

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ZF AUTOMOTIVE US, INC., ET AL., )  
Petitioners, )  
v. ) No. 21-401  
LUXSHARE, LTD., )  
Respondent. )

- - - - -  
ALIXPARTNERS, LLP, ET AL., )  
Petitioners, )  
v. ) No. 21-518  
THE FUND FOR PROTECTION OF INVESTORS' )  
RIGHTS IN FOREIGN STATES, )  
Respondent. )

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Pages: 1 through 113  
Place: Washington, D.C.  
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11                                   v.                                    ) No. 21-518

12   THE FUND FOR PROTECTION OF INVESTORS'        )

13   RIGHTS IN FOREIGN STATES,                        )

14                                   Respondent.                    )

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16                                   Washington, D.C.

17                                   Wednesday, March 23, 2022

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20                   The above-entitled matter came on for oral

21   argument before the Supreme Court of the United States

22   at 10:00 a.m.

23

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25

1 APPEARANCES:  
2  
3 ROMAN MARTINEZ, ESQUIRE, Washington, D.C.; on behalf  
4 of the Petitioners in 21-401.  
5 JOSEPH T. BAIO, ESQUIRE, New York, New York; on behalf  
6 of the Petitioners in 21-518.  
7 EDWIN S. KNEEDLER, Deputy Solicitor General,  
8 Department of Justice, Washington, D.C.; for the  
9 United States, as amicus curiae, supporting the  
10 Petitioners.  
11 ANDREW R. DAVIES, ESQUIRE, New York, New York; on  
12 behalf of the Respondent in 21-401.  
13 ALEXANDER A. YANOS, ESQUIRE, New York, New York; on  
14 behalf of the Respondent in 21-518.  
15  
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is unable to be present today but will participate in consideration and decision of the cases on the basis of the briefs and the transcript of oral arguments.

We'll hear argument this morning in Case 21-401, ZF Automotive US Incorporated versus Luxshare Limited, and the consolidated case.

Mr. Martinez.

ORAL ARGUMENT OF ROMAN MARTINEZ

ON BEHALF OF THE PETITIONERS IN 21-401

MR. MARTINEZ: Mr. Chief Justice, and may it please the Court:

Section 1782's text, structure, and history make clear that district courts are not authorized to grant discovery for use in purely private foreign arbitrations. The key statutory language is the complete phrase "foreign tribunal." That phrase most naturally refers to government tribunals, just like the phrase "foreign leader" most naturally refers to government leaders.

1            Ordinary and legal usage confirm that  
2            interpretation. So do nearby provisions using  
3            the same phrase, as well as this Court's  
4            decision in Intel.

5            The history supports us too. The  
6            rules commission drafted this statute under a  
7            direct command from Congress in the 1958 Act to  
8            promote interstate comity and assist the  
9            judicial and quasi-judicial arms of foreign  
10           governments. The commission, Senate, and House  
11           reports all show that the drafters chose the  
12           words "foreign tribunal" to achieve these  
13           government-focused objectives.

14           Luxshare misreads the text and ignores  
15           the context. It can't identify a single person,  
16           not a lawmaker, judge, lawyer, scholar, anyone  
17           who ever claimed 1782 covers private  
18           arbitrations, either in 1964 or for decades  
19           afterwards.

20           Luxshare's approach would flood  
21           district courts with discovery applications,  
22           undermine the goals of arbitration, and inflict  
23           asymmetric harm on American companies and  
24           American businesses. Congress didn't intend  
25           these results.

1                   Below, Luxshare admitted that, under  
2                   the rules Luxshare itself agreed to, the German  
3                   arbitrators in this case would refuse to order  
4                   the discovery it's now seeking here. You should  
5                   reject any interpretation of 1782 that  
6                   encourages parties to run to U.S. courts to  
7                   circumvent their agreements in this way.  
8                   Congress did not force American judges to  
9                   referee private discovery fights in purely  
10                  private, non-governmental arbitrations abroad.

11                  I welcome the Court's questions. And  
12                  I'd like to start perhaps with the statutory  
13                  text.

14                  CHIEF JUSTICE ROBERTS: Mr. Martinez,  
15                  why isn't it natural to think of a foreign  
16                  tribunal as one established under the laws of a  
17                  foreign country? A tribunal in Italy, you know,  
18                  its existence is, say, due to Italian corporate  
19                  law or whatever, and enforceability of its  
20                  judgments might well be particularly compelling  
21                  in Italy. I don't know why it's necessarily  
22                  referencing a governmental entity.

23                  MR. MARTINEZ: Well, I think a couple  
24                  points to that, Your Honor.

25                  I think the complete phrase "foreign

1 tribunal," that's sort of a common construction,  
2 adding the adjective "foreign" to a noun that  
3 has, you know, strong governmental connotations.  
4 We've given the examples in our brief of  
5 "foreign leader," "foreign flag," "foreign law,"  
6 "foreign official."

7           When -- when people hear those --  
8 those sort of phrases using the word "foreign"  
9 with -- with a noun like that, I think it most  
10 naturally conjures up the idea of a -- a -- an  
11 official, a flag, a leader of a government. And  
12 I think that's the sort of intuition, that's the  
13 common construction. And I think that common  
14 construction --

15           CHIEF JUSTICE ROBERTS: Well, it kind  
16 of -- it might be because you don't think of  
17 private people as having their own flags, but  
18 "tribunal," I mean, I understand your argument  
19 that it carries a governmental connotation, but  
20 I'm not sure that excludes a -- that that  
21 excludes any other tribunal.

22           I mean, the arbitral bodies function  
23 as a tribunal. It's natural to refer to them in  
24 that way. And particularly when you add  
25 "foreign," it seems to me that that means it's,



1 you know, a private arbitral body, a tribunal,  
2 that happens to be located, set up in a foreign  
3 country, in France.

4 MR. MARTINEZ: So -- so a couple  
5 points on that, Your Honor.

6 I do think the phrase -- a phrase like  
7 "foreign leader" would not be sort of ordinarily  
8 used to refer to a non-governmental entity. You  
9 know, the -- the captain of the Manchester  
10 United football team is foreign and is a leader  
11 but is not a foreign leader.

12 CHIEF JUSTICE ROBERTS: Yeah, yeah,  
13 but -- but it -- it -- it is a leader.

14 MR. MARTINEZ: Sure.

15 CHIEF JUSTICE ROBERTS: But, you know,  
16 the tribunals are also adjudicatory bodies. And  
17 "foreign" carries significance in that it is set  
18 up in -- in Italy. It's not like a gratuitous  
19 word that can only convey the notion of  
20 governmental.

