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 FOR THE RESPONDENT


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## QUESTION PRESENTED

Whether 28 U.S.C. § 1782(a), which authorizes discovery "for use in a proceeding in a foreign or international tribunal," encompasses foreign commercial arbitral tribunals.

## CORPORATE DISCLOSURE STATEMENT

Respondent Luxshare Ltd. has no parent company and no publicly held company owns 10% or more of its stock.

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The text of the statutes involved in the case is set out in the appendix.

## STATEMENT OF THE CASE

### I. Statutory Background

Enacted in 1964, 28 U.S.C. § 1782(a) authorizes a district court to order discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a).

Before 1964, two separate regimes governed discovery for use in foreign proceedings. Section 1782, enacted in 1948 and then captioned "Testimony for use in foreign country," consolidated and revised three nineteenth-century statutes that had authorized the compulsion of testimony at the request of the "court" of a "foreign country." 28 U.S.C. § 1782 (1958); *see* Act of Feb. 27, 1877, ch. 69, 19 Stat. 241; Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769; Act of Mar. 2, 1855, ch. 140, 10 Stat. 630.

The original 1948 version of § 1782 retained the requirement of a proceeding in the "court" of a "foreign country," Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949, but otherwise "substantially broadened the scope of assistance" available, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–48 (2004). Assistance could be provided for "any civil action," 1948 Act § 1782, even if the foreign government had no interest at stake, *Intel*, 542 U.S. at 248. A 1949 amendment further broadened the coverage to "any judicial proceeding." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

A separate statute authorized discovery for use before certain kinds of "international tribunal or commission." 22 U.S.C. §§ 270–270g (1958). Enacted in 1930 to accommodate claims arising from military actions, that statute permitted an international tribunal or commission to compel evidence, provided

the United States was a party to the constituting agreement and the United States or its national was interested in the claim. 22 U.S.C. §§ 270, 270a, 270c; *see* Act of July 3, 1930, ch. 851, 46 Stat. 1005; *see also* Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264, 1265–73 (1962). A 1933 amendment authorized federal courts to compel evidence for use before international tribunals and commissions, if the United States was a party and made the request. 22 U.S.C. §§ 270d–270e; Act of June 7, 1933, ch. 50, §§ 5–6, 48 Stat. 117.

In 1964, Congress effected "a complete revision of § 1782." *Intel*, 542 U.S. at 248. It repealed the 1930 statute, Act of Oct. 3, 1964 § 3, Pub. L. No. 88-619, 78 Stat. 995, re-captioned § 1782 "Assistance to foreign and international tribunals and to litigants before such tribunals," *Id.* § 9, and expanded the available assistance in several ways. As amended, § 1782(a) permits "any interested person" to seek discovery, including documents, even if the foreign proceeding is not yet pending. 28 U.S.C. § 1782(a). As relevant here, the 1964 statute eliminated the requirement that the proceeding be a "judicial" one before a "court in a foreign country," or that it involve specific kinds of claim before certain kinds of "international tribunal or commission." Shorn of those historical limitations, § 1782(a) broadly authorizes discovery for use before any "foreign or international tribunal." 28 U.S.C. § 1782(a).

A 1996 amendment confirmed that § 1782(a) encompasses "criminal investigations conducted before formal investigation," but "[n]othing suggests that this amendment was an endeavor to rein in, rather than to confirm, by way of example, the broad

range of discovery authorized in 1964." *Intel*, 542 U.S. at 259.

## II. Factual and Procedural Background

### A. The contemplated proceeding before a foreign commercial arbitral tribunal

This case concerns respondent Luxshare's efforts to secure evidence to prove fraud claims that Luxshare will bring against petitioner ZF Automotive US Inc. ("ZF US," together with petitioners Dekker and Marnat, "ZF") before a commercial arbitral tribunal seated in Germany.

In August 2017, Hong Kong-based Luxshare paid approximately $1 billion to buy two business units from Michigan-based ZF US. JA-56–57 (¶¶ 3, 5), 65 (¶ 6). The parties entered into the German law-governed purchase agreement in Germany, and the transaction closed in Germany in April 2018. JA-57 (¶ 5), 61 (¶ 18), 93 (§ 20.10.1).

Luxshare later learned that ZF US had concealed material negative information from Luxshare. JA-58 (¶ 7), 61 (¶ 19), 76–82 (¶¶ 9–22). Michigan residents Dekker and Marnat, then senior officers of ZF US, participated directly in the due-diligence process and were aware of at least some of the undisclosed information. JA-62 (¶ 24), 66 (¶¶ 7–9), 76–77 (¶¶ 6–7), 80–81 (¶¶ 17, 20). ZF US's conduct violated the applicable German law and inflated the purchase price by hundreds of millions of dollars. JA-57 (¶ 5), 66–68 (¶¶ 10–14).

Disputes in connection with the purchase agreement are subject to arbitration in Munich, Germany under the Arbitration Rules of the German Institution of Arbitration e.V. (the "DIS Arbitration Rules"). JA-69 (¶ 18), 93 (§ 20.10.2). Luxshare

intends to pursue its claims before the agreed German-seated arbitral tribunal. JA-58 (¶ 8), 68 (¶ 14), 73 (¶¶ 28–30).

### B. The limited discovery ordered under 28 U.S.C. § 1782(a)

In October 2020, the district court authorized subpoenas pursuant to § 1782(a), to secure evidence pertaining to ZF US's fraud for use before the German-seated arbitral tribunal. Pet.App. 20a–21a; *see* JA-68 (¶ 14).

In May 2021, a magistrate judge granted in part and denied in part ZF's motion to quash the subpoenas. Pet.App. 22a–56a. The magistrate judge ruled that the arbitration agreement did not preclude § 1782 discovery, Pet.App. 42a–47a, and that the discretionary *Intel* factors did not require the denial of discovery, Pet.App. 30a–56a. But under the circumstances of this case, the *Intel* factors warranted significant limitations on the scope of discovery. Pet.App. 30a–56a. Luxshare may depose only one witness, Pet.App. 55a–56a, and document discovery has been limited by deleting portions of the requests, narrowing the timeframe, and restricting the universe of documents to be searched, Pet.App. 49a–55a. In July and August 2021, the district judge overruled ZF's objections to the magistrate judge's ruling, Pet.App. 1a–19a, and compelled compliance with the subpoenas as narrowed, Pet.App. 57a–69a. Although crucial to the arbitration, the "nonconfidential" discovery ordered here is "limited," even "minimal," JA-21, 24, compared with domestic U.S. discovery, as the court of appeals recognized.

To make this a better vehicle to address the statutory question, ZF "affirmatively" and "definitively" "abandoned" all objections to the

district court's orders, save for the argument that § 1782(a) excludes commercial arbitral tribunals. Reply Br. filed Nov. 1, 2021 at 2, 7 & n.2. After staying the district court's orders, this Court granted certiorari before judgment.

## SUMMARY OF ARGUMENT

I. Enacted in 1964, § 1782(a) authorizes discovery for use "in a foreign or international tribunal." This Court should affirm because the German-seated commercial arbitral tribunal that will adjudicate Luxshare's fraud claim against ZF US is a foreign tribunal within § 1782(a).

A. The statutory phrase "foreign or international tribunal" encompasses a commercial arbitral tribunal seated in another country. *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 717–31 (6th Cir. 2019). Such a tribunal is "foreign" because it is attached to, situated in, and subject to the foreign jurisdiction and its laws, which regulate the tribunal's proceedings and govern vacatur of its award.

A commercial arbitral tribunal is also a "tribunal" within the ordinary meaning of that term, as evidenced by dictionaries and longstanding usage by this and other courts. The liberalizing 1964 amendment to § 1782 deleted the language that historically authorized assistance limited to "judicial" proceedings before a foreign "court," thereby ruling out the narrower dictionary meaning of tribunal as a synonym for court.

B. The statutory context confirms that a foreign commercial arbitral tribunal is a foreign tribunal within § 1782(a). *See Abdul Latif*, 939 F.3d at 722–26. Congress used "tribunal" to extend

assistance to bodies exercising quasi-judicial functions and powers. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246–47, 255, 257–58 (2004). Commercial arbitral tribunals fit comfortably into the *Intel* quasi-judicial paradigm because they render impartial adjudications that are binding under national and international law and that are subject to judicial review.

C. Nothing in the statutory text, context, or structure limits § 1782(a) to some subset of foreign-*governmental* tribunals—a fuzzy grouping that, as articulated by ZF, would extend beyond courts but stop somewhere short of commercial arbitral tribunals. Because of the crucial role that national law and courts play in commercial arbitration, the Fourth Circuit concluded that, even if § 1782(a) were limited to tribunals exercising government-conferred authority, commercial arbitral tribunals would qualify. *See Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209, 213–14 (4th Cir. 2020).

In any event, Congress did not limit § 1782(a) to foreign-governmental tribunals. The statute is not limited to the tribunals "of" a foreign country, which is how Congress typically limits its enactments to foreign-governmental tribunals. And even if "international tribunal" connotes multilateral bodies such as the International Court of Justice or International Criminal Court, § 1782(a) encompasses "*foreign or* international tribunals." A commercial arbitral tribunal seated in another country is a foreign tribunal.

The text and context show that the 1964 statute did not use foreign tribunal as shorthand for foreign-governmental tribunal. "Foreign" does not ordinarily connote foreign-governmental, as when used to refer

to foreign films, foreign cars, or foreign cuisine. Much like a foreign corporation, a foreign commercial arbitral tribunal is a non-sovereign body that is attached or subject to another jurisdiction. And the same 1964 statute enacted 18 U.S.C. § 1391, using the phrase "foreign documents" to mean documents located overseas. But when it enacted 28 U.S.C. § 1741, the 1964 statute used the phrase "record or document *of a foreign country*" to mean foreign-*governmental* documents. Section 1782(a) applies to foreign tribunals broadly, not just to the tribunals "of" a foreign country.

