commission, the Nantong Arbitration Commission and the Korean Commercial Arbitration Board ("KCAB"). As an arbitrator, Dr. Xu has rendered more than 200 arbitration awards on disputes covering international trade, construction, real estate transactions, technology transfer, banking, insurance and financial transactions and foreign investment. Dr. Xu is a senior partner at the Shanghai office of SGLA Law Firm.

Amicus curiae Li Hongji has been a practicing attorney for more than thirty years. Mr. Li is the Head of Dispute Resolution Department of Commerce & Finance Law Offices. He obtained degrees from Peking University, China University of Political Science and Law, Cornell University, and McGill University. Mr. Li is a member of the bar of the People's Republic of China and the New York bar. He also serves as an arbitrator on the panels of multiple major arbitration commissions, including CIETAC, the Beijing Arbitration Commission/Beijing International Arbitration Center ("BAC/BIAC"), the Shanghai International Economic and Trade Arbitration Commission, the Qingdao Arbitration Commission, among others. Over the years, he has served as arbitrator in more than 300 cases.

Amicus curiae Zhu Yongrui (Raymond) joined the PRC bar in 1995, and he specializes in international dispute resolution representing domestic and international clients either in litigation or arbitration proceedings. His practice includes acting as counsel and sitting as mediator and arbitrator. He is a fellow of the Chartered Institute of Arbitrators (FCIArb) and Singapore Institute of Arbitrators (FSIArb), and he is ranked in Chambers & Partners Asia Pacific and Global as an international arbitration lawyer. Mr. Zhu has more than fifteen years of experience in resolving international disputes, including sitting as arbitrator or mediator or in other forms of alternative dispute resolution. He is on the arbitrator panels of BAC/BIAC, the Arbitration and Mediation Center of the Mauritius Chamber of Commerce and Industry, the Hong Kong International Arbitration Centre ("HKIAC"), KCAB, and in the database of neutrals for the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce.

Amicus curiae Tang Qingyang is currently an arbitrator and member of the Expert Advisory Committee of CIETAC, and the director of the Expert Advisory Committee of the Chongqing Arbitration Commission. He has served as arbitrator in more than 45 commercial dispute cases as chief arbitrator, sole arbitrator and arbitrator, in matters involving China, the United States, France, South Africa, Kenya and other countries, along with Hong Kong, SAR, China.

Amicus curiae Dr. Zhang Guanglei earned his degrees of LL.B., LL.M. and Ph.D. in Law from China University of Political Science & Law. While in the U.S., he obtained his LL.M. degree from The George Washington University Law School and was also a visiting scholar at Columbia University Law School.

Dr. Zhang has been admitted to practice law in the PRC and the State of New York. Dr. Zhang specializes in dispute resolution, including civil and commercial litigation, arbitration and mediation. Dr. Zhang has represented clients in hundreds of cases before CIETAC, BAC/BIAC, SHIAC, the Shenzhen Court of International Arbitration, the Zhuhai Court of International Arbitration, HKIAC, ICC International Court of Arbitration, and courts of different levels in China. In addition, Dr. Zhang has served as Arbitrator of HKIAC, Hainan International Arbitration Court, and Zhuhai Arbitration Commission. He also has been an adjunct professor at the School of Law, University of International Business and Economics, and an adjunct professor at the School of Juris Master, China University of Political Science & Law.

Collectively, the Arbitrators have served as the neutral in hundreds of arbitration disputes, with decades of collective experience. In addition to serving as arbitrators, several of the Arbitrators also work in private practice as arbitration counsel to parties or as legal scholars in the field of international arbitration.

In supporting the position of the Petitioners, ZF Automotive US Inc., et al. ("Petitioners") in this matter, the Arbitrators do not delve into the legislative history or judicial interpretations of Section 1782's core phrase currently under scrutiny by this Court: "foreign or international tribunal." 28 U.S.C. § 1782. Rather, the Arbitrators seek to provide the Court with pragmatic guidance on the current workings of private international arbitration based on the Arbitrators' experiences, along with their perspective on policy considerations to guide the Court's assessment of the issue presented in this case. The Arbitrators urge the

Court to look carefully at the practical implications of their decision along with public policy considerations.[2]

Unlike litigation, which is an always-available tool for dispute resolution so long as jurisdiction is established, arbitration is a product of the agreement between the parties. *See, e.g.*, Roy Goode, Herbert Kronke and Ewan McKendrick, Transnational Commercial Law, Oxford University Press 2007, p. 622. Commercial international arbitration in particular is recognized as "a private method of dispute resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them." Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell 2004, p. 1.