21 MR. MARTINEZ: Well, I -- I guess a  
22 couple points.

23 First of all, in ordinary usage, if  
24 you just look empirically -- and this is the --  
25 the study that we -- the usage study, the Corpus

1 Linguistic study that we cite in our reply brief  
2 -- what -- what the study did was it sort of  
3 comprehensively looked at five different  
4 databases involving tens of thousands of  
5 documents, millions of words, and it  
6 historically --

7 CHIEF JUSTICE ROBERTS: Yeah, I don't  
8 quite know what to make of that. That's --  
9 that's something new. I mean, have we relied on  
10 that source before?

11 MR. MARTINEZ: Not this particular  
12 study, but you absolutely have used that same  
13 methodology before. I think the best example is  
14 the Court's decision in Muscarello, where the  
15 Court --

16 CHIEF JUSTICE ROBERTS: I mean, have I  
17 ever done that before?

18 MR. MARTINEZ: Have you ever done  
19 that? I think -- I think, if I -- if I recall  
20 correctly, Your Honor, I think you wrote the  
21 decision in AT&T versus FCC, which sort of  
22 similarly looked beyond dictionary definitions  
23 to kind of a couple of different -- what the --  
24 the -- the academics would call a corpus, but  
25 the -- the sort of body of U.S. judicial

1 opinions, U.S. statutes. And -- and I think  
2 it's a common way of -- of trying to tease out  
3 the ordinary meaning, to survey ordinary usage.

4 JUSTICE BARRETT: Mr. Martinez, the  
5 Court has never -- the Court has never used the  
6 Corpus Linguistics database before. You know,  
7 the Sixth Circuit has, the Utah Supreme Court  
8 has, but this Court has not done -- I mean,  
9 Muscarello was a more informal survey, as was  
10 the Chief's opinion in AT&T, correct?

11 MR. MARTINEZ: Right. And so I think  
12 what -- what the Corpus Linguistics study here  
13 does is take that same methodology and make it  
14 more accurate and reliable by being more  
15 comprehensive. But I think it's the same  
16 general idea, and the idea is, essentially, if  
17 we're going to figure out what the ordinary  
18 meaning of language is, let's look to see how  
19 ordinary people use it in all sorts of different  
20 contexts.

21 So I don't think it's methodologically  
22 new. I think it's just a little bit more  
23 scholarly, a little bit more reliable. They use  
24 Latin words, which maybe makes it a little  
25 scarier in some way, but I think it's the same

1 basic idea.

2 But, Chief Justice, I -- I do want to  
3 get back to your -- your point about -- about  
4 "tribunal" and "foreign tribunal." I think that  
5 what's interesting is that, if you look  
6 historically, that phrase, as a unified whole,  
7 is sort of -- has historically empirically been  
8 used to refer to government entities.

9 I think you're right that if you took  
10 the word "tribunal" alone in ordinary speech,  
11 that would pose a somewhat different question.  
12 But, if you look at the way Congress has used  
13 the word "tribunal" historically, at the time  
14 that this statute was passed in 1964, Congress  
15 had used "tribunal" many times in statutes.  
16 Every single time it had used the word  
17 "tribunal" to refer to a government entity.

18 And in situations after 1964, I think  
19 there are a couple of -- of examples where  
20 Congress used the phrase "arbitral tribunal," I  
21 think what's notable is that it added the -- the  
22 adjective "arbitral" because it wanted to signal  
23 that it was going beyond its standard sort of  
24 government-focused usage of "tribunal" to -- to  
25 capture arbitral tribunal.

1 JUSTICE KAGAN: Yeah, but --

2 JUSTICE KAVANAUGH: In this -- go  
3 ahead.

4 JUSTICE KAGAN: Go ahead.

5 JUSTICE KAVANAUGH: Go.

6 JUSTICE KAGAN: You know, back then,  
7 arbitration was not as settled a practice as it  
8 is now, but now we just commonly refer to  
9 arbitral tribunals, right, and we don't think  
10 anything of it.

11 And I guess the idea that when you put  
12 "foreign" in -- in front of something, all of a  
13 sudden it connotes government, I mean, you have  
14 some -- some examples where it does. You know,  
15 foreign language doesn't connote government.

16 MR. MARTINEZ: Right.

17 JUSTICE KAGAN: If I say it's a  
18 foreign university, I may or may not be speaking  
19 of a government-run school. If I say it's a  
20 foreign city, all I mean is a city that happens  
21 to be in another country.

22 I mean, it all depends, right? And I  
23 guess my broader question is, like, really, what  
24 can you take from this language? I -- I mean,  
25 I'm all for, you know, being serious about

1 language when there's something to be serious  
2 about, but I don't know -- I don't know --

3 MR. MARTINEZ: Well --

4 JUSTICE KAGAN: -- what this language  
5 tells us.

6 MR. MARTINEZ: -- I -- I -- I think --  
7 let me move past the ordinary meaning because I  
8 do think our sources do give you something just  
9 about that phrase.

10 But I think that that's just one piece  
11 of the puzzle because we have a bunch of other  
12 arguments based on the stat -- broader statutory  
13 context, the history, and the policy that  
14 Congress was trying to enact here that really, I  
15 think, reinforce our reading of the statutory  
16 language.

17 Going to the -- the broader statutory  
18 context, we've cited three neighboring  
19 provisions: the -- the practice or procedure  
20 clause in 1782, the State Department middleman  
21 provision in 1781, and the judgment order and  
22 decree language in 1696.

23 We think all of the -- none of those  
24 is a hundred percent dispositive. It's not  
25 going to, like, be a -- a slam dunk, you know,

1 case winner for us on its own, but I think that  
2 constellation of provisions operating together,  
3 each one of them kind of favors our side and I  
4 think reinforces the point that, here, you are  
5 using the phrase "foreign tribunal" kind of like  
6 you would use the phrase "foreign leader" as  
7 opposed to "foreign food."

8 I think, in addition to that, though,  
9 Your Honor, we can look to the history, and,  
10 here, you have history that is overwhelmingly in  
11 -- in my view -- I'm biased -- but in my view on  
12 our side.

13 This statute was drafted by the rules  
14 commission, and the rules commission drafted the  
15 statute to implement a specific -- sorry,  
16 drafted the -- the -- the proposed language to  
17 implement the statutory directive in the 1958  
18 act.

19 And that directive, which is on 14A of  
20 the -- the Solicitor General's appendix, was to  
21 draft legislation that would improve assistance  
22 to foreign courts and quasi-judicial agencies  
23 with the purpose of enhancing cooperation  
24 between the United States and foreign countries.

25 So look at the focus of that '58 act

1 and its directive. Quasi-judicial agencies.  
2 Cooperation with foreign countries. The focus  
3 there is on aid to governmental adjudicators,  
4 not to private arbitrators.

5 And so the rules commission, when it  
6 got this command from Congress, it sat down and  
7 it translated that command into the statutory  
8 language that would become 1782, and not only  
9 did it write the statute to implement the  
10 command, but it also wrote a 105-page report  
11 telling Congress and the world what it had done.