Nothing else in the 1964 statute supports importing an extratextual "governmental" limiter into § 1782(a). The "practice and procedure" language in § 1782(a) "imposes no substantive limitation on the discovery to be had." *Intel*, 542 U.S. at 260 n.11. Sections 4 and 8 of the 1964 statute (28 U.S.C. §§ 1696 and 1781) also do not show that Congress used foreign tribunal to mean foreign-governmental tribunal. The liberalizing 1964 statute does not disqualify a tribunal from using *any* of the various forms of assistance unless it is immediately capable of using *all* of them. In any event, a commercial arbitral tribunal could seek assistance under §§ 1696 and 1781 by, for example, requesting issuance and service of a § 1782(a) subpoena.

II. There is no need to resort to legislative history here because the statutory text, context, and structure show that § 1782(a) encompasses foreign commercial arbitral tribunals. But if consulted, the legislative history confirms the inclusion of foreign commercial arbitral tribunals.

Contrary to the notion that Congress was focused only on extending comity to foreign-governmental

tribunals, the 1964 statute was a response to the post-war explosion in cross-border commerce, and to the resulting proliferation in cross-border commercial disputes. By 1964, commercial arbitration was a significant and favored part of the cross-border commercial-dispute resolution infrastructure. The 1925 Federal Arbitration Act ("FAA") reversed the historical judicial antipathy towards arbitration, and courts were enforcing foreign arbitral awards even before the United States ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The United States' delayed ratification of the New York Convention reflected a technical concern about its consistency with domestic law, not a national anti-cross-border-commercial-arbitration animus.

Historical materials that long pre-date the 1964 statute and that do not reflect its terms provide no basis to limit § 1782(a) to governmental tribunals. And the Second Circuit—later followed by the Fifth and Seventh Circuits—erred by deeming § 1782(a) ambiguous, and by determining that it excludes commercial arbitral tribunals because the legislative history does not expressly reference them. Congress uses broad language—as in § 1782(a)—to effect broad coverage, not to invite judicial ad hoc exceptions.

III. A rational Congress could have made the policy decision indicated by the text, context, and structure of § 1782(a)—to extend assistance to foreign commercial arbitral tribunals. A parade of overstated policy problems provides no justification to read in extratextual limitations.

A. Far from undermining its benefits, § 1782(a) promotes cross-border commercial arbitration. In the cross-border commercial context,

arbitration is favored, not so much because it is fast or inexpensive, but because it provides a flexible process before a neutral tribunal and yields a widely-enforceable award. And it is misconceived to think that cross-border commercial arbitration and discovery do not go together, given that the rules of most commercial arbitration institutions provide for or contemplate pre-hearing discovery. At the same time, § 1782(a) does not import U.S.-style discovery into arbitration. Here, the district court ordered nonconfidential discovery that is crucial to the arbitration, but that is limited, even minimal compared with U.S. discovery.

Parties that do not want § 1782(a) discovery are free to preclude it in their arbitration agreements. But the categorical exclusion of commercial arbitral tribunals from § 1782(a) would preclude discovery that the parties and the tribunal agree is essential to do justice.

Corroborating that § 1782(a) does not threaten the benefits of cross-border commercial arbitration, no major commercial arbitral institution has amended its rules to preclude § 1782(a) discovery, and none has appeared before this Court to advocate for a categorical exclusion.

B. The assistance that § 1782(a) provides to foreign commercial arbitral tribunals does not conflict with § 7 of the FAA. *Intel* precludes such comparisons, *Intel,* 542 U.S. at 263, and there is no conflict because § 7 applies where § 1782(a) does not—to commercial arbitral tribunals seated in the United States. In addition, § 7 authorizes only compelled attendance at an arbitration hearing, not the pre-hearing discovery permitted by § 1782(a). What this shows is that Congress has authorized

broad pre-hearing discovery for foreign tribunals that it has not authorized for domestic arbitral *or judicial* tribunals, such as pre-filing discovery and requests by interested nonparties.

C. The theoretical burdens associated with § 1782(a) discovery do not warrant reading commercial arbitral tribunals out of the statute. Here as in *Intel*, the risk of a flood of § 1782(a) applications "seems more imaginary than real," and provides no basis to impose extratextual "categorical limits" on § 1782(a). *Intel*, 542 U.S. at 266 n.17. ZF's own authorities demonstrate that § 1782(a) cases are generally resolved quickly and with minimal judicial activity, and that the number of civil § 1782(a) applications is small (208 in 2017), with only about ten each year arising from commercial arbitrations.

The complaint that § 1782(a) imposes asymmetric burdens on U.S. businesses represents a challenge to Congress's policy decision to enact the statute, and it applies equally when assistance is sought for foreign judicial tribunals. It also overlooks that major U.S. businesses have used § 1782(a). Moreover, courts have demonstrated that they have ample tools to address potential problems, including requests that target U.S. law firms or that require the production of documents located overseas.

D. Finally, the United States has several routes to address the Government's policy concern that § 1782(a) discovery could be deleterious in the separate investor-state-arbitration context. Concern about the impact that § 1782(a) might have on investor-state arbitrations that did not exist in 1964 cannot justify reading commercial arbitral tribunals out of the statute.

## ARGUMENT

### I. The Statutory Text, Context, and Structure Show that 28 U.S.C. § 1782(a) Encompasses Foreign Commercial Arbitral Tribunals

The district court ordered targeted discovery for use in a commercial arbitration proceeding before an arbitral tribunal seated in Germany. In the words of the statute, this is evidence "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a).

#### A. The Ordinary Meaning of "Foreign or International Tribunal" Includes Foreign Commercial Arbitral Tribunals

The parties agree that the "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); *see* Brief for petitioners ("Br.") at 17–18. An arbitral tribunal seated in another country is "foreign" within the ordinary meaning of that term now, and in 1964 when § 1782(a) was enacted: "[o]f, relating to, or involving another country" or "another jurisdiction," *Black's Law Dictionary*, s.v. foreign, at 790 (11th ed. 2019); "[s]ubject to the jurisdiction of another political unit," *American Heritage Dictionary of the English Language*, s.v. foreign, at 514 (1969) ("*American Heritage*"); "belonging or attached to another jurisdiction," "subject to another jurisdiction," *Black's Law Dictionary*, s.v. foreign, at 775 (rev. 4th ed. 1968); or "situated outside a place or country," *Webster's Third New International Dictionary*, s.v. foreign, at 889 (1961) ("*Webster's Third*").

1. A commercial arbitral tribunal seated in another country is "foreign" because it is "attached

to" that country, is "situated" there, and is "subject to" that jurisdiction and its laws. The law of the seat, comprising the "national arbitration legislation (and judicial decisions) of the arbitral seat[,] will almost always provide the procedural law of the arbitration," governing "both the 'internal' procedural conduct of the arbitral proceedings and the 'external' relationship between the arbitration and national courts." Gary B. Born, *International Commercial Arbitration* 1650 (3d ed. 2021) ("Born"); *see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291–92 (5th Cir. 2004). For example, German law requires that German-seated arbitral tribunals provide equal treatment and due process. JA-100–01 (¶¶ 6–8); *see* German Code of Civil Procedure ("GCCP") § 1042; DIS Arbitration Rules, art. 21.4 ("The arbitral tribunal shall apply all mandatory provisions of the arbitration law applicable at the seat of the pending arbitration."). The law of the arbitral seat also governs vacatur of an award, and the courts of the arbitral seat have exclusive jurisdiction to entertain a vacatur proceeding. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 22–23 (2d Cir. 1997).

2. A commercial arbitral tribunal is also a "tribunal" within the present and past ordinary meaning of that term, as confirmed by dictionaries, judicial opinions, and other legal sources. *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 719–22 (6th Cir. 2019).

*Dictionaries*. Commercial arbitral tribunals are encompassed by the ordinary meaning of "tribunal," which includes: "[a] court of justice or other adjudicatory body," *Black's Law Dictionary*, s.v. tribunal, at 1814 (11th ed. 2019); "a court or forum of

justice: a person or body of persons having to hear and decide disputes so as to bind the parties," *Merriam-Webster's Dictionary of Law*, s.v. tribunal, at 498 (1996); "[a] seat or court of justice" or "[a]nything having the power of determining or judging," *American Heritage*, s.v. tribunal, at 1369; and "a person or body of persons having authority to hear and decide disputes so as to bind the disputants," "something that decides or judges," *Webster's Third*, s.v. tribunal, at 2441.

*Judicial usage*. This Court has long used "tribunal" to reference commercial arbitral tribunals, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 n.12, 627, 630–31, 633–34 & n.18, 636–38 & n.19 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 121 n.1 (1924) (quoting *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845) (Story, J.)), as well as other contractual arbitral tribunals, *see Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) (union-jurisdictional dispute); *N.L.R.B. v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 580 (1961) (same); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (employment-contract arbitration). Likewise, in the era when § 1782(a) was enacted and for decades before, federal appellate courts and state supreme courts used "tribunal" to mean commercial arbitral tribunals.[1]

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[1] *See, e.g., U.S. Wrestling Fed'n v. Wrestling Div. of AAU, Inc.*, 605 F.2d 313, 317, 322 (7th Cir. 1979); *Am. Airlines, Inc. v. Louisville & Jefferson Cnty. Air Bd.*, 269 F.2d 811, 816, 821 (6th

*Other usage*. Other sources corroborate that, by 1964, "tribunal" was a term long-associated with commercial arbitral tribunals, such that the notion that a commercial arbitral tribunal is not a § 1782(a) tribunal "strikes most international arbitration practitioners as odd to the point of absurdity," Born, *supra*, at 2586. For decades, foreign and domestic commercial arbitral bodies have referred to the arbitrators as the "tribunal." *See, e.g.*, ICC Rules of Conciliation and Arbitration, arts. 2.4, 2.6, 19 (1975); ICC Rules of Arbitration, arts. 7.2, 24 (1955); Commercial and Labor Arbitration Rules of the American Arbitration Association, art. 2 (1948); Canadian-American Commercial Arbitration Commission Rules, art. 8 (1943); Arbitration Rules of the German Chamber of Commerce in Buenos Aires, arts. 2, 4–5 (1925).