As long-time international arbitration participants in China and the Asia-Pacific region, the undersigned Arbitrators support the efficient functioning of the international arbitration system as a whole. The Arbitrators have an interest in ensuring that the promise of arbitration continues to be delivered – the efficient, fair, and final resolution of disputes. These benefits of arbitration are best supported by a bright-line rule excluding private arbitration from the scope of Section 1782. As a result, the Arbitrators respectfully urge this Court not to extend Section 1782 to private international or foreign arbitration.

As arbitrators and practitioners based primarily in the PRC, the Arbitrators commonly handle arbitration matters before CIETAC, HKIAC, and the Singapore

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[2] The Arbitrators do not take a position on the issue presented in the consolidated matter of *AlixPartners LLP, et al. v. The Fund for Protection of Investor Rights in Foreign States*, which involves investor-state arbitration. This brief of *amici curiae* is solely in support of the issues raised in the *ZF Automotive* appeal.

International Arbitration Centre ("SIAC"), among others. The Arbitrators offer the following brief background on these three arbitral institutions, although there are many others in the Asia-Pacific region and worldwide.[3]

CIETAC is headquartered in Beijing, China, with sub-commissions in multiple locations throughout mainland China. CIETAC was first established in 1956 under the name of a predecessor entity, and it has grown into a well-known and globally respected arbitral institution. In 2020, a total of 3,615 new cases were registered, representing about 8.5% growth from 2019. CIETAC reported that it handled disputes amounting in total to approximately USD $17.3 billion (RMB 112.13 billion). In 2020, 739 cases were "foreign-related cases," up from 617 in 2019. In 67 of these foreign-related cases, both parties were foreign. *See* CIETAC, CIETAC 2020 Work Report and 2021 Work Plan, at https://tinyurl.com/yvewkph8 (last visited Jan. 26, 2022).

HKIAC was established in 1985 in Hong Kong. In addition to providing a forum for the arbitration of disputes, HKIAC also administers mediation and adjudication of disputes. HKIAC reported that its arbitration caseload totaled 318 new cases in 2020. The total amount in dispute in 2020 was approximately USD $8.8 billion, the highest amount since HKIAC began to publish such information. In 2020, about 72% of all arbitrations submitted to HKIAC were international, with at least one party not from Hong Kong. In 2020, a majority of the arbitrations submitted to HKIAC applied the HKIAC Administered Arbitration Rules ("HKIAC AA Rules"), with about

[3] The rules of procedure for those other institutions are largely similar to the ones identified in more detail here.

70% of all HKIAC arbitrations applying those rules. *See* HKIAC, 2018 Administered Arbitration Rules, at https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (last visited Jan. 26, 2022). About 25% of HKIAC arbitrations applied *ad hoc* rules of the parties' choosing, and the balance applied other rules. *See* HKIAC 2020 Statistics, at https://www.hkiac.org/about-us/statistics (last visited Jan. 26, 2022).

SIAC was established in 1991 as a non-profit organization to administer arbitration disputes in Singapore. In 2020, SIAC handled 1,080 new arbitration case filings. Of the 1,080 cases, 98% were cases administered by SIAC, and the remaining 2% of cases were *ad hoc* appointments. SIAC's total sum in dispute for 2020 was approximately USD $8.49 billion. Approximately half of the arbitration cases filed with SIAC have no connection with Singapore, and parties from 60 different jurisdictions chose to arbitrate at SIAC in 2020. *See* SIAC, About Us, at https://tinyurl.com/74kfe22e (March 31, 2021) (last visited Jan. 26, 2022); *see also* SIAC, Frequently Asked Questions, 14, at https://www.siac.org.sg/faqs (last visited Jan. 26, 2022).