12 And what does the report say? On page  
13 17, it says: We are implementing the statutory  
14 command that appears in Section 2 of the 1958  
15 act. So it links the language that it chose,  
16 the legislation that it drafted, to the specific  
17 directive that it was given by Congress,  
18 quasi-judicial agencies, cooperation with  
19 foreign countries.

20 Then later in the report, on page 45,  
21 when it's discussing its choice of the -- the  
22 phrase "foreign tribunal," it specifically says  
23 we're -- we're -- we chose these words because  
24 we wanted to pick up something more than just  
25 foreign courts. We wanted to broaden it a



1 little bit. And we wanted to broaden it to  
2 cover investigating magistrates, foreign  
3 administrative tribunals, and quasi-judicial  
4 agencies.

5 All of those are government-focused.  
6 Quasi-judicial, by the way, I think the  
7 Halliburton brief has -- has the Black's Law  
8 Dictionary of quasi-judicial. That -- that  
9 refers to government officials.

10 So not only do you have the '58 act,  
11 but you have the rules commission report which  
12 chose where -- I mean, these are experts, eight  
13 of the top experts on -- on law and  
14 international law in the country that were on  
15 this commission. They chose words to implement  
16 the statutory directive, which was limited to  
17 government-focused objectives. They put those  
18 words in the legislation. They issued a  
19 105-page report telling everyone what they had  
20 done.

21 Congress then took that report, put it  
22 -- or the committees took that -- that report  
23 explaining the language. They cut-and-pasted  
24 the -- the -- the explanation into the Senate  
25 report, into the House report. They then

1 enacted the statute without change.

2           And then this Court comes along a  
3 number of years later, and when it's  
4 interpreting this statute in Intel,  
5 methodologically, what does it do? It looks to  
6 the exact same historical sources that we're  
7 pointing to, the 1958 Act, the rules commission,  
8 the House report, the Senate report.

9           And not only does it look to those  
10 sources, but it looks to the exact same points  
11 that we're making about the -- the judicial --  
12 the governmental objectives, the quasi-judicial  
13 agency goal of -- of this statute.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Justice Breyer?

17           JUSTICE BREYER: I mean, the language  
18 goes -- it's true they were thinking probably of  
19 government then, but the language can be read  
20 more broadly, and, unlike then, now commercial  
21 arbitration is resolving lots and lots of  
22 matters that businesses used to bring before  
23 courts.

24           And so what's the problem? Why not  
25 treat them the same way as these quasi-judicial,

1 et cetera, used to be treated?

2 MR. MARTINEZ: I -- I think --

3 JUSTICE BREYER: Purpose is similar.  
4 Language, similar. Nothing that says you can't.  
5 Why not?

6 MR. MARTINEZ: I think that -- I think  
7 that the history and the language foreclose you  
8 from doing that. But even if we were just  
9 looking at the policy objectives, I think it  
10 would be very strange to think that Congress  
11 would have -- would have wanted to create the  
12 results that this statute creates on Luxshare's  
13 reading.

14 JUSTICE BREYER: No, you've read, as  
15 I've read, the amicus briefs, which have several  
16 ways of preventing this interpretation from  
17 getting out of hand, probably the most important  
18 being Intel modification, which would say don't  
19 order discovery unless the tribunal wants the  
20 discovery.

21 MR. MARTINEZ: Right, but that would  
22 -- and, Justice Breyer, I know you dissented in  
23 Intel and were more attuned to some of the  
24 challenges that the statute would pose, but I  
25 think that's at odds with this Court's

1 interpretation of the statute.

2 JUSTICE BREYER: Well, I can look at  
3 that, but my -- my question --

4 MR. MARTINEZ: Right.

5 JUSTICE BREYER: -- is -- is a  
6 practical question.

7 MR. MARTINEZ: Sure.

8 JUSTICE BREYER: If the language  
9 allows it, like foreign language, you know, not  
10 government, state arbitration tribunals, hmm,  
11 what about those? Well, government's involved.  
12 Well, so?

13 You see, if you do take that approach,  
14 I want you to talk about that. Then what  
15 happens?

16 MR. MARTINEZ: So I think that --

17 JUSTICE BREYER: Why is this so  
18 terrible?

19 MR. MARTINEZ: I think there are four  
20 problems, and I'll just do -- do it quickly --

21 JUSTICE BREYER: Okay.

22 MR. MARTINEZ: -- cognizant of the  
23 time.

24 One, I think it's going to overburden  
25 U.S. district courts and put U.S. district

1 courts in a position of essentially meddling or  
2 playing a role in private arbi- -- proceedings  
3 abroad where there might not be a strong U.S.  
4 interest. I think it's notable that the  
5 government is on our side and I think recognizes  
6 that that's kind of an unusual place to put  
7 district courts.

8           Number two, I do think it undermines  
9 the goals of arbitration because, when parties  
10 sign up to arbitration, the -- the reason  
11 they're often doing that is to opt for a more  
12 streamlined set of procedures that don't include  
13 the kind of burdensome discovery you see in  
14 litigation.

15           So, when you have a bunch of parties  
16 making a contract overseas, an arbitration  
17 contract, I think it would come as quite a  
18 surprise to them that -- that they're suddenly  
19 triggering the potential for intrusive,  
20 burdensome, and time-consuming discovery  
21 proceedings that might happen in the United  
22 States. So I think it's contrary to the  
23 contract goals, contract-based goals of  
24 arbitration.

25           Number three, I think that this

1 statute asymmetrically disadvantages American  
2 citizens and American businesses. I think  
3 that's a bad policy consequence. I also think,  
4 though, that that provides a useful window into  
5 Congressional intent.

6 It seems very unlikely to me that  
7 Congress would have passed a statute that would  
8 have burdened whether they're U.S. third parties  
9 or whether they're U.S. parties --

10 JUSTICE BREYER: All right. On -- on  
11 the burden, I've read that England, France,  
12 Spain, I think, and I can't -- Germany, they all  
13 follow this approach --

14 MR. MARTINEZ: Yeah.

15 JUSTICE BREYER: -- or something like  
16 it, and -- and they think that attracts business  
17 and it's good for their economy and it's good  
18 for their bar because people will come to their  
19 courts to settle commercial disputes or at least  
20 their arbitrations.

21 MR. MARTINEZ: Your Honor, I -- I  
22 don't think that's --

23 JUSTICE BREYER: How am I wrong? Go  
24 ahead.

25 MR. MARTINEZ: I think you're -- I

1 don't think that's right.

2 First of all, if you look at the Berne  
3 treaties, those are the handful of -- of  
4 counter-examples that allow anything even, like,  
5 arguably in the same ballpark as this. The  
6 majority of states go the other way.

7 Even with respect to those states,  
8 though, the discovery that is potentially  
9 available to foreign arbitrations under the laws  
10 of those countries is completely different from  
11 what we're talking about here.