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Cir. 1959); *Kanmak Mills, Inc. v. Soc'y Brand Hat Co.*, 236 F.2d 240, 251–52 (8th Cir. 1956); *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953); *Mut. Ben. Health & Acc. Ass'n v. United Cas. Co.*, 142 F.2d 390, 394 (1st Cir. 1944); *Cal. Prune & Apricot Growers' Ass'n v. Catz Am. Co.*, 60 F.2d 788, 790 (9th Cir. 1932); *Campbell v. Campbell*, 44 App. D.C. 142, 151, 153, 154a–54b (D.C. Cir. 1915); *Eyre-Shoemaker, Inc, v. Buffalo, R & P R Co*, 193 F. 387, 389 (3d Cir. 1912); *Hennen v. St. Paul Mercury Ins. Co.*, 250 N.W.2d 840, 841–845 (Minn. 1977); *Siegel v. Lewis*, 358 N.E.2d 484, 485 (N.Y. 1976); *E. Eng'g Co. v. Ocean City*, 167 A. 522, 523–24 (N.J. 1933); *Dworkin v. Caledonian Ins. Co.*, 226 S.W. 846, 848 (Mo. 1920); *Dickie Mfg. Co. v. Sound Constr. & Eng'g Co.*, 159 P. 129, 132–33 (Wash. 1916); *Jones v. Enoree Power Co.*, 75 S.E. 452, 454 (S.C. 1912); *Henry v. Lehigh Valley Coal Co.*, 64 A. 635, 636 (Pa. 1906); *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904); *Bartlett v. L. Bartlett & Son Co.*, 93 N.W. 473, 477–78 (Wis. 1903); *Hartford Fire Ins. Co. v. Hon*, 92 N.W. 746, 748 (Neb. 1902); *In re Curtis-Castle Arb.*, 30 A. 769, 771–72 (Conn. 1894); *Brush v. Fisher*, 38 N.W. 446, 447–48 (Mich. 1888); *Bumpass v. Webb*, 4 Port. 65, 70 (Ala. 1836).

Similarly, the Geneva Treaties, signed by dozens of other nations to facilitate the enforcement of commercial arbitral agreements and awards, used "tribunal" to refer to the arbitrators. *See* Geneva Convention on the Execution of Foreign Arbitral Awards arts. 1(c), 2, Sept. 26, 1927, 92 L.N.T.S. 301; Geneva Protocol on Arbitration Clauses art. 2, Sept. 24, 1923, 27 L.N.T.S. 157.

Commentators, too, have long used "tribunal" to reference commercial arbitral tribunals. *See, e.g.*, Am. Arb. Ass'n, Administration of Commercial Arbitration under the Code of Arbitration Practice and Procedure of the American Arbitration Tribunal, Supp. No. 1, Report for 1926–1931, at 9–10 (Frances Kellor ed., 1932); Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 Yale L.J. 147, 151 n.15 (1921) (quoting *Scott v. Avery*, 5 H.L. Cas. 811, 843 (1856) (Coleridge, J., dissenting)); Joseph Story, *Commentaries on Equity Jurisprudence* § 1463, at 689 (Little, Brown, & Co. 9th ed. 1866).

3. ZF misses the mark with expressions of incredulity that Congress could have intended § 1782(a) to encompass commercial arbitral tribunals. *See* Br. at 3, 5, 15, 32, 36–37, 42–43. Point II *infra* demonstrates that, contrary to ZF's "selective tour through the legislative history," *Food Mktg. Inst.*, 139 S. Ct. at 2364, there is no support for the notion that the 1964 Congress "disfavored" transnational commercial arbitration, Br. at 40, or that it was "focused" only on extending "comity" to foreign governments, Br. at 31; *see also id.* at 3, 6, 15, 48–49; United States Amicus Br. ("Gov't Br.") at 2, 20, 22, and therefore intended only a "measured expansion" of § 1782(a) to encompass certain foreign-governmental tribunals that purportedly were "of concern" at the time, *id.* at 20.

Moreover, arguments to limit § 1782(a) by divining Congress's dislikes, focuses, and concerns are "relic[s] from a bygone era of statutory construction." *Food Mktg. Inst.*, 139 S. Ct. at 2364 (quotation marks omitted). We are governed by "the provisions of our laws rather than the principal concerns of our legislators." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Therefore, this Court does not "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have intended." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (quotation marks omitted); *cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1751 (2020) (declining to limit another 1964 statute based on "cynicism that Congress could not *possibly* have meant to protect a disfavored group").

Although investment-treaty arbitration did not exist in 1964, *see* Gov't Br. at 13, 30–31, *commercial* arbitration was by then a well-established, popular way to resolve cross-border commercial disputes, *infra* at 33–34. There is no reason, then, to suppose that Congress would have been surprised by the application of § 1782(a) to commercial arbitral tribunals, especially as facilitating cross-border-commercial-dispute resolution was a driving force behind the 1964 amendment. *Infra* at 32–33. But "[e]ven if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). There is no "elephants-in-mouseholes" issue, Br. at 37, as the breadth of § 1782(a) is patent from its text, context, and history. Congress uses broad language to "produce general coverage—not to leave room for courts to recognize ad hoc exceptions."

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012).

The Government is wrong that Luxshare urges a "clear-statement rule," calling for "the broadest possible meaning of 'tribunal' unless Congress unambiguously rejected it." Gov't Br. at 33. It is ZF and the Government that advocate a plain-statement rule—that arbitral tribunals are excluded unless Congress expressly references them. Their approach is consistent with no principle of statutory interpretation, and its anti-arbitral-tribunal bent cannot be squared with the "emphatic federal policy in favor of arbitral dispute resolution" that "applies with special force in the field of international commerce," *Mitsubishi Motors Corp.*, 473 U.S. at 631.

ZF and the Government are correct that some historical dictionaries defined "tribunal" narrowly as a synonym for court. *See, e.g.*, *Oxford English Dictionary*, s.v. tribunal, at 341 (1933, reprinted 1961) ("court" or "judicial assembly"); *see also* Br. at 18; Gov't Br. at 15–16. But that narrow definition—even if "textually permissible"—is ruled out here by the "broader statutory context." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 231–32 (2014). Although ZF would like to anchor § 1782(a) to its "statutory antecedents," Br. at 31, the 1964 statute deleted the language that previously limited § 1782 to "judicial" proceedings in a "court," *see supra* at 3, precisely to "ensure that 'assistance is not confined to proceedings before conventional courts,'" *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249 (2004) (quoting S. Rep. No. 88-1580, at 7–8 (1964); H.R. Rep. No. 88-1052, at 9 (1963)). To give that amendment "real and substantial effect," *United States v. Quality Stores, Inc.*, 572 U.S. 141, 148 (2014), "tribunal" must be given the broader of its ordinary meanings, which

encompasses commercial arbitral tribunals, *supra* at 13–16.

### B. The Statutory Context Confirms that a Foreign Commercial Arbitral Tribunal Is a Foreign Tribunal Within § 1782(a)

The statutory context confirms what is apparent from the text—that a foreign commercial arbitral tribunal is a § 1782(a) tribunal. Over the course of the twentieth century, Congress substantially broadened discovery assistance for foreign proceedings. *See Intel*, 542 U.S. at 247–49; *see also supra* at 2–4. In 1948 and 1949, Congress eliminated the foreign-government-interest limitation, broadening the coverage first to "any civil action," and then to "any judicial proceeding." *Supra* at 2. The 1964 statute continued the liberalization, eliminating the requirement that the proceeding be a "judicial" one pending in a "court in a foreign country," and broadly authorizing discovery for use before any "foreign or international tribunal." *Supra* at 3.

Leaving the reach of § 1782(a) "unbounded by categorical rules," *Intel*, 542 U.S. at 263 n.15, Congress employed "tribunal" to extend assistance broadly to all "administrative and quasi-judicial proceedings abroad," *id.* at 258 (citing S. Rep. No. 88-1580, at 7–8); *see also id.* at 249. Therefore, in *Intel*, this Court concluded that the European Commission was a "tribunal" because it exercised quasi-judicial functions and powers. *See id.* at 246–47, 255, 257–58.

Commercial arbitral tribunals fit comfortably within the *Intel* quasi-judicial paradigm. Like the Commission, a commercial arbitral tribunal acts as a "first-instance decisionmaker," *id.* at 246–47, 258, in a "proceeding that leads to a dispositive ruling," that is "reviewable in court," *id.* at 255, 258. These

characteristics limit the reach of "tribunal," and dispel the notion that if § 1782(a) encompasses commercial arbitral tribunals then it must also encompass such groups as "football referees discussing a penalty on the pitch," Gov't Br. at 17; *see also id.* at 14, 33, Facebook's Oversight Board, and "countless others," Br. at 19–20.

A commercial arbitral tribunal's ruling is "dispositive," *Intel*, 542 U.S. at 255, because it is "final and binding," not just as a matter of contract, *see, e.g.*, DIS Arbitration Rules art. 38, but *as a matter of law*, *see, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 21 U.S.T. 2517 ("New York Convention") (contracting states "shall recognize arbitral awards and enforce them . . ."); 9 U.S.C. §§ 9, 207, 304 (requiring confirmation of foreign and domestic awards); GCCP §§ 1055 ("arbitration award has the effect of a final and binding judgment handed down by a court"), 1060–61 (addressing recognition and enforcement of domestic and foreign arbitral awards); English Arbitration Act 1996 ("EAA") §§ 66(1), 101(2) (foreign and domestic awards enforceable like "a judgment or order of the court to the same effect").