SUMMARY OF ARGUMENT

The core issue presented in the *ZF Automotive* appeal is whether 28 U.S.C. § 1782 applies to private foreign or international commercial arbitration. The Arbitrators support the position of the Petitioners in this action that Section 1782 does not, and should not, apply to private arbitration.

First, Section 1782 discovery in the context of private arbitration is contrary to key favorable characteristics of arbitration, including its efficiency, fairness, and finality.

Second, discovery under Section 1782 is not necessary for the successful resolution of private arbitration disputes.

Third, because arbitration panels are constituted for a particular dispute and then disbanded, there is no mechanism for either international comity or pre-dispute evaluation of a Section 1782 petition.

ARGUMENT

The Arbitrators support the position of the Petitioners, that Section 1782 does not apply to private arbitration. The Arbitrators do not present arguments on the statutory interpretation, legislative history, or judicial precedent regarding Section 1782, but rather focus on the providing the Court with pragmatic and policy guidance on the application of Section 1782 to private commercial arbitration from the perspective of experienced arbitrators.

In arbitration, the parties' agreement is paramount. International rules of law support this principle. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") provides that the recognition and enforcement of the award may be refused only on very narrow grounds. One of those narrow grounds is if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." Convention, Article V(d), June 10, 1958, 21 U.S.T. 2520, 330 U.N.T.S. 42 (emphasis added). This enforcement provision endorses the parties' agreement as the cornerstone of commercial arbitration.

Parties to an arbitration proceeding can select either institutional arbitration rules or *ad hoc* rules,

subject to the parties' choice. In addition, by consent, the parties may modify the rules of arbitration procedure to suit the needs of their particular dispute. This flexibility and emphasis on party choice is a key feature of arbitration. Likewise, any rules about the taking of evidence will be governed by the parties' agreement in determining the applicable rules. For example, the International Bar Association's IBA Rules on the Taking of Evidence in International Arbitration are some of the most frequently used rules in international arbitration proceedings. Those rules provide that "Parties and Arbitral Tribunals are free to adapt [the rules] to the particular circumstances of each arbitration." *Id*. at Preamble, at https://tinyurl.com/8m7jkh2a (last visited Jan. 26, 2022).

A conclusion by this Court that Section 1782 is available to private commercial arbitration only with the consent of the appointed arbitrator and the arbitration parties could be consistent with the Arbitrators' position. However, the Arbitrators strongly support a bright-line rule that excludes commercial arbitration from the ambit of Section 1782. A bright-line rule will best support the purpose and benefits of arbitration. Anything less than a bright-line exclusion will encourage collateral litigation under Section 1782, which detracts from the efficiency, fairness, and finality of arbitration. Moreover, the language of Section 1782 and its previous interpretation by this Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004), make it difficult to conclude that Section 1782 may only extend to private arbitration with the consent of an appointed arbitrator and the parties. Among other issues, a petition for discovery under Section 1782 may be brought upon "reasonable contemplation" of a dispute by "any

interested person." *Intel*, 542 U.S. at 259; 28 U.S.C. § 1782. Further, it is well-established that Section 1782 petitions may be presented *ex parte*. *See, e.g., Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012) ("it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*."). As a result, to preserve the benefits of arbitration and to uphold parties' expectations when they select arbitration, the best construction of Section 1782 is a bright-line exclusion of private commercial arbitration.

I. Discovery Under Section 1782 Is Contrary to Key Favorable Characteristics of Arbitration.

Private commercial arbitration is often favored as a dispute resolution mechanism because of its efficiency, fairness, finality, and emphasis on party autonomy, among other salient features. Because the expansion of Section 1782 to arbitration is contrary to these well-recognized favorable characteristics of arbitration, the Arbitrators respectfully contend that Section 1782 should not encompass private international or foreign arbitration.