12 In those countries, you can't get it  
13 before the arbitral panel is constituted. You  
14 can only get it with the permission of the  
15 arbitrator.

16 And the actual discovery that's  
17 ordered is not like U.S. style, you know, give  
18 me all the documents, you know, all the emails  
19 using this term over this year period, but it's  
20 -- we're talking about very targeted.

21 So no country in the world would grant  
22 this kind of request. And, certainly, Luxshare  
23 and the amicus briefs have not cited anything.

24 I think the final sort of policy point  
25 -- and this is really -- this builds on -- on

1 what I was just saying. I think, if Luxshare is  
2 right about what the statute means, it really  
3 puts the United States as an outlier with  
4 respect to its treatment of international  
5 arbitration, and I think comity is really all  
6 about harmonizing, when possible, U.S. law with  
7 the law of other countries.

8 And I just think it's very -- it's  
9 anomalous, it's not a -- it's not good policy,  
10 but it's also not a good approximation of what  
11 Congress was trying to get at with this statute,  
12 to think that it wanted to uniquely disadvantage  
13 American parties and -- and make the United  
14 States an outlier on the international stage in  
15 this way.

16 CHIEF JUSTICE ROBERTS: Justice Alito,  
17 anything?

18 Justice Sotomayor, anything?

19 Justice Gorsuch, anything further?

20 JUSTICE KAVANAUGH: Two questions.  
21 First, the briefs set up a divide between  
22 looking at the literal meaning of individual  
23 words versus the ordinary meaning of the phrase  
24 as a whole. Why should we go with the ordinary  
25 meaning of the phrase as a whole when we seem to



1 have cases that sometimes go with the literal  
2 meaning of individual words?

3 MR. MARTINEZ: I -- I think this --  
4 this Court's cases overwhelmingly say, including  
5 some of the cases that arguably go the other  
6 way, a case like *Bostock*, for example, I think  
7 these -- even *Bostock* recognizes that the  
8 ordinary meaning of the words govern.

9 You can't use sort of a specialized  
10 meaning or a historical meaning to trump the  
11 plain language. So, if -- if -- if this were a  
12 conflict between there's only one reading and it  
13 says X, but we're coming in and using history  
14 and something else to say, oh, it really means  
15 Y, that wouldn't be permissible. But that's not  
16 what we're doing here.

17 What we're doing is trying to find the  
18 ordinary meaning of the -- the language. And  
19 what this Court has said in cases like *AT&T* is  
20 that it's an -- it's not an appropriate mode of  
21 statutory construction to take a phrase, chop it  
22 up into its constituent parts, get a dictionary,  
23 find the broadest possible dictionary definition  
24 of each word, and then glue it all together.  
25 That just doesn't -- that doesn't work. That's

1 not appropriate.

2 And I think that's ultimately what  
3 Luxshare's interpretation is doing.

4 JUSTICE KAVANAUGH: Second question is  
5 how would you define "governmental" in this  
6 context? And this gets really to both cases,  
7 but do you have a definition that we can use  
8 that would distinguish "governmental" from  
9 "nongovernmental"?

10 MR. MARTINEZ: I -- I would -- I would  
11 say -- I guess what I would say -- for purposes  
12 of defining "foreign tribunal," I would say that  
13 the tribunal needs to be created by the  
14 government and exercising authority conferred by  
15 the government.

16 And then let me just add one point. I  
17 don't think it's enough -- I think the Chief may  
18 have been alluding to this idea, and Luxshare  
19 alludes to it briefly when talking about the  
20 Fourth Circuit's approach. It's definitely not  
21 enough that there is a court at the end of the  
22 day that might be asked to enforce the award. I  
23 think that court involvement is not enough to  
24 governmentalize what -- what is -- what everyone  
25 else would think of as a private arbitration.

1           And there are a couple reasons for  
2           that. I think courts enforce private contracts  
3           all the time, and we all recognize that the  
4           contracts themselves remain private. So the  
5           fact that there's, like, judicial involvement  
6           doesn't kind of, you know, make it a -- a public  
7           contract in any sort of meaningful way.

8           I think, secondly on that, U.S. courts  
9           across the country have had to wrestle with the  
10          idea of whether arbitrators are state actors for  
11          constitutional purposes. Courts have uniformly  
12          rejected that idea. I think there are five  
13          circuits out there have said arbitrators are not  
14          state actors, I think recognizing that  
15          arbitration really is something that's private.

16          And then -- and then, finally, I do  
17          think that having a judicial role is not enough  
18          to make an arbitration governmental because the  
19          judicial role is so limited. Whether it's under  
20          the FAA or under Section 1059 of the German  
21          Civil Procedure Code, review of arbitrations,  
22          when you're being asked to enforce an  
23          arbitration -- enforce an arbitral judgment or  
24          award, is extremely limited, and if -- if a  
25          court comes in and sees a -- an error of law, it

1 can't correct it.

2 And so that doesn't -- if a court  
3 doesn't have the ability to correct an error of  
4 law, it's not really judicial review. It's not  
5 really governmental involvement at all.

6 JUSTICE KAVANAUGH: One follow-up on  
7 that. Sorry to prolong it. Do you look at  
8 whether the arbitrators themselves are  
9 government appointed, government paid,  
10 government removable, or --

11 MR. MARTINEZ: I -- I think that --

12 JUSTICE KAVANAUGH: -- is that  
13 relevant?

14 MR. MARTINEZ: -- I think that those  
15 are factors that could bear on this. I -- I do  
16 think that that is a legitimate -- I don't think  
17 that that is like the only test, like looking at  
18 where the paycheck comes from, because, frankly,  
19 there are all sorts of different arrangements,  
20 including, you know, some arrangements that --  
21 that we would say would fall within the category  
22 of, you know, international -- intergovernmental  
23 arbitral tribunals that might sometimes use  
24 private adjudicators in the sense that they're  
25 not like government officials.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 Thank you, counsel.

5 Mr. Baio.

6 ON BEHALF OF THE PETITIONERS IN 21-401

7 ORAL ARGUMENT OF JOSEPH T. BAIIO

8 MR. BAIIO: Mr. Chief Justice, and may  
9 it please the Court:

10 The ad hoc arbitration initiated by  
11 the fund is not a proceeding before an  
12 international tribunal as that phrase is used in  
13 Section 1782. In order to constitute an  
14 international tribunal, the decisionmaker must  
15 owe its existence and its powers to an  
16 international agreement between or among  
17 sovereign nations.

18 Here, the treaty between Lithuania and  
19 Russia did not create the ad hoc arbitration  
20 panel, and it did not empower that panel to  
21 resolve investor disputes. The panel was  
22 created when the fund, which is not a party to  
23 the treaty, elected to take up Lithuania's  
24 standing offer and consent to arbitrate with a  
25 potential class of unknown private investors.