Commercial arbitral awards are also subject to two layers of judicial review. *Cf. Intel*, 542 U.S. at 254–55, 257 (noting the "limited" judicial review of the Commission's final actions). The courts of the arbitral seat may vacate an award, *supra* at 13, on the grounds provided by the law of the seat, *see* GCCP § 1059; 9 U.S.C. § 10; EAA §§ 67–69; *see, e.g., Commonwealth Coatings Corp.*, 393 U.S. at 147–50 (arbitrator's failure to disclose interest warranted vacatur). And a commercial arbitral award is subject to further review in any other jurisdiction where

enforcement is sought. *See* GCCP § 1061; 9 U.S.C. § 207; EAA §§ 99–104; *see, e.g.*, *CEEG* (*Shanghai*) *Solar Sci. & Tech. Co., Ltd v. LUMOS LLC,* 829 F.3d 1201, 1206–08 (10th Cir. 2016) (inadequate notice of the arbitration warranted denial of enforcement).

Courts have long recognized that commercial arbitral tribunals exercise quasi-judicial functions and powers. "Arbitrators are judges chosen by the parties to decide the matters submitted to them." *Burchell v. Marsh*, 58 U.S. 344, 349 (1854). A commercial arbitral proceeding bears the core hallmarks of a judicial or quasi-judicial proceeding—a binding decision rendered by an impartial tribunal based on evidence adduced in the proceeding. *See* DIS Arbitration Rules, arts. 9, 28–29, 38; *see also Morgan v. United States*, 298 U.S. 468, 480 (1936) (proceeding involving "the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings" is "frequently described as a proceeding of a quasi judicial character"). "Because the role of an arbitrator is functionally equivalent to that of a judge," *Lanza v. Fin. Indus. Regul. Auth.*, 953 F.3d 159, 163 (1st Cir. 2020), arbitrators enjoy quasi-judicial immunity, *see id.*; *see also Cahn v. Int'l Ladies' Garment Union*, 311 F.2d 113, 114 (3d Cir. 1962) (arbitrators' "quasi-judicial duties" support quasi-judicial immunity).

### C. Nothing in the Statutory Text, Context, or Structure Limits § 1782(a) to Some Subset of "Governmental" Tribunals

There is no basis to "arbitrarily *constrict*" § 1782(a) by adding a governmental limiter that is "found nowhere in its terms." *Food Mktg. Inst.*, 139 S. Ct. at 2366 (emphasis in original). The argument that

commercial arbitral tribunals fall outside of § 1782(a) because they are insufficiently "governmental" fails for two principal reasons: it mischaracterizes the nature of commercial arbitration, and it lacks any basis in the text, context, and structure of § 1782(a).

As a threshold matter, ZF is wrong to characterize commercial arbitral tribunals as "purely private" creatures, Br. at 14; *see also id.* at 3, 17–19, 26–27, that have "no government or treaty involvement whatsoever," *id.* at 26–27; *see also id.* at 3, whose "authority derives *solely* from the contractual agreement or private parties rather than any government," *id.* at 19 (emphasis added), and that "involv[e] *only* private parties and non-state adjudicators," *id.* at 18 (emphasis added); *see also* Gov't Br. at 12–15, 18, 23–26.

Although party consent is essential, "the ultimate efficacy of an international arbitration agreement depends in large part upon its validity and enforceability in national courts, applying rules of national and international law." Born, *supra*, at 256. Courts applying national and international law play a vital role in regulating commercial arbitration tribunals and in recognizing and enforcing their awards. *Supra* at 13. Courts also routinely deploy their sovereign authority in aid of commercial arbitration, including by enforcing arbitration agreements—compelling arbitration, appointing arbitrators, and staying court proceedings. *See, e.g.*, 9 U.S.C. §§ 2–5; GCCP §§ 1032, 1035(4)–(5); EAA §§ 9, 17. Courts also issue interim measures, such as preliminary injunctions "to preserve the status quo and the meaningfulness of the arbitration process," *Toyo Tire Holdings of Americas Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 981 (9th Cir. 2010); *see also* GCCP § 1033; EAA § 44, and enforce interim

measures issued by the tribunal, *see, e.g.*, *Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310, 316–18 (S.D.N.Y. 2013); GCCP § 1041; EAA § 42. The indispensability of national laws and courts to commercial arbitration led the Fourth Circuit to conclude that, even if § 1782(a) is limited to tribunals exercising government-conferred authority, commercial arbitral tribunals qualify. *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209, 213–14 (4th Cir. 2020).

Nothing in the text, context, or history of § 1782(a) could justify limiting the statute to foreign arbitral tribunals that are *more* "governmental" than a commercial arbitral tribunal. Significantly, *Intel* held that the Commission was a tribunal due to its quasi-judicial functions and powers. *Supra* at 19. Contrary to ZF's conclusory assertions, Br. at 44–45, *Intel* did not treat the Commission's governmental-enforcement role as relevant to, much less determinative of, its tribunal status. *See Intel*, 542 U.S. at 255 & n.9 (rejecting contention that the Commission was akin to a prosecuting authority). The lack of any "governmental" qualifier in the statutory text is significant. As this Court observed when rejecting a foreign-discoverability limitation on § 1782(a): "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect." *Intel*, 542 U.S. at 260 (quotation marks omitted).

ZF also offers no limiting principle for its concept of a "governmental" tribunal, serving up instead a word salad of what might qualify, including: (a) "a court or other governmental adjudicative or quasi-adjudicative body convened to render justice," Br. at

19; (b) not just foreign courts, but "a somewhat broader range of *governmental* investigative and adjudicatory bodies," *id.* at 15 (emphasis in original); (c) "legal proceedings operating under the auspices of one or more sovereign governments," *id.* at 3; and (d) "all ordinary foreign courts, as well as other foreign governmental entities such as a French examining magistrate (juge d'instruction), the Japanese Patent Office, and the Korean Free Trade Commission, among countless others," *id.* at 22; *see also id.* at 3–4, 14, 16–17.

**1. "Tribunal" does not connote "governmental tribunal" generally or in § 1782(a)**

ZF offers no basis to conclude that any of its varied formulations has ever represented an ordinary meaning of tribunal. It identifies no dictionary that has ever defined tribunal broadly enough to mean "courts *and similar governmental bodies*," Br. at 18 (emphasis added); *see also id.* at 3, 14, 19, but narrowly enough to exclude commercial arbitral tribunals. The Government's contention that "tribunal" should mean governmental judicial and non-judicial adjudicators, *see* Gov't Br. at 12–17, 19, 21, 23–24, is similarly untethered.

The context of § 1782(a) rules out the narrower meaning of "tribunal," as a synonym for "court." *Supra* at 3, 18–19. Therefore, it is immaterial that, in the context of other statutes that are not at issue here, Congress used "tribunal" in its narrower sense. *See* Br. at 22–23. None of those other statutes uses the "foreign or international tribunal" phrase in § 1782(a). And unlike § 1782(a), those other statutes expressly reference the tribunals "of" a foreign country, or employ other language that squarely rules

out non-sovereign tribunals.[2] Congress's consistent use of limiting language to mean *governmental* tribunal demonstrates that "tribunal"—the term used in § 1782(a)—is not ordinarily limited to governmental bodies. ZF also misplaces its reliance on Congress's use, in several other statutes, of a phrase—"arbitral tribunal"—that it did not use in § 1782(a). Br. at 23 n.8.[3] Naturally, Congress would use that phrase when legislating about arbitral tribunals *only*, but that does not support ZF's request for a plain-statement rule that would exclude arbitral tribunals unless they are expressly included.

As the context shows that § 1782(a) is not limited to foreign courts, it is also immaterial that this Court has occasionally used "foreign tribunal" to refer to foreign courts. *See* Br. at 23–24. Foreign courts are

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[2] *See* 16 U.S.C. § 971c(b) ("court or tribunal of a foreign country"); 18 U.S.C. § 3190 ("the tribunals of the foreign country"); 19 U.S.C. § 4452(e), (f)(3) ("court, an administrative body, or other tribunal of a foreign country"); 22 U.S.C. § 7427(c)(3) ("courts or tribunals of any country"); 28 U.S.C. §§ 4101(3), 4102 ("court, administrative body, or other tribunal of a foreign country"); *see also* 22 U.S.C. § 6912(a)(5)(D), (a)(11) (concerning China's provision of tribunals that provide "fair and public hearings" in criminal and other cases); 28 U.S.C. § 2414 (judgment rendered by a "foreign court or tribunal" against the United States); Bankruptcy Act of 1938, Pub. L. No. 75-696, § 2, 52 Stat. 840, 842–43 (bankruptcy receivers may litigate before "any judicial, legislative, or administrative tribunal in any jurisdiction).

[3] *See* 16 U.S.C. § 973n; 22 U.S.C. §§ 290k-11, 1650a(a). Another statute's use of the phrase "action in a foreign court or international tribunal, or an arbitration," 5 U.S.C. § 552b(c)(10), Br. at 26 n.11, similarly does not show that foreign tribunal—a phrase not used in that statute—excludes foreign commercial arbitral tribunals.

foreign tribunals, but not all foreign tribunals are courts.

No basis exists for the suggestion that the 1964 amendment merely expanded § 1782(a) to cover more sovereign-affiliated tribunals, such as the International Court of Justice, the European Court of Human Rights, *see* Br. at 26, or, later, the International Criminal Court. Even if "international tribunal" connotes the resolution of disputes between sovereigns, § 1782 authorizes assistance, not only to an "international tribunal," but to a "*foreign or* international tribunal." 28 U.S.C. § 1782(a) (emphasis added). Limiting § 1782(a) to bodies adjudicating disputes between sovereigns would impermissibly render the "foreign or" language superfluous, *see Yates v. United States*, 574 U.S. 528, 543 (2015), denying "real and substantial effect," *Quality Stores, Inc.*, 572 U.S. at 148 (quotation marks omitted), to Congress's use of a different phrase ("foreign or international tribunal") than the phrases it employed in earlier statutes ("court" of a "foreign country" and "international tribunal or commission").