A. Streamlined Discovery in Arbitration Promotes Efficiency and Fairness.

Generally, pre-hearing discovery in foreign or international arbitration is limited. The default procedural rules of CIETAC, HKIAC, and SIAC, for example, do not allow for depositions or interrogatories, which are common discovery tools in U.S. litigation. Instead, the parties have an affirmative duty to produce all documents upon which they intend to rely, without the need for a counterparty's request. For example, under the SIAC rules, the parties are under an affirmative

obligation to share all documents in support of their position, without waiting for a request from any counterparty. *See* SIAC, SIAC 2016 Rules, at https://www.siac.org.sg/our-rules/rules/siac-rules-2016 (last visited Jan. 26, 2022) ("SIAC Rules"), Rule 20.7 ("All submissions referred to in this Rule shall be accompanied by copies of all supporting documents which have not previously been submitted by any party."). Likewise, under the HKIAC AA Rules, the parties have an affirmative obligation to submit all supporting materials. *See* HKIAC AA Rules, Article 16, Rule 16.3 ("The Claimant shall annex to its Statement of Claim all supporting materials on which it relies."); *see also id*., Rule 17.4 ("The Respondent shall annex to its Statement of Defence all supporting materials on which it relies.").

This practice tends to streamline discovery. In the experience of the Arbitrators, parties to international or foreign arbitration generally understand that the goal of prehearing discovery is to accumulate enough evidence to present one's position, not to conduct an exhaustive search for information. When parties select arbitration as their mechanism for dispute resolution, they do so with the knowledge that arbitration procedures generally do not allow the parties to unearth every last shred of evidence. Far from being a shortcoming of arbitration, this is a key benefit. Broadstrokes discovery under Section 1782 is therefore contrary to this feature of arbitration that parties intentionally select when they choose to arbitrate a dispute.

B. Allowing Section 1782 Discovery in Aid of Arbitration Will Spawn Burdensome Collateral Litigation.

The Arbitrators' concern about applying Section 1782 to foreign or international arbitration is not just about the resultant discovery and whether it is helpful for the arbitral process. Rather, another key concern is the burden on the parties and the dispute resolution process itself created by collateral litigation under Section 1782. As highlighted by the facts of *Servotronics* and other matters, collateral litigation can arise in multiple jurisdictions simultaneously, with inconsistent results. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 690 (7th Cir. 2020) *and Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020) (reaching contrary conclusions on the same issue of law).

Collateral litigation under Section 1782 drives up the overall costs of a dispute. The Arbitrators are concerned that only well-resourced parties will be able to navigate the U.S. court system to pursue Section 1782 discovery, thus creating a further imbalance between parties with different means. Even though arbitration is generally intended as a cost-effective and streamlined process, collateral litigation under Section 1782 creates a risk of diminishing that economic efficiency. Other U.S. courts have recognized this risk. *See, e.g., Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) ("The course of the litigation before us suggests that arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration."). Further, there is an appreciable risk that collateral litigation under Section 1782 would slow down the arbitration

proceedings, as one or more parties may request that an arbitration should be stayed pending resolution of a Section 1782 petition.

Section 1782 can also be used as a tool to burden or harass an opposing party to an arbitrated dispute, which is problematic and contrary to the confidentiality of arbitration. *See Del. Coal. for Open Govt, Inc. v. Strine*, 733 F.3d 510, 518 (3d Cir. 2013) (recognizing that "[c]onfidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings."). The Arbitrators are aware, for example, of one recently arbitrated dispute under CIETAC that resulted in Section 1782 discovery in the United States. Although the parties to the CIETAC dispute were a Chinese hospital and affiliates of a U.S.-based fertility business, the Section 1782 petition targeted the individual principals of the Chinese hospital, along with a family member who was living in the United States and the principals' small business holdings in the United States. The matter reached the Ninth Circuit, in the matter of *In re: Application of HRC-Hainan Holding Co., LLC*, Case No. 20-15371 (stayed). Even though it seemed to be a thinly-veiled fishing expedition, the California federal court granted the discovery with few limitations. The lower court gave no weight to the fact that the arbitrators had not expressed interest in the requested documents, instead concluding that the arbitrator could simply disregard the acquired evidence if it was not useful. *See HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-mc-80277-TSH, 2020 U.S. Dist. LEXIS 32125, at *24-25 (N.D. Cal. Feb. 25, 2020), *appeal filed sub nom In re: Application of HRC-Hainan Holding Co*., No. 20-15371 (stayed) ("[Section] 1782(a) . . . does not require the foreign or international tribunal to accept evidence produced by that discovery.