1                   The resulting ad hoc panel of  
2 non-governmental arbitrators, selected by the  
3 disputants as equal parties, was empowered by  
4 the parties' consent to arbitrate and not by the  
5 treaty.

6                   Do you have any questions, Your Honor?

7                   CHIEF JUSTICE ROBERTS: Sure. The --  
8 you're quite right that the panel is -- private  
9 parties participate and not the countries  
10 themselves, but -- but this just seems to me as  
11 quite different, for example, from the case --  
12 or the issue we were just talking about.

13                   You have two governments behind this  
14 whole enterprise. They, for their own  
15 particular reasons, have set up this -- this  
16 mechanism. It's not a purely private  
17 undertaking or -- or endeavor.

18                   And I think that sovereign character  
19 maybe suggests less support for the position  
20 that you're arguing for.

21                   MR. BAIIO: I think, Your Honor, the  
22 statutory language is focusing not on whether it  
23 is such a proceeding, but it's whether it is an  
24 international tribunal. It's focusing on the  
25 decisionmaker itself.

1           Now, in this case, and as you have  
2           said in other cases, let's start with the  
3           treaty. The treaty itself simply says and is  
4           designed to encourage people in Lithuania to  
5           invest in Russia and in Russia to invest in  
6           Lithuania, a fairly common occurrence.

7           And how it achieves that is by giving  
8           an option to the investor to escape from the  
9           courts, to escape from a governmental  
10          adjudicator, to have a resolution that is shorn  
11          of governmental implication.

12          You pick an ad hoc arbitration panel  
13          under private rules. Everyone selects the  
14          arbitrator as at regular arbitration. It is  
15          final and will be binding on the sovereign when  
16          you sue the sovereign or you arbitrate against  
17          the sovereign. You eschew courts. You're going  
18          nowhere near them. There isn't any appellate  
19          right. Indeed, it's final.

20          So what this treaty is doing is it's  
21          assuring the investor that there will not be a  
22          governmental decisionmaker that's going to be  
23          involved in the outcome. You can go and avoid  
24          home court advantage.

25          Now that's the opposite, I --

1 JUSTICE SOTOMAYOR: Counsel, I'm --

2 MR. BAIIO: Sorry.

3 JUSTICE SOTOMAYOR: -- I'm having a  
4 very hard time understanding that distinction.

5 MR. BAIIO: Okay.

6 JUSTICE SOTOMAYOR: International  
7 tribunals generally want to select neutral  
8 judges that are not the state's, an individual  
9 state's decision, but a combined decision by an  
10 adjudicatory body that it considers neutral.

11 MR. BAIIO: Yes.

12 JUSTICE SOTOMAYOR: Now I'm not going  
13 to define neutrality for them, but virtually all  
14 I know of them, most of them don't even require  
15 judges, they let the states pick whatever judges  
16 they want, with whatever background they want,  
17 and they even often permit those bodies to  
18 decide the procedural rules.

19 MR. BAIIO: Yes.

20 JUSTICE SOTOMAYOR: So I don't  
21 understand the emphasis on a state adjudicator.

22 Now, if you're talking about selection  
23 of the adjudicator, which is what I think you  
24 mean --

25 MR. BAIIO: Yes.



1 JUSTICE SOTOMAYOR: All right?

2 Lithuania picked one of the -- correct?

3 MR. BAIO: Yes.

4 JUSTICE SOTOMAYOR: What's the  
5 difference between it doing it directly and the  
6 investor state saying I'm going to give my  
7 agency to the investor? I can pick any  
8 adjudicator I want in the world.

9 MR. BAIO: Yes.

10 JUSTICE SOTOMAYOR: Why is it wrong  
11 for me to say I'm going to have my Secretary of  
12 State do it or I'm going to have an individual  
13 do it? The reason I ask this question is  
14 because I think, and that's what I want you to  
15 respond to, that the issue is one of the treaty,  
16 that it is an agreement between two sovereign  
17 nations to submit a dispute that could involve  
18 both of them in a -- in an adjudicatory body  
19 that they have created.

20 And I don't see -- that's my  
21 definition.

22 MR. BAIO: Okay.

23 JUSTICE SOTOMAYOR: How do you say  
24 this doesn't fit that definition?

25 MR. BAIO: Quite -- that's -- there's

1 a lot there to unpack, Your Honor, and I will  
2 try to address each part of it.

3 Let's start with the notion of  
4 neutrality. I'm not talking about neutrality.  
5 I'm talking about non-governmental. So I'm an  
6 investor. I'm a Russian national. I invest in  
7 Lithuania.

8 If Lithuania expropriates my  
9 investment, do I want to go to a Lithuanian  
10 court? It's governmental. I'm not suggesting  
11 that that court is necessarily biased, but it's  
12 a home field.

13 Would I want to be disputing something  
14 with Lithuania before a Lithuania judiciary?  
15 Even if they are honest and impartial, it is  
16 non-governmental. It is telling -- the two  
17 countries are telling investors you will not be  
18 burdened by our courts if you don't want to do  
19 it.

20 Now I don't think the -- so that's the  
21 difference. I'm not saying neutrality. I'm  
22 saying non-governmental.

23 When the parties then select the  
24 arbitrators, it looks just like any other  
25 arbitration. Lithuania is the respondent in

1 that case. They pick one arbitrator. They  
2 don't have control over the outcome.

3 The other arbit -- the other  
4 arbitrator is selected by the individual. And  
5 they must collectively pick someone else. There  
6 is no governmental role, other than the  
7 government is a party and has agreed to follow  
8 private arbitration rules and continue.

9 JUSTICE SOTOMAYOR: So --

10 MR. BAIO: And they will be bound --

11 JUSTICE SOTOMAYOR: -- give me your  
12 definition of what constitutes an international  
13 tribunal. Define it for me.

14 MR. BAIO: An international tribunal  
15 --

16 JUSTICE SOTOMAYOR: It can't be the  
17 decisionmaker.

18 MR. BAIO: It is a decisionmaker that  
19 owes both its existence and its powers to an  
20 international agreement by or between or among  
21 sovereigns.

22 And that does not happen here. The  
23 tribunal doesn't exist or the decisionmaker  
24 doesn't exist. This treaty was passed in 2004.  
25 Now it could have created an entity that would

1 resolve disputes. It could make it  
2 governmental. They could appoint governmental  
3 agents to do that. That was not done here.

4 They specifically give four  
5 alternatives that the claimant gets to pick to  
6 escape any governmental review in the  
7 decisionmaking. And I think the statute is  
8 referring to the decisionmaker, not its origin,  
9 not whether there is a state that's involved  
10 anywhere as a party, if it's -- it's -- it's  
11 tribunal-focused. It's the deliberative body  
12 itself, is it a private adjudicator?