Finally, contrary to ZF's contention, *see* Br. at 22–23, Congress's use of the term "arbitrators" in the Federal Arbitration Act ("FAA"), forty years before it enacted § 1782(a), does not show that Congress uses "tribunal" to mean judicial tribunal but not arbitral tribunal. Just as Congress used "arbitrators" to refer to arbitral tribunals, it has used "judge" to refer to judicial tribunals. *See, e.g.*, 18 U.S.C. §§ 2518(1)–(3), (5)–(6), (8)–(10), 3060, 3184.

**2. "Foreign" does not connote "foreign governmental" generally or in § 1782(a)**

The Fourth Circuit has held that even if § 1782(a) were limited to tribunals exercising government-

conferred authority, commercial arbitral tribunals would qualify, because their authority and effectiveness depends on national laws and courts. *See Boeing Co.*, 954 F.3d at 213–14. But there is no such limitation. The term "foreign" cannot bear the weight that ZF seeks to place on it. Br. at 14, 20. "Foreign" does not usually connote a connection to a government, *supra* at 12, as when used to reference foreign films, foreign cars, or foreign cuisine. In ZF's selective examples it is the noun (leader, official, flag, and country) that brings the sovereign connotation. Tribunal does not connote a sovereign body as a matter of ordinary meaning, *supra* at 13–16, and certainly not in the context of the 1964 amendment, *supra* at 3, 18–19. "Foreign corporation" may offer a better analogy. Like a foreign arbitral tribunal, a foreign corporation is a non-sovereign body that is attached or subject to another jurisdiction. *Supra* at 12–13.

The statutory context also confirms that the 1964 statute did not use "foreign" as shorthand for "foreign governmental." In § 2 of the same statute, Congress used "foreign" to mean outside the United States, enacting 18 U.S.C. § 3491 to regulate the admissibility of "foreign documents," meaning any document "which is not in the United States." 1964 Act § 2, 78 Stat. 995. "[I]dentical words used in different parts of the same statute" presumptively "carry the same meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (quotation marks omitted). And when § 5 of the 1964 statute enacted 28 U.S.C. § 1741 to address the authentication of foreign *governmental* documents, it did so expressly by referencing the "official record or document *of a foreign country*." 1964 Act § 5, 78 Stat. 996 (emphasis added). Significantly, § 1782(a)

encompasses foreign tribunals, not just the tribunals of a foreign country.

### 3. Nothing else in the structure of the statute limits "tribunal" to foreign-governmental tribunals

Contrary to ZF's arguments, *see* Br. at 27–31, and contrary to the Seventh Circuit's decision in *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694–95 (7th Cir. 2020), no other aspect of the 1964 statute supports limiting § 1782(a) to foreign-governmental tribunals.

ZF mistakenly invokes Congress's purported "failure to identify a default set of procedures" for foreign commercial arbitrations. Br. at 28. Section 1782(a) includes both a default rule and the flexibility to order a procedure tailored to a particular ad hoc commercial arbitral proceeding. Absent some other order, § 1782(a) discovery is taken "in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a). Before 1964, that was the only permissible mode of taking § 1782 discovery, 28 U.S.C. § 1782 (1958), but the 1964 amendment introduced flexibility—a district court "*may* prescribe the practice and procedure, which *may* be in whole or in part the practice and procedure of the foreign country or the international tribunal," 28 U.S.C. § 1782(a) (emphases added). This "mode-of-proof-taking instruction imposes no substantive limitation on the discovery to be had." *Intel*, 542 U.S. at 260 n.11. The "permissive wording" of this "optional borrowing provision," *Abdul Latif*, 939 F.3d at 722, does not limit a district court to ordering use of the "established procedures" of a foreign country or a standing international tribunal. Gov't Br. at 18; *see* Br. at 27–28. Notably, many of the "governmental"

tribunals that ZF and the Government acknowledge are covered by § 1782(a) are ad hoc, and therefore, like commercial arbitral tribunals, lack fixed practices and procedures.[4]

ZF is also incorrect that §§ 4 and 8 of the 1964 statute (28 U.S.C. §§ 1696 and 1781) show that Congress used foreign tribunal to mean foreign-governmental tribunal. Br. at 28–31; *see also* Gov't Br at 18–19. As a threshold point, there is no support for the assumption that the "liberalizing" 1964 statute, *Intel*, 542 U.S. at 260 (quotation marks omitted), prohibits the provision of *any* of the various forms of assistance unless the putative tribunal is presently capable of using *all* of them, and *Intel* shows that there is no such all-or-nothing requirement, *see id.* at 257 n.10.

In any event, it is not clear that only a "governmental" tribunal could use the assistance provided by §§ 1696 and 1781. To be sure, letters rogatory are "matters of comity between governments," Br. at 29 (quotation marks omitted), but §§ 1696, 1781, and 1782(a) all refer to "a letter rogatory issued, *or request made*" by a tribunal. A tribunal that cannot issue a letter rogatory can instead make a "request." *See Abdul Latif,* 939 F.3d at 723.

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[4] Ad hoc "governmental" tribunals arbitrate disputes under, *inter alia*, civil aviation agreements, *see* Paul Stephen Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 Ga. J. Int'l Comp. L. 231, 234–35 (2004), and the United Nations Convention on the Law of the Sea, see John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 Cornell Int'l L. J. 109, 119–20 (1998).

Moreover, ZF mischaracterizes § 1781 with the argument that the State Department should not have to play "middleman" between two private entities. *See* Br. at 28–29. Nothing in the permissive language of § 1781 requires the State Department to act on any request. And § 1781 contemplates that a foreign tribunal may transmit its request "directly," 28 U.S.C. § 1781(b), and thus does not require State Department involvement. A foreign commercial arbitral tribunal might, for example, invoke § 1781 to seek assistance in transmitting a § 1782(a) request to a federal district court, or to request amicus assistance from the Department of Justice to ensure that a "prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," *Mitsubishi Motors Corp.*, 473 U.S. at 637.[5]

ZF fares no better with its argument based on § 1696, Br. at 30, which authorizes a district court to order service of "any document issued in connection with a proceeding in a foreign or international tribunal," 28 U.S.C. § 1696(a).[6] "[A]ny document" could hardly be broader, and might encompass, among other things, a § 1782(a) subpoena. ZF emphasizes the statutory caveat that service under

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[5] *See Achmea B.V. v. The Slovak Republic*, Case. No. 2008-13, Award on Jurisdiction, Arbitrability, and Suspension, ¶¶ 31–37, 154–70, 175–96 (Perm. Ct. Arb. Oct. 26, 2010) (tribunal invited and received written observations on EU law from the European Commission and from the Netherlands).

[6] As § 1696(a) "is not limited to service of *process*," *Intel*, 542 U.S. at 257 n.10 (emphasis in original), the Government is mistaken to endorse the Seventh Circuit's view that § 1696(a) must refer to governmental tribunals because "[s]ervice-of-process assistance" is a matter of "comity between governments," *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694 –95 (7th Cir. 2020); *see* Gov't Br. at 18–19.

§ 1696(a) does not entail recognition or enforcement of "a judgment, decree, or order rendered by a foreign or international tribunal." Br. at 30; *see also* Gov't Br. at 18. But if Congress wished to limit § 1782(a) to "governmental" tribunals, including this language in a caveat to a different section of the 1964 statute would be a "surpassingly strange manner of accomplishing that result." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 647 (2012). "[J]udgment, decree, or order" is apt to capture the breadth of the "any document" that may be served under § 1696(a), and *Intel* held that the Commission was a tribunal even though it issues "decision[s]" and "action[s]," 542 U.S. at 254–55, rather than decrees, judgments, or orders. In any event, an arbitral award may be described as a "decree" or a "judgment," *Univ. of Notre Dame* (*USA*) *in England v. TJAC Waterloo, LLC*, 861 F.3d 287, 290–94 (1st Cir. 2017) (Souter, J.), and commercial arbitral tribunals also issue "orders," s*ee, e.g.*, ICC Arbitration Rules (2021), arts. 28–29, 38; DIS Arbitration Rules, arts. 25, 27, 28.2, 31, 42.

## II. If Considered, the Legislative History Confirms that § 1782(a) Encompasses Foreign Commercial Arbitral Tribunals

There is no need to resort to legislative history here because the statutory text, context, and structure demonstrate that § 1782(a) encompasses foreign commercial arbitral tribunals. *See Food Mktg. Inst.*, 139 S. Ct. at 2364; *see also Intel*, 542 U.S. at 267 (Scalia, J., concurring) (declining to consider legislative history because "the Court's disposition is required by the text of the statute"). In any event, the legislative history confirms that foreign commercial arbitral tribunals are included.

1. It was the "growth of international commerce" that caused Congress to commission the review that culminated in the 1964 statute. *Intel*, 542 U.S. at 248. A 1952 Justice Department report noted the "unprecedented amount of litigation with international ramifications" resulting from the post-war "resumption of world-wide commerce and business." Report of the Honorable James. P. McGranery, *reprinted in* Report of the Judicial Conference of the United States at 38 (1952). Therefore, in 1958, Congress established the Commission on International Rules of Judicial Procedure ("Rules Commission") to modernize the "legal procedure necessary to settle commercial disputes" in light of this "expansion of international business activities." S. Rep. 85-2392, at 2 (1958) (cited in *Intel*, 542 U.S. at 248); *see* Act of Sept. 2, 1958, Pub. L. 85-906, 72 Stat. 1743–45.

Contrary to the notion that Congress was focused only on extending "comity" to sovereign tribunals, Br. at 3, 6, 15, 31, 48–49; Gov't Br. at 2, 20, 22, § 1782(a) was a response to this post-war commercial "international intercourse," S. Rep. 88-1580, at 2.[7] Congress's "twin aims" were to "provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects" and thereby to "invite foreign countries similarly to adjust their procedures." *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992) (quoting S. Rep. No. 88-1580, at 2).

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[7] As the Senate and House Reports are the same in material part, *see* S. Rep. 88-1580, at 1–20 (1964); H.R. Rep. 88-1052, at 4–19 (1963), this brief cites to the Senate Report only.