The tribunal can simply refuse such evidence if it would burden the efficiency of proceedings."). Such an approach is contrary the efficiency sought by the parties when they opt into arbitration, and threatens to encourage tactical "fishing" litigation under Section 1782.

C. Arbitration Supports Party Autonomy By Giving the Parties Control Over the Proceeding.

When parties choose arbitration and certain rules of procedure to govern resolution of their dispute, it is reasonable to conclude that they are not silently choosing those rules plus Section 1782. This principle is reflected by the arbitration rules themselves. *See, e.g.*, Rule 1.1 of the SIAC Rules ("Where the parties have agreed to refer their disputes to SIAC for arbitration or to arbitration in accordance with the SIAC Rules, the parties shall be deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with these Rules."). Particularly where the arbitration agreement is silent as to Section 1782 – and the Arbitrators do not recall encountering any arbitration clauses that specifically address Section 1782 – it is contrary to the parties' intention to graft Section 1782 onto the selected arbitration procedures.

Even tightening up the lower court's discretion over Section 1782 for international arbitration will not solve this inherent conflict. In the view of the Arbitrators, narrowing the U.S. courts' discretion over Section 1782 petitions in aid of foreign or international arbitration is not sufficient. The better outcome is a bright-line rule against Section 1782 discovery for private commercial arbitration. Arbitration is intended to be a creature of the parties' consent. *See, e.g., Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)

("Arbitration . . . is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). If the parties select arbitration, then that intention should be upheld. Moreover, merely tightening the U.S. courts' discretion does not give parties and participants the certainty of a bright-line rule, thus continuing to incentivize collateral litigation outside of a main arbitration dispute, to the detriment of the international arbitration system.

The breadth of Section 1782, as written and interpreted by the U.S. courts, is incompatible with the fundamental arbitral principle of party autonomy for at least two reasons. First, Section 1782 expressly permits *any interested person* to seek discovery under Section 1782. *See* 28 U.S.C. § 1782 ("The order may be made . . . upon the application of any interested person[.]"). Even if the parties to an arbitrated dispute intend only for the arbitration rules of procedure to govern their gathering of evidence, Section 1782 nevertheless permits an interested third party to commence a potentially burdensome discovery expedition in the United States, which may require intervention and defense by one or more parties to the arbitration. Although the U.S. courts retain discretion to deny such an application, anything less than a bright-line rule will continue to incentivize collateral attempts at discovery under Section 1782.

Second, discovery applications under Section 1782 may be submitted *ex parte*, without notice to the arbitration parties, which is incompatible with party autonomy in arbitration. *See, e.g., Gushlak*, 486 F. App'x at 217 ("it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*."). If the target of Section 1782

discovery is a non-party to the arbitration, then it may be up to the judge's discretion whether to order that notice must be provided to the arbitration parties as well as the discovery target. An *ex parte* proceeding in the United States, commenced without notice by any interested party – including by a non-party to the arbitration – is contrary to the principle that the parties' mutually agreed terms are paramount in arbitration.

D. Arbitrators Have Broad Discretion to Manage Disputes, Leading to Streamlined Proceedings.

In private commercial arbitration, the arbitrator plays an important role in managing the proceedings. Because arbitration is not reviewable except on very narrow grounds, the decisions of an arbitrator on routine procedural issues are generally not reviewable. This system gives the arbitrator significant control over the proceedings and an ability to promote efficient resolution of disputes.

Some specific examples are illustrative of this efficiency and control, and how Section 1782 litigation and discovery are contrary to these principles. In CIETAC proceedings seated in China – which would be a "foreign or international" arbitration – the arbitration panel controls and dominates evidence production. For example, a CIETAC arbitrator may specify a time period for the parties to produce evidence and strictly refuse to admit any evidence produced after that time. *See* CIETAC, CIETAC 2015 Arbitration Rules ("CIETAC Rules"), Rule 41.2, http://www.cietac.org/Uploads/201902/5c6148b100105.pdf. In addition, an arbitrator for a dispute under CIETAC rules "may undertake investigation and

collect evidence as it considers necessary." *Id.*, CIETAC Rules, Article 43.1.