13 Now Justice Breyer asked the question  
14 of, well, what happens if we go the other way,  
15 particularly on what I'll call the --

16 JUSTICE SOTOMAYOR: Thank you. You're  
17 -- you're turning to his question.

18 MR. BAIO: No, I -- I'm sorry, Your  
19 Honor. I may not have finished.

20 JUSTICE SOTOMAYOR: No, you finished.

21 MR. BAIO: Okay. Thank you, Your  
22 Honor. I -- I hope I'm not finished, but --

23 JUSTICE SOTOMAYOR: Well, yeah.

24 MR. BAIO: -- I -- I completed my  
25 answer.

1           Justice Breyer, you know, the -- the  
2     parade of horrors, I'm not going to -- to go  
3     down that road, but -- but what does it mean if  
4     a tribunal is any decisionmaker, if you go that  
5     broadly, or an international tribunal is any --  
6     anything outside that's -- or foreign that is  
7     outside the United States.

8           Think of the number of decisionmakers  
9     that there are out there. And we use the  
10    example of the ersatz television judges who  
11    decide disputes. That is actually an  
12    arbitration. Those people sign an arbitration  
13    agreement. The adjudicator wears a robe, stands  
14    up on TV, and makes a decision.

15           Is the United States, which does not  
16    favor broad discovery in arbitrations under the  
17    FAA, going to recognize that, if there is the  
18    German equivalent of Judge Judy, that -- that  
19    they will be entitled --

20           JUSTICE BREYER: You don't have to do  
21    that. I mean, you know, that's the dissent in  
22    Intel. You have a narrow definition of  
23    tribunal. And it seems to me you're swept up  
24    once we say, if we said, that private  
25    arbitrations are part of this.

1 MR. BAIO: Oh, yes. I -- I think I --

2 JUSTICE BREYER: And -- and -- and so  
3 the thing that's pushing me, I'm not an expert  
4 in this, but the Restatement says we should.

5 MR. BAIO: We should what, Your Honor?

6 JUSTICE BREYER: That we should say  
7 that private tribunals are -- I mean, that's at  
8 least Berman's brief, you know, I read that, and  
9 -- and they say the Restatement is -- is against  
10 you and against your side on this.

11 MR. BAIO: But -- but the Restate --  
12 that is simply nomenclature. We're talking  
13 about a statute that extends to foreign  
14 litigants the opportunity to come to the United  
15 States and seek discovery from United States  
16 citizens.

17 Once you move into the arbitration  
18 forum, you have now -- that is the foreign  
19 entity -- you've created a wonderful incentive  
20 for me as a litigator to start the arbitration  
21 outside the United States if I can and then say  
22 it's an external arbitration and then have at  
23 the courts for discovery.

24 JUSTICE BREYER: No, you can't if you  
25 follow -- if you add Intel and, you know, the

1 Japanese tribunal and the others saying, of  
2 course, that's a problem, what you say.

3 MR. BAIIO: Yes.

4 JUSTICE BREYER: And so what we have  
5 to do is -- is say that this discovery here  
6 takes place if and only if the foreign tribunal  
7 says it wants it.

8 MR. BAIIO: Well, that didn't happen  
9 here, Your Honor, right? The foreign tribunal  
10 --

11 JUSTICE BREYER: Yeah. All right. It  
12 might not have happened there, but this is a  
13 broad problem that I'm worried about. And I  
14 have the government on the one side. It sounds  
15 like the Restatement's on the other side. There  
16 are a lot of real experts on this or on the  
17 other side, and I'm having trouble with this  
18 case --

19 MR. BAIIO: Yes.

20 JUSTICE BREYER: -- all right, not  
21 surprisingly.

22 MR. BAIIO: There -- there certainly is  
23 a lot of --

24 JUSTICE BREYER: Okay. And --- and --  
25 and, therefore, the things that you say I can

1 think of matching problems no matter what. If  
2 we go against -- if we take the first, you know,  
3 we say only applies to foreign governmental  
4 things, only governmental.

5 Hey, you produce a wonderful example  
6 of that, of whether it is or isn't.

7 MR. BAIIO: Yes.

8 JUSTICE BREYER: And we'll have to  
9 decide cases like that.

10 MR. BAIIO: Yes, and I -- I think that,  
11 frankly, Your Honor, mine is fairly easy just  
12 because of what the treaty says.

13 JUSTICE BREYER: I know you think  
14 yours is easy and you want to win, but what I  
15 want to do is figure out what kind of opinion to  
16 write and how to decide.

17 MR. BAIIO: I understand.

18 JUSTICE BREYER: So -- so I'm putting  
19 you in my dilemma --

20 MR. BAIIO: Yes.

21 JUSTICE BREYER: -- which is  
22 Restatement, the experts over here, a lot of  
23 them, including the Japanese tribunal,  
24 government over here. You claim, my God, this  
25 will be a mess. Fourteen briefs say here's what



1 you do to stop the mess.

2 MR. BAIIO: Yes.

3 JUSTICE BREYER: They won't stop it  
4 totally. All right.

5 MR. BAIIO: No, it won't stop it  
6 totally, there's no doubt about it, Your Honor,  
7 but if you look at a statute that moved from  
8 courts to foreign or international tribunals,  
9 has an enacting statute beforehand that told the  
10 commission look at quasi-judicial agencies when  
11 you are deciding how to broaden this.

12 There -- there's no easy one-shot  
13 answer, but the difference between the two  
14 definitions, one of them being circumscribed in  
15 what I think is a reasonable way, that will be  
16 for you Justices to determine, but I think that  
17 that works, as opposed to the opposite, which is  
18 any outside United States decisionmaker.

19 If an orchestra decides that they want  
20 -- a national orchestra decides that it wants to  
21 have a particular audition for violinists and  
22 they all vote, that is a decisionmaking. It  
23 might even be by a governmental entity.

24 But it is certainly not a tribunal  
25 that was created by, in my case, two sovereigns

1 acting together and deciding here is what will  
2 -- here's the -- the instrument. Here's the  
3 vehicle that will resolve the case.

4 They did not do that here. And I  
5 think you can carve out those.

6 Can you come up with a completely  
7 outcome-determinative answer? I don't know.  
8 But you certainly can with what's before you, I  
9 believe, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Alito? Anything further?  
13 Justice Sotomayor?

14 JUSTICE SOTOMAYOR: The W -- the World  
15 -- World Trade Organization --

16 MR. BAIIO: Yes.

17 JUSTICE SOTOMAYOR: -- is made up of  
18 foreign states, and it has a dispute settlement  
19 plan between the states.

20 MR. BAIIO: Yeah.

21 JUSTICE SOTOMAYOR: The states can  
22 petition the WTO, it picks the arbitrators, and  
23 the states can then adjudicate their dispute  
24 between. That would be an international  
25 tribunal?

1                   MR. BAIIO:  It depends, Your Honor.  I  
2  -- I'm sorry, I don't --

3                   JUSTICE SOTOMAYOR:  On what?

4                   MR. BAIIO:  It depends on whether they  
5  are selecting as the -- the parties, the  
6  disputants, they are selecting the arbitrators.