In § 1782(a), Congress pursued those aims by "clarify[ing] and liberaliz[ing] existing U.S. procedures for assisting foreign and international tribunals." S. Rep. 88-1580, at 7. "International" tribunals are the kinds of government-to-government tribunals, previously covered by 22 U.S.C. §§ 270–270g, that promote the "peaceful settlement of international disputes." *Id.* at 3–4, 8. And "foreign" tribunals are those previously subject to § 1782. Until 1964, § 1782 assistance was limited to "judicial" proceedings before the "court" of a "foreign country," but the 1964 amendment eliminated those limitations. *See id.* at 4, 7. Under § 1782(a), the same assistance is available whether the tribunal is "international" or "foreign," *id.* at 4, and "irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative or other nature," *id.* at 9.

Contrary to ZF's assertions, *see* Br. at 15, 40, by the second half of the twentieth century, commercial arbitration was a popular, well-established part of cross-border commercial-dispute resolution. "[A]rbitration has been an enduring feature of dispute resolution—both state-to-state and commercial—since the beginning of recorded history," Born, *supra*, at 66, and commercial arbitration has been widely used in this country since Colonial times, *see id.* at 40. Businesspeople have "particularly" used arbitration to resolve "their international disputes." *Id.* at 66; *see also id.* at 23. Two of today's most popular cross-border commercial-arbitration bodies were established in 1892 and 1923, respectively. *See id* at 196–97, 201–02.

No basis exists for the contention that, in 1964, the United States looked upon cross-border commercial arbitration with "disfavor[]," "skepticism," or

"hostility." Br. at 40–42. In 1925, Congress enacted the FAA to reverse a "judicial mistrust" of arbitration that had begun during the mid-nineteenth century, Born, *supra*, at 65–66; *see also id.* at 44–49, and with an eye to, *inter alia*, foreign commerce, 9 U.S.C. § 1. Even before the United States ratified the 1958 New York Convention, 21 U.S.T. 2517, foreign commercial arbitral awards were being enforced here under comity principles and under bilateral treaties. *See* Martin Domke, *The Settlement of Disputes in International Trade*, 1 U. Ill. L. F. 402, 412–14 (1959); *see, e.g.*, *Landegger v. Bayerische Hypotheken Und Wechsel Bank*, 357 F. Supp. 692, 694–95 (S.D.N.Y. 1972). And the United States' initial decision not to join the New York Convention reflected, not "hostility" towards cross-border commercial arbitration, Br. at 40, but rather a technical concern about the Convention's consistency with domestic law, *see* H.R. Rep. No. 91-1181, at 1 (1970). In 1968, President Johnson signed the New York Convention with "[v]irtually no opposition," and with the strong support of international business. *See* Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 128–29 (2018).

The scholarship of Professor Hans Smit, cited extensively in *Intel*, *see* 542 U.S. at 248–49 & nn.1, 3, 256–57, 258–59, 261–62 & nn.12–14, 264 & n.17, further confirms that § 1782(a) encompasses foreign commercial arbitration tribunals. Professor Smit was "the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782." *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.). He "drafted the report eventually submitted to the President and the Congress," Hans

Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 Am. Rev. Int'l Arb. 153, 154–55 (1997) ("Smit, American Assistance"), and recounted that "whether I incorporated the explanatory notes into my law review articles or in legislative history materials was determined by me," *id.* at 154. Shortly after the enactment of § 1782(a), and long before any dispute arose as to whether it encompassed foreign commercial arbitral tribunals, Professor Smit wrote that "tribunal" includes "investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1046, 1026–27 & n.71 (1965) (emphasis added) (cited in *Intel*, 542 U.S. at 258).[8]

2. ZF cannot limit § 1782(a) to "governmental" tribunals by citing materials that long predate the 1964 amendment and that do not reflect § 1782(a) as enacted. *See* Br. at 4–5, 15, 24, 26, 33–37. ZF misplaces its extensive reliance on a 1939 Draft Convention on International Judicial Assistance. *See* Br. at 24, 26, 33–34. That never-ratified document was merely a "starting point" for the Rules Commission's work. Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and A Program for Reform*, 62 Yale L.J. 515, 518 n.6 (1953). Crucially, as enacted in 1964, § 1782(a) omitted the draft Convention's carve-out for commercial arbitral

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[8] A reference in Professor Smit's 1962 law review article to international tribunals owing their existence and powers to international agreement, *see* Br. at 36, 42–43 & n.13, concerned a tribunal's authority to administer oaths, and "has nothing to do with" § 1782(a), Smit, American Assistance, *supra*, at 159.

tribunals and its express limitation to tribunals "created by the State or by a political subdivision thereof." Draft Convention on Judicial Assistance (Research in Int'l Law of the Harvard Law School), 33 Am. J. Int'l L. Sup. 11, 15, 36 (1939).

Jones's 1953 article also provides no sound basis to limit § 1782(a) as enacted a decade later. *See* Br. at 25. Even if a focus on "governmental" tribunals might have been consistent with Jones's 1953 view that treaties represented the "only practical method" to improve international practice, Jones, *supra*, at 550, the Rules Commission rejected that approach and drafted § 1782(a) as a component of "the reform and improvement of *domestic* practices," Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88, 88th Cong. (1963) ("1963 Report") at 9 (emphasis added).

ZF and the Government cannot demonstrate that § 1782(a) is limited to governmental tribunals by noting that the 1958 statute that created the Rules Commission referenced "quasi-judicial agencies," and that the Congressional Reports referenced "quasi-judicial agencies" and "investigating magistrates" as examples of covered tribunals. *See* Br. at 4, 8, 34–36; Gov't Br. at 20–21; *see also* S. Rep. No. 88-1580, at 7–8; 1963 Report at 45; Act of Sept. 2, 1958, Pub. L. 85-906, 72 Stat. 1743. The same error undermines the Second Circuit's ruling in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) ("*NBC*"), later followed by the Fifth and Seventh Circuits, *see Rolls-Royce PLC*, 975 F.3d at 694; *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881–82 (5th Cir. 1999).

What matters is the language of the statute that Congress enacted in 1964. *See Dorsey v. United*

*States*, 567 U.S. 260, 274 (2012). Section 1782(a) makes no reference to quasi-judicial agencies or investigating magistrates, and instead broadly encompasses all foreign tribunals. The Second Circuit was wrong to conclude that the breadth of § 1782(a) made the statute "ambiguous," *NBC*, 165 F.3d at 188, because if "a statute can be applied in situations not expressly anticipated by Congress," that demonstrates "breadth," not "ambiguity," *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). The Second Circuit compounded its error by searching the legislative history for evidence that the authors of the Congressional Reports had commercial arbitral tribunals specifically "in mind," *NBC*, 165 F.3d at 189, and by concluding, based on the references to magistrates and agencies, that they did not. *Id.*; *see also Biedermann*, 168 F.3d at 882 (seeking "contemporaneous evidence" that Congress "contemplated" commercial arbitral tribunals). Contrary to the faulty approach taken by the Second, Fifth, and Seventh Circuits, "silence in the legislative history" "cannot defeat the better reading of the text and statutory context," *Encino Motorcars, LLC*, 138 S. Ct. at 1143, and "examples set forth in the legislative history" do not limit the scope of a broadly-drawn statute, *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990).[9]

[9] Petitioners do not explain why it is pertinent that certain literature from the 1958–1970 period did not state that § 1782(a) encompasses commercial arbitral tribunals, Br. at 42, and they overlook Professor Smit's 1965 article, which said exactly that. *Supra* at 35.

## III. Misdirected, Ill-Founded Policy Arguments Provide No Basis to Exclude Foreign Commercial Arbitral Tribunals from § 1782(a)

The statutory text, context, and structure show that § 1782(a) encompasses foreign commercial arbitral proceedings, so ZF's "host of policy problems," Br. at 45–50, "is properly addressed to Congress, not this Court," *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). Because "a rational Congress could reach the policy judgment the statutory text suggests it did," ZF's "policy-talk" is beside the point. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

### A. The Availability of § 1782(a) Discovery Promotes Cross-Border Commercial Arbitration

The contention that § 1782 "undermine[s] many of the benefits" of commercial arbitration is misinformed. Br. at 49; *see also* Gov't Br. at 25; *NBC*, 165 F.3d at 190–91. Contrary to ZF's assumptions, Br. at 49–50, parties to cross-border commercial transactions favor arbitration because it provides a flexible process before a neutral tribunal, and, crucially, yields an award that is readily and widely enforceable. *See* Queen Mary Univ. of London & White and Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 7–8 (2019); *see also* W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 Am. Rev. Int'l Arb. 243, 251–52 (2010); Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, 16 Arb. Int'l 379, 382 (2000). To whatever extent speed and cost give domestic arbitration an advantage over domestic

court litigation, they are not significant differentiators in the cross-border commercial context. *See id.*

Also misconceived is the notion that discovery and commercial arbitration do not go together. Because "[t]he fair and commercially-sensible resolution of business disputes requires that tribunals decide the parties' claims in light of what the facts really are," Born, *supra*, at 2508, there is a "general consensus" in the commercial-arbitration world that pre-hearing discovery promotes "justice, as well as efficiency." *Id.* at 2520–21.[10] Increasingly, parties agree to the discovery procedures in article 3 of the International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules"). *See* Born, *supra*, at 2508; *see also* IBA Rules, art. 3 (Dec. 17, 2020). And although compelled *non*party discovery necessarily depends on national laws and courts, *see id.* at 2497–98, 2517–18, the rules of most commercial arbitration institutions rules authorize or, at a minimum, contemplate pre-hearing discovery. *See* Born, *supra*, at 2511–17 (collecting sources).