As another example, under the SIAC rules adopted in 2016, the arbitrator or panel controls the prehearing discovery process. *See, e.g.*, SIAC Rule 27(f) ("[T]he tribunal shall have the power to . . . order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome[.]"); SIAC Rule 27(h) ("[T]he tribunal shall have the power to . . . direct any party or person to give evidence by affidavit or in any other form[.]"). The arbitration rules of procedure also allow the arbitrator to request certain discovery from the parties. In the experience of the Arbitrators, this mechanism is used when needed by the facts of a particular dispute. *See also* HKIAC AA Rules, Article 22, Rule 22.3 ("At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome.").[4]

As a further example, under the HKIAC AA Rules, the arbitrator or arbitrators have significant discretion to adopt suitable procedures for the particular dispute. *See* HKIAC AA Rules, Article 13, Rule 13.1 ("Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the

[4] The use of the word "tribunal" in the English version of the SIAC, CIETAC, or HKIAC rules should have no bearing on this Court's statutory interpretation of the phrase "foreign or international tribunal" as used by the U.S. Congress in 1964.

amount in dispute and the effective use of technology, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case."). The rules recognize that tailored procedures, adopted by the arbitrator, are the best means to deliver the promise of arbitration.

Finally, the rules of procedure for most arbitration institutes contain a general default provision favoring the efficient resolution of disputes. For example, the SIAC Rules provide that "[i]n all matters not expressly provided for in these Rules, the President, the Court, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award." SIAC Rule 41.2 (emphasis added).

When parties choose arbitration as their mechanism for dispute resolution, they are intentionally selecting a highly-empowered decisionmaker, who will proceed in an efficient, fair, and economical manner. The expansive scope of Section 1782 is inconsistent with this party intention.

II. Discovery Under Section 1782 is Not Necessary for the Successful Resolution of Arbitration Disputes.

Simply put, additional discovery under Section 1782 is not necessary for fair resolution of arbitrated disputes, in addition to being contrary to key features of arbitration and party intent. Private international and foreign arbitration proceedings follow well-established rules of procedure for gathering pre-hearing evidence. Based on the Arbitrators' cumulative experience over hundreds of arbitration disputes, the

Arbitrators posit that additional discovery under Section 1782 is simply not necessary for the successful resolution of arbitration disputes.

Arbitration rules of procedure already allow for pre-hearing exchange of evidence. Unlike discovery in the United States, much of the evidence exchanged under arbitration rules is provided without request. Instead, the parties are under an affirmative obligation to share all documents that support their positions. *See, e.g.,* SIAC Rule 20.7; HKIAC AA Rules, Article 16, Rule 16.3. Moreover, the arbitrator has significant power to order the exchange of evidence when the arbitrator deems it necessary. *See, e.g.,* CIETAC Rules, Article 43.1.

In the collective experience of the Arbitrators, these discovery tools are sufficient to provide a fair adjudication of disputes. When parties select international or foreign arbitration for resolution of their disputes, they do so with the intention that the evidence-gathering tools provided by those arbitral bodies will be sufficient.[5]

Discovery under Section 1782 has been rare, to date, in the arbitrations in which the Arbitrators have been involved. This rarity of Section 1782 further supports the conclusion that Section 1782 is unnecessary,

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[5] Moreover, the Chinese court system does not allow for "discovery" in the same sense as in the U.S. court system. The Chinese courts generally do not have the power to compel parties to produce evidence. As is typical in commercial arbitration, the parties have an affirmative obligation to produce evidence in support of their position. In addition, the parties may petition the court to command third parties to produce evidence, which the court may order or deny within its sole discretion. In general, Chinese trial courts follow an inquisitorial style of dispute resolution, in which the judge plays a primary role.

because all of these disputes were fairly resolved in the absence of Section 1782 discovery. There is a serious risk that a decision by this Court conclusively extending Section 1782 to private arbitration will cause collateral litigation to skyrocket, thus ratcheting up the costs of dispute resolution and imperiling the benefits of arbitration.