7                   If they're doing it in that fashion,  
8  that's one --

9                   JUSTICE SOTOMAYOR:  I'm sorry, I don't  
10 understand.

11                  MR. BAIIO:  Okay.

12                  JUSTICE SOTOMAYOR:  The fact that the  
13 WTO selects the arbitrators makes a difference  
14 for you?

15                  MR. BAIIO:  Yes, if the individual  
16 disputants are selecting an arbitration panel  
17 that is basically made up of private  
18 individuals, if the WHO is not establishing,  
19 creating, a standing body that will be resolving  
20 these disputes, you do not have an international  
21 tribunal.

22                  JUSTICE SOTOMAYOR:  All right.  Tell  
23 me why.  The WTO is a world international state  
24 agency.

25                  MR. BAIIO:  Yes.

1 JUSTICE SOTOMAYOR: They create a  
2 dispute settlement body that says the states can  
3 come to it and say we want you --

4 MR. BAIO: Yes.

5 JUSTICE SOTOMAYOR: -- the WHO, to  
6 settle this dispute between us. WTO picks the  
7 arbitral panel, and the states submit to its  
8 jurisdiction. That's not an international  
9 treaty?

10 MR. BAIO: No, that would be, as you  
11 described it -- and I -- I apologize, I  
12 misunderstood you, Your Honor. That sounds like  
13 it was an entity that was created by two or more  
14 sovereigns acting through the WHO.

15 So, yes, in that case, the entity is  
16 established by the governments -- by the treaty.  
17 Nothing is established by this treaty.

18 JUSTICE KAGAN: So --

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: -- so just in that  
21 vein, I mean, suppose there's a treaty and it's  
22 between two countries and it's to resolve  
23 disputes between those two countries.

24 MR. BAIO: Yes.

25 JUSTICE KAGAN: But they don't want to

1 set up any kind of standing organization.  
2 Instead, they want to use arbitrators. And the  
3 arbitrators, there will be one set for Dispute 1  
4 and another set for Dispute 2. All right?

5 But the treaty just says we're going  
6 to go to arbitration to resolve any differences  
7 between them. Is the eventual arbitral panel an  
8 international tribunal?

9 MR. BAIO: That is a -- that's a  
10 situation where it's state to state. That is  
11 the nature of --

12 JUSTICE KAGAN: It is state to state.  
13 It's meant to be essentially this case but state  
14 to state?

15 MR. BAIO: Right, or is it more like  
16 "I'm Alone," that series of cases, or the mixed  
17 German claims --

18 JUSTICE KAGAN: Well, you're -- now  
19 you're going above my knowledge.

20 MR. BAIO: I'm sorry. Okay.

21 JUSTICE KAGAN: So let's stick to my  
22 hypothetical.

23 MR. BAIO: Yes. If -- if it is two  
24 countries coming together or more than two  
25 countries creating --

1 JUSTICE KAGAN: It's a treaty, and  
2 they create a system of arbitration.

3 MR. BAIIO: Yes. That could be --  
4 depending on whether the tribunal itself -- it  
5 -- it's selected by the states; that is, the  
6 states themselves select --

7 JUSTICE KAGAN: Yeah. Eventually,  
8 when a dispute arises, then the -- the states  
9 pick arbitrators in the normal fashion that --  
10 that private parties pick arbitrators.

11 MR. BAIIO: I think the -- the Court  
12 could -- could find that that is not a -- an  
13 international tribunal because the decisionmaker  
14 itself was not created by the act of the  
15 sovereigns and it was not empowered by them.  
16 That is the specific tribunal.

17 It is a much closer case, Your Honor.

18 JUSTICE KAGAN: So -- so it's a much  
19 closer case because --

20 MR. BAIIO: Than mine.

21 JUSTICE KAGAN: -- it's state to  
22 state?

23 MR. BAIIO: Because state to state.

24 JUSTICE KAGAN: Yeah. So --

25 MR. BAIIO: And it involves the --

1 JUSTICE KAGAN: -- I guess one  
2 question then would be why is state to state so  
3 different from investor state when states used  
4 to represent investors directly and now they  
5 don't? This is a better system. Why should  
6 that difference matter?

7 MR. BAIIO: Well --

8 JUSTICE KAGAN: But, if you think, as  
9 you said at the end, that my system also is not  
10 an international tribunal, then I guess I want  
11 to ask you another question about why -- why  
12 that should be, because then you're saying,  
13 well, a standing body that they set up would be  
14 an international tribunal, but if they send up  
15 -- set up a standing system under which they  
16 pick arbitrators as disputes arise, that doesn't  
17 count as an international tribunal, and I guess  
18 I wonder why that should be.

19 MR. BAIIO: I said -- and I apologize,  
20 Your Honor, I said it could. And -- and --

21 JUSTICE KAGAN: Well, you have to --

22 MR. BAIIO: -- it really does -- it's  
23 not so --

24 JUSTICE KAGAN: -- you have to come  
25 out one way or the other.

1           MR. BAIIO: -- helpful, but -- no, I  
2 think that it depends upon the nature of the  
3 decisionmaker. And, here, you could say the  
4 decisionmaker ultimately is being selected by  
5 sovereigns and only sovereigns.

6           That is not our case. That is not a  
7 case where they are yielding to a common citizen  
8 and giving up the opportunity to have their own  
9 courts review it. So I -- I think that it is  
10 different. I think it's different from when --  
11 our treaty, which simply is an agreement to  
12 arbitrate if the claimant chooses it.

13           That's not what you're describing.  
14 And you are describing the establishment of a  
15 deliberative body by the governments themselves  
16 eventually. That's not what we have in our  
17 case. So I think you could conclude, yes, that  
18 is a international tribunal without disturbing  
19 my analysis, I hope.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch?

22           JUSTICE GORSUCH: In this vein, it  
23 seems like one thing we do know is that in 1964  
24 the rules committee was trying to capture  
25 entities like the U.S.-German Mixed Claims



1 Commission --

2 MR. BAIO: Yes.

3 JUSTICE GORSUCH: -- and the U.S.-  
4 Canada arbitration.

5 MR. BAIO: Yes.

6 JUSTICE GORSUCH: Why do those fall on  
7 the side of the line of being international  
8 tribunal -- foreign tribunals on your account?

9 MR. BAIO: Those were state-to-state  
10 disputes, and the -- the treaty or the  
11 commission or the document that was involved  
12 created an entity, and in both of those cases,  
13 the adjudicators are government officials,  
14 usually from both countries. That is richly  
15 governmental. That is certainly created by the  
16 international interchange between the -- between  
17 the countries, and it is staffed with government  
18 officials usually from both sides and it has  
19 sort of a diplomatic side to it. But that is  
20 entirely different.