There is no basis for the conceit that § 1782(a) engrafts "full-blown pre-trial discovery" onto foreign arbitration proceedings. Br. at 47. Section 1782(a) is "much more limited," contemplating only discovery that is "'for use' in the proceedings before the tribunal." *Boeing Co.*, 954 F.3d at 214–15. Illustrating the point,

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[10] At least twenty-one states and the District of Columbia have adopted the Revised Uniform Arbitration Act of 2000, authorizing court-supported subpoena power to acquire nonparty discovery in commercial arbitrations. *See* Peter Jacobus, *et al.*, *Third Party Discovery Subpoenas in Arbitration Proceedings Under State Law: A Fifty State Survey*, 2.1 Am. J. Constr. Arb. & ADR (AJCA) 71, 74 (2019).

the district court here permitted "nonconfidential" discovery that, although crucial to the arbitration, is "limited," even "minimal," compared with domestic U.S. discovery. *Supra* at 5. Indeed, "courts generally exercise considerable restraint, granting access to requested information only in limited circumstances when the grant is consistent with the tribunal's receptivity to the information." *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* § 3.5 Reporter's Note b. (Am. Law. Inst., Proposed Final Draft 2019).

However, arbitration is based on consent, *see Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019), so parties that do not want § 1782(a) discovery are free to preclude it in their arbitration agreement. "The FAA requires courts to enforce arbitration agreements according to their terms," including provisions that set the ground rules for the arbitration. *Id.* at 1417 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018)). Agreements not to seek discovery are enforceable, based on the "general, and undisputed, principle of party autonomy in procedural matters." Born, *supra*, at 2598–99. ZF's arguments for a categorical exclusion of commercial arbitral tribunals from § 1782(a) would turn the party-autonomy principle on its head, precluding § 1782(a) discovery that the parties and tribunal agree is necessary to do justice. This Court has hinted in dicta that a complete absence of discovery—as distinct from the "reduced discovery" typically available in arbitration—might render arbitration inadequate to vindicate a federal claim. *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

No one is more incentivized to safeguard the benefits of cross-border commercial arbitrations than the arbitral institutions that earn fees to administer

them. *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 Vand. J. Transnat'l L. 79, 98 (2000) ("Administering institutions compete fiercely as to the fees they charge for their services as well as to the procedures followed in the arbitrations they administer."). Those "institutions consult widely with users of the rules so that the rules as promulgated best meet the needs of their customers." *Id.* at 101. It is telling, then, that no major institution has amended its rules to bar § 1782(a) discovery, even though courts have been granting § 1782(a) discovery for use before foreign arbitral tribunals for at least fifteen years. *See* Born, *supra*, at 2587 n.478 (collecting cases). To the contrary, "[i]nstitutional arbitration rules virtually never exclude judicial assistance" with discovery. *Id.* at 2598–99.[11]

Perhaps even more telling, no arbitral institution has appeared before this Court to argue that § 1782(a) excludes commercial arbitral tribunals. Of the two that have appeared, one supports the Sixth Circuit's ruling that § 1782(a) encompasses commercial arbitral tribunals, *see* Amicus Curiae Br. for the International Arbitration Center in Tokyo, at 3–4, 12, 24, and the other urges only that, once a tribunal has been constituted, its views should be accorded great deference in the discretionary *Intel* analysis, *see* Amicus Curiae Br. for the International

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[11] A party to an arbitration conducted under London Court of International Arbitration Rules ("LCIA Arbitration Rules") must obtain the consent of all parties before requesting judicial relief that the tribunal could also grant. *See* LCIA Arbitration Rules, art. 22.2 (2020). The LCIA Arbitration Rules do not preclude (a) a request for judicial relief by the tribunal, or (b) a party's request for judicial relief that the tribunal could not grant, such as nonparty discovery.

Court of Arbitration of the International Chamber of Commerce, *et al.*, at 5–6.[12]

### B. There Is No Conflict Between § 1782(a) and § 7 of the Federal Arbitration Act

There is no merit to the argument that § 1782(a) must exclude foreign commercial arbitral tribunals to avoid an "inconceivable" "conflict" or "bizarre asymmetry" with the assistance that § 7 of the FAA, 9 U.S.C. § 7, provides to domestic arbitral tribunals. Br. at 4, 37–40, 43; *see* Gov't Br. at 25–27.

As a threshold matter, and as the Fourth and Sixth Circuits recognized, this argument is precluded by *Intel*'s rejection of any requirement "that United States law would allow discovery in domestic litigation analogous to the foreign proceeding." *Intel*, 542 U.S. at 263; *see also Abdul Latif*, 939 F.3d at 728–29; *Boeing Co.*, 954 F.3d at 216.[13]

Moreover, as the Government aptly observed in *Intel*, asking "whether a federal court could order production of analogous materials if an analogous proceeding were taking place in the United States" "sheds little light on the meaning of Section 1782 because Section 1782 would expressly not apply in that situation." Brief for the United States as Amicus Curiae Supporting Affirmance at 25, *Intel*, 542 U.S. 241 (No. 02-572). Just so here. In the commercial-arbitration context, § 7 of the FAA applies where § 1782(a) does not—to tribunals seated in the United

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[12] ZF has abandoned its objections to, *inter alia*, the district court's weighing of the *Intel* factors. *Supra* at 5–6.

[13] The Seventh Circuit held post-*Intel* that § 1782(a) must be interpreted not to apply to commercial arbitral tribunals to avoid a "serious conflict" with § 7, *Rolls-Royce PLC*, 975 F.3d at 695–96, but it overlooked that *Intel* precludes such comparisons.

States. *See Wash. Nat'l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 139 (2d Cir. 2020); *see also Boeing Co.*, 954 F.3d at 215 (§ 7 gives "American arbitrators" the benefit of subpoenaed evidence).[14]

And the particular "conflict" alleged here sheds no light on matters for the additional reason that it rests on a misunderstanding of § 7. No § 1782(a) analogue authorizes pre-hearing discovery for use before a domestic arbitral or judicial tribunal. Enacted in 1925, more than a decade before pre-trial discovery became part of federal civil litigation, *see Hickman v. Taylor*, 329 U.S. 495, 500–51 (1947), § 7 addresses a different subject—compelling witnesses to attend hearings before arbitral tribunals seated in the United States. *See Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158–61 (11th Cir. 2019) ("§ 7 does not permit pre-hearing depositions and discovery from non-parties"). Section 7 is comparable to a federal trial subpoena, with comparable geographical limitations. *See* Fed. R. Civ. P. 45(c)(1); Br. at 39.

What ZF and the Government label "asymmetry" reflects a choice by Congress to authorize courts to grant broad discovery—including pre-filing discovery and discovery requested by interested nonparties—for use in foreign proceedings that it has not authorized in the context of domestic arbitral *or judicial* proceedings. Far from being "inconceivable," Br. at 4, such choices are patent on the face of § 1782(a) and promote Congress's goals in enacting the statute. *Supra* at 33. And the availability of those tools in the foreign-commercial-arbitration context is

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[14] Petitioners note that Chapter 1 of the FAA, which includes § 7, generally applies to some foreign-seated arbitrations, Br. at 43; *see* 9 U.S.C. §§ 208, 307, but § 7 is limited on its face to tribunals seated in the United States.

consistent with the especially strong pro-arbitration policy in the context of international-commercial disputes, even if "a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp.*, 473 U.S. at 631.

### C. Overstated Burdensomeness Concerns Do Not Warrant Extratextual Limitations on § 1782(a)

The "raw consequentialist calculation[s]" inherent in ZF's remaining "policy problems," Br. at 45, *see id.* at 45–50, do not authorize this Court to second-guess Congress's policy judgment to authorize broad assistance to foreign tribunals. *Niz-Chavez*, 141 S. Ct. at 1486. The purported problems are overstated, and, for the most part, they apply equally when assistance is sought for foreign *judicial* tribunals.

1. ZF posits that district courts are already "struggl[ing] to cope with an explosion of litigation over Section 1782," and that "the floodgates" will surely burst if this Court interprets § 1782(a) to encompass foreign arbitral tribunals. Br. at 45–47. But "it is not the province of this Court to rewrite the statute to" avoid a "flood" of federal-court filings. *Artuz v. Bennett*, 531 U.S. 4, 10 (2000). And here, as in *Intel*, a concern that "seems more imaginary than real" provides no basis to impose extratextual "categorical limits" on § 1782(a). *Intel*, 542 U.S. at 266 n.17.

ZF stresses that civil § 1782(a) requests "*quadrupled*" between 2005 and 2017. Br. at 46. But they quadrupled from one very small number (49) to another (208), and remain a "small fraction of the overall federal docket," some *0.07 percent* of the 292,076 civil filings in 2017. Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089, 2111, 2154 & n.295 (2020) ("Wang"). And

contrary to the contention that § 1782(a) cases "can be especially burdensome," Br. at 46, ZF's own authorities say that they are generally "resolved relatively quickly and with minimal judicial activity," Wang, *supra*, at 2120. Illustrating the point, if this Court resolves the statutory question in Luxshare's favor, the discovery here will be as ordered in the case's first substantive ruling. *Supra* at 5–6.

ZF also notes that the number of foreign commercial arbitrations has "skyrocketed" to "thousands" since § 1782(a) was enacted. Br. at 46. But "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority" to alter statutes to reflect changed circumstances. *Wis. Cent. Ltd.*, 138 S. Ct. at 2074. In any event, little reason exists to fear a deluge of foreign-arbitral-tribunal-related § 1782(a) applications. Only about ten percent of the civil § 1782(a) requests filed between 2005 and 2017 sought assistance for arbitral tribunals—averaging about ten each year. Wang, *supra*, at 2169 (table 10). The number would have to increase an improbable sixty-fold to yield one application per federal district judge per annum. Tellingly, the number of § 1782(a) applications for court proceedings remains small, even though foreign court cases heavily outnumber foreign arbitral proceedings, with the courts of England and Wales alone handling an average of 4.2 million cases per year from 2014 to 2019. *See, e.g.*, Georgina Sturge, *Court Statistics for England and Wales*, House of Commons Library (Dec. 23, 2021), at 5.