III. The Arbitral Panel is Only Empowered for a Particular Dispute, Thus Limiting its Role in International Comity and Pre-Dispute Evaluation of a Section 1782 Petition.

Unlike judicial or quasi-judicial forums for dispute resolution, an arbitral panel is constituted for the resolution of a particular dispute, and then it is disbanded. Thus, the prospect of international comity is not advanced by extending Section 1782 to private arbitration, because neither arbitral panels nor arbitration institutions have such power. In addition, the courts cannot rely on "checking in" with an arbitrator before exercising discretion over a Section 1782 petition under the *Intel* factors, because an arbitral panel is not constituted until a particular dispute is presented. As established by the Court in *Intel*, discovery under Section 1782 can be sought by an "interested person" in aid of a "reasonably contemplated" proceeding, one for which no arbitrator has been assigned and perhaps no arbitral forum has even been selected. *See Intel*, 542 U.S. at 259.

A. Arbitration Panels are Not Equipped to Offer Comity with Governmental Tribunals.

One of the fundamental purposes of Section 1782 is the encouragement of international comity between governments. *See id.* at 248 ("In 1958, prompted by

the growth of international commerce, Congress created a Commission . . . to 'investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.'") (quoting Act of Sept. 2, Pub L 85-906, § 2, 72 Stat 1743; S. Rep. No. 2392, 85th Cong., 2d Sess., 3 (1958)); *see also Biedermann*, 168 F.3d at 883 ("The provision was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration.").

Although Section 1782 is intended to promote international comity, arbitration panels are not equipped to reciprocate. Each single arbitrator or arbitration panel is appointed for a particular dispute, and then disbanded. Arbitral panels are non-governmental and do not have the powers of a governmental entity. As noted above, many arbitrators also work in private practice, and they are only empowered to resolve a particular dispute by the agreement of particular parties. Nor are arbitration bodies, such as CIETAC, HKIAC, or SIAC, empowered to provide reciprocal discovery. The arbitration bodies provide procedural rules, administrative support, and other benefits for arbitration, but only subject to party selection. Thus, unlike courts of another country that could be empowered by statute to authorize reciprocal discovery, an arbitration center cannot offer any reciprocity for the discovery assistance offered by the U.S. courts under Section 1782.

B. Because No Arbitration Panel Exists Pre-Dispute for Assessment of Scope of Proposed Section 1782 Discovery, Even High Deference Would Be Insufficient.

It is possible that other *amici curiae* may propose that the district courts' discretion over Section 1782

should be tied to the position of the arbitrators or that courts should defer to the arbitrators' view on the discovery sought. However, this overlooks the fact that no arbitral decisionmaker is appointed pre-dispute. As confirmed by this Court in *Intel*, Section 1782 is an available tool for "reasonably contemplated" disputes, in addition to on-going disputes. *See Intel*, 542 U.S. at 259 (Section 1782 "requires only that a dispositive ruling . . . be within reasonable contemplation.").

In such a circumstance, there are no arbitrators to weigh in on a request for discovery under Section 1782, and therefore even a high degree of deference to those arbitrators is meaningless. It is also possible that no arbitral forum or rules of procedure would have even been selected pre-dispute, depending on the governing arbitration clause.

Anything less than a bright-line exclusion of arbitration from the purview of Section 1782 will encourage collateral litigation, contrary to the parties' intentions and the promise of arbitration. Because Section 1782 may be invoked before an action has been filed, the tightening of the district courts' discretion is insufficient. Moreover, even tightening discretion fails to avoid the problem of incentivizing collateral litigation to test the boundaries of discretion. Therefore, the Arbitrators respectfully urge that the better conclusion is a bright-line exclusion of private arbitration from the scope of Section 1782.

CONCLUSION

For the foregoing reasons, the Arbitrators support the position of the Petitioners in this matter.

Respectfully submitted,

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January 28, 2022