2. ZF further posits that § 1782(a) is "contrary to U.S. commercial interests" because it imposes "unfair," "one-sided," "asymmetric" burdens on U.S. businesses. Br. at 49. This grievance applies equally to discovery for foreign *judicial* tribunals, and

represents a direct challenge to Congress's policy judgment to enact § 1782(a) as a "one-way street" that "grants wide assistance to others, but *demands* nothing in return." *In re Malev*, 964 F.2d at 101 (emphasis in original).

ZF then exposes the baselessness of its position by highlighting as an example of purported abuse a series of § 1782(a) requests filed by Chevron, a major U.S. corporation. Br. at 48. Chevron's use of § 1782(a) has been hailed as "a paradigmatic example of the use of ancillary discovery to prove denial of justice." Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 Va. J. Int'l L. 127, 128, 142–47 (2012). Other major U.S. businesses and at least one significant state pension fund have similarly employed § 1782(a).[15]

Moreover, courts have ample tools, including the *Intel* factors, to address ZF's theoretical problems. As to parity, Br. at 49, "a district court can condition" § 1782(a) assistance "upon reciprocal information exchange," *Intel*, 542 U.S. at 244. Courts have also rebuffed attempts to use § 1782(a) to "target[] evidence held by U.S. law firms," Br. at 47; *see Kiobel v. Cravath, Swaine & Moore*, 895 F.3d 238 247–48 (2d Cir. 2018), and they have crafted protections for those producing documents located overseas, including requiring the requesting party to pay the costs of compliance with data-protection

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[15] *See In re Application of Cal. State Tchrs.' Ret. Sys.*, No. 2:16-cv-04251, 2016 WL 7477753 (D.N.J. Dec. 28, 2016); *In re Ex Parte Application of Google, Inc.*, No. 3:14-cv-00550-RCJ-VPC, 2014 WL 10434948 (D. Nev. Oct. 23, 2014); *In re Ex Parte Application of Apple Inc.*, No. 12-cv-00036, 2012 WL 4865824 (E.D. Tex. Jan. 20, 2012); *In re Application of Philip Morris, Inc. et al.*, No. 6:00-MC-50-ORL-B, 2000 WL 34582251 (M.D. Fla. June 6, 2000).

requirements and to indemnify the producing party against the risk of foreign-law liability, *see In re Hansainvest Hanseatische Investment-GmbH*, 364 F. Supp. 3d 243, 252 (S.D.N.Y. 2018).

### D. The Government's Policy Concerns About § 1782(a) Discovery in the Investor-State-Arbitration Context Have No Bearing on this Case

The tribunal in this case is a foreign tribunal within § 1782(a), even if the Court determines that the *AlixPartners* tribunal is not an "international tribunal." Luxshare takes no position on that question, but notes the following points.

The Government represents that § 1782(a) discovery could jeopardize the advantages of investment-treaty-based investor-state arbitrations by upsetting the settled expectations of investors and states. Gov't Br. at 13–14, 31–32. It notes, in particular, that, in the investor-state context, § 1782(a) discovery may "implicate questions of foreign sovereign immunity." Gov't Br. at 31 n.4; *see also BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 57 (2014) (Roberts, C.J., dissenting) (discussing sovereign immunity in connection with investor-state arbitration).

These concerns are inapplicable to commercial arbitration, and therefore cannot justify interpreting § 1782(a) to exclude foreign commercial arbitral tribunals. It would be a strange thing, indeed, to interpret commercial arbitral tribunals out of § 1782(a) to accommodate investor-state arbitrations that "did not exist in 1964." Gov't Br. at 30–31; *see also id.* at 13, 27.

The United States has several better routes to promote its policy interests in investor-state arbitration. Section 1782(a) can be amended to exclude some or all investor-state arbitrations, investment treaties can exclude § 1782(a) discovery for some or all investor-state arbitrations, and the United States can appear in court to oppose a grant of § 1782(a) discovery, s*ee, e.g.*, 28 U.S.C. § 517. Each route permits the political branches to make calibrated policy judgments. There is no need—as well as no legal warrant—to wield the blunt tool of interpreting all arbitral tribunals out of § 1782(a).

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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February 23, 2022

# APPENDIX

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## 9 U.S.C. §§ 1–5, 7, 9–10, 207–08, 304, 307

### § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**§ 3. Stay of proceedings where issue therein referable to arbitration**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

**§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the

parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

**§ 5. Appointment of arbitrators or umpire**

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or

umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

**§ 7. 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.

## § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

## § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

**§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding**

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or

enforcement of the award specified in the said Convention.

**§ 208. 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.

**§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity**

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

**§ 307. 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.

**22 U.S.C. §§ 270–270g (1958)**

**§ 270. 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. (July 3, 1930, ch. 851, § 1, 46 Stat. 1005.)

**§ 270a. 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. (July 3, 1930, ch. 851, § 2, 46 Stat. 1006.)

**§ 270b. 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. (July 3, 1930, ch. 851, § 3, 46 Stat. 1006.)

**§ 270c. 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. (July 3, 1930, ch. 851, § 4, 46 Stat. 1006.)

**§270d. 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. (July 3, 1930, ch. 851, § 5, as added June 7, 1933, ch. 50, 48 Stat. 117.)

**§ 270e. 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. (July 3, 1930, ch. 851, § 6, as added June 7, 1933, ch. 50, 48 Stat. 117.)

**§ 270f. Same; perjury; contempt; 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. (July 3, 1930, ch. 851, § 7, as added June 7, 1933, ch. 50, 48 Stat. 118.)

**§ 270g. 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.

## 28 U.S.C. § 1782 (1958)

### § 1782. 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. (June 25, 1948, ch. 646, 62 Stat. 949; May 24, 1949, ch. 139, § 93, 63 Stat. 103.)

## 28 U.S.C. §§ 1696, 1741, 1781, 1782

### § 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.

### § 1741. Foreign official documents

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure.

### § 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.

**§ 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, 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.

## Act of Mar. 2, 1855, ch. 140, 10 Stat. 630

CHAP. CXL.—An Act to prevent Mis-trials in the District and Circuit Courts of the United

States, in certain Cases.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*,

* * *

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.

APPROVED, March 2, 1855.

## Act of Mar. 3, 1863, ch. 95, §1, 12 Stat. 769

CHAP. XCV.—An Act to facilitate the taking of Depositions within the United States, to be used in the Courts of other Countries, and for other Purposes.

*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 officer 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.

*** * ***

## Act of Feb. 27, 1877, ch. 69, 19 Stat. 241

CHAP. 69.—An Act to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of correcting errorors and supplying omissions in the act entitled

"An act to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy three," so as to make the same truly express such laws, the following amendments are hereby made therein:

* * *

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."

* * *

**Act of July 3, 1930, ch. 851, 46 Stat. 1005**

CHAP. 851.— An Act Authorizing commissioners or members of international tribunals to administer oaths, to subpoena witnesses and records, and to punish for contempt.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That 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.

SEC. 2. 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.

SEC. 3. 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.

SEC. 4. 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.

Approved, July 3, 1930

**Act of June 7, 1933, ch. 50, §§5–6, 48 Stat. 117**

AN ACT

To amend the Act approved July 3, 1930 (46 Stat. 1005), authorizing commissioners or members of the international tribunals to administer oaths, or so forth.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Act of July 3, 1930 (46 Stat. 1005), authorizing commissioners or members of

international tribunals to administer oaths, and so forth, be, and the same is hereby, amended by adding at the end thereof the following additional sections:

"SEC. 5. That 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.

"SEC. 6. That 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.

"SEC. 7. That every person knowingly or wilfully 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.

"SEC. 8. For the purposes of sections 5, 6, and 7 of this Act, the Supreme Court of the District of Columbia shall be considered to be a district court of the United States."

Approved, June 7, 1933.

## Act of June 25, 1948, ch. 117, §1782, 62 Stat. 869

AN ACT

To revise, codify, and enact into law title 28 of the United States Code entitled "Judicial Code and Judiciary".

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That title 28 of the United States Code, entitled "Judicial Code and Judiciary" is hereby revised, codified, and enacted into law, and may be cited as "Title 28, United States Code, section—", as follows:

* * *

CHAPTER 117—EVIDENCE; DEPOSITIONS

* * *

### § 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.

* * *

## Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89

AN ACT

To amend title 18, entitled, Crimes and Criminal Procedure, and title 28, entitled, Judiciary and Judicial Procedure, of the United States Code, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That

*** * ***

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".

*** * ***

## Act of Sept. 2, 1958, §§ 1–2, Pub. L. 85-906, 72 Stat. 1743

AN ACT

To establish a Commission and Advisory Committee on International Rules of Judicial Procedure.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*,

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.

* * *

## Act of Oct. 3, 1964, § 2, Pub. L. No. 88-619, 78 Stat. 995

AN ACT

To improve judicial procedures for serving documents, obtaining evidence, and proving documents in litigation with international aspects.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That

*** * ***

SEC. 2. Section 3491 of title 18, United States Code, is amended to read:

**"§ 3491. Foreign documents**

"Any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States shall, when duly certified as provided in section 3494 of this title, be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under section 3492 of this title, that such document (or the original thereof in case such document is a copy) satisfies the authentication requirements of section 1732 of title 28, unless in the event that the genuineness of such document is denied, any party to such criminal action or proceeding making such denial shall establish to the satisfaction of the court that such document is not genuine. Nothing contained herein shall be deemed to

require authentication under the provisions of section 3494 of this title of any such foreign documents which may otherwise be properly authenticated by law."

SEC. 3. The Act of July 3, 1930, 46 Stat. 1005, as amended by the Act of June 7, 1933 (48 Stat. 117; 22 U.S.C., secs. 270 through 270g), is repealed.

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. 5. (a) Section 1741 of title 28, United States Code, is amended to read:

**"§ 1741. Foreign official documents**

"An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt

authenticated as provided in the Federal Rules of Civil Procedure."

* * *

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.

(b) The analysis of chapter 117 of title 28, United States Code, is amended by striking:

"1782. Testimony for use in foreign countries."

and inserting in place thereof:

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