21 And that fits within, I think, the  
22 definition that I'm offering the Court, which  
23 is, is this -- is the decisionmaker basically  
24 created by the entities, the two governmental  
25 entities? And is it exercising the power of

1 those two entities? And in the case of "I'm  
2 Alone" and in the case of the German Mixed  
3 Claims Commission, that was exactly the case.

4 Of course, German Mixed Claims  
5 Commission was together for 17 years, decided  
6 over a thousand disputes between the countries.  
7 So that's a very different animal. And I don't  
8 think anyone would say that that is not an  
9 international -- those are not international  
10 tribunals.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Just so I'm clear  
14 on your answer to Justice Kagan's question, if  
15 we were to rule for you here, I understood you  
16 to say you could distinguish the state-to-state  
17 situation based on some differences there --

18 MR. BAIO: Yes.

19 JUSTICE KAVANAUGH: -- or,  
20 alternatively, perhaps the principle that you  
21 would win on here would apply in the  
22 state-to-state situation, but we don't have to  
23 answer that question one way or the other in  
24 this case. Is that --

25 MR. BAIO: I -- I think that's

1 correct, Your Honor. Yes.

2 JUSTICE KAVANAUGH: Okay. Second, the  
3 question I asked Mr. Martinez as well. For the  
4 arbitrators themselves, of what significance is  
5 it that -- who appoints them, who pays them, and  
6 who can remove them?

7 MR. BAIO: Well, I think, if -- if the  
8 body is established by the treaty and it is  
9 staffed with government employees, let's say  
10 Russia and Lithuania, and they are agents of the  
11 two countries, I think then you start to have an  
12 international tribunal. I think that's  
13 different.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 Thank you, counsel.

18 MR. BAIO: Thank you, Your Honor.  
19 Thank you, Justices.

20 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

21 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
22 FOR THE UNITED STATES, AS AMICUS CURIAE,  
23 SUPPORTING THE PETITIONERS

24 MR. KNEEDLER: Mr. Chief Justice, and  
25 may it please the Court:

1           Section 1782 was enacted as part of a  
2   1964 law specifically designed to promote comity  
3   with other governments by improving existing  
4   practices of judicial assistance in litigation.  
5   Arbitration is an alternative to litigation. It  
6   is not a form of litigation.

7           Section 1782 accordingly applies to  
8   requests for evidence from courts or other  
9   adjudicatory bodies established by the  
10  government and exercising authority, official  
11  authority, conferred by a government.

12           But Section 1782 does not authorize  
13  the obtaining of evidence for a panel of private  
14  arbitrators assembled pursuant to an agreement  
15  between parties to a dispute. That is so  
16  because -- that is so whether the agreement is  
17  formed in a contract between two private parties  
18  to arbitrate or when a private investor takes up  
19  the offer by a -- by a government to arbitrate a  
20  dispute rather than going to court and  
21  litigating it.

22           This government focus is strongly  
23  supported by the text of 1782 as -- and we think  
24  the most natural reading is, of the term  
25  "foreign or international tribunal," one having

1 a governmental character. And we think that's  
2 particularly true in an act of Congress that was  
3 passed to improve methods of cooperation in  
4 litigation with other countries. It's used in a  
5 formal legal sense in -- in that way.

6 Arbitration is handled separately, for  
7 example, under the United States Code in a whole  
8 title, Title IX. And arbitration --  
9 provisions for enforcement of arbitration are  
10 handled separately.

11 Other provisions of the -- of the 1964  
12 act reinforce this conclusion even further, as  
13 explained in the briefs, 1781, 1782, and 1696,  
14 but I particularly want to focus on the  
15 background of this. Prior -- the background --

16 CHIEF JUSTICE ROBERTS: Before --  
17 before you do that, Mr. Kneedler, you are  
18 supporting two very different petitioners or at  
19 least with quite distinct status, and I wonder  
20 if you could spend a couple moments talking  
21 about that, how you, representing the  
22 government, looks at these -- the differences  
23 between the two entities?

24 MR. KNEEDLER: Well, there -- there  
25 are certain differences, but -- but I -- I think

1 fundamentally they are the same because, in the  
2 private -- in the private arbitration situation,  
3 it's private arbitrators who are assembled  
4 because the parties have agreed to arbitrate and  
5 they select the arbitrators.

6 That is -- that is exactly what is  
7 happening in the investor state situation. All  
8 the treaty does is obligate each party to offer  
9 to -- to -- to arbitrate. It's the investor who  
10 takes up the offer, and it's only then that the  
11 agreement to arbitrate is reached.

12 CHIEF JUSTICE ROBERTS: Well, I know,  
13 but I -- I would have thought -- I would have  
14 thought you, given your obligations representing  
15 the United States in the international sphere,  
16 might regard the second case as distinct in the  
17 sense that this isn't, you know, General Motors  
18 and Volvo or whoever coming to set up something  
19 and it just happens to be overseas.

20 But it's two sovereign nations coming  
21 together, and I would have thought that might  
22 have made a significant difference to the State  
23 Department.

24 MR. KNEEDLER: It does not. We -- we  
25 view the investor state situation for these

1 purposes to be just like the private arbitration  
2 because it -- because it functions just like the  
3 private arbitration. There is a standing offer  
4 to arbitrate from the government.

5 And if -- if the private investor  
6 accepts that offer, there is an agreement to  
7 arbitrate formed. At that point, the foreign  
8 government is stepping out of its governmental  
9 role, just like when a sovereign waives  
10 sovereign immunity, it is becoming a private  
11 person or just like a private person.

12 And, as I said, 1782, just like the  
13 whole 1964 act, was enacted to further comity  
14 with other governments. This has the potential  
15 to undermine that by putting U.S. courts --

16 CHIEF JUSTICE ROBERTS: What if --

17 MR. KNEEDLER: -- intruding them into  
18 arbitrations involving foreign governments or  
19 private parties --

20 CHIEF JUSTICE ROBERTS: What if --

21 MR. KNEEDLER: -- anywhere in the  
22 world.

23 CHIEF JUSTICE ROBERTS: -- what if the  
24 arbitral -- the arbitrators were selected by the  
25 governments, in other words, and -- and it was a

1 standing entity? This is the body of  
2 arbitrators selected by Lithuania and Russia to  
3 decide disputes under this agreement.

4 MR. KNEEDLER: That might well be  
5 different. And I -- and I think it's important  
6 to understand the background of the -- of the  
7 term "international tribunal" in 1782.

8 The -- the -- the foreign tribunal  
9 deals with individual foreign states, and we  
10 think those tribunals are governmental because  
11 the predecessor to 1782 for foreign states was  
12 clearly limited to courts and slightly expanded  
13 here to include other things like courts.

14 For international tribunals, that  
15 phrase is picked up directly from the  
16 predecessor statutes that we put -- that we have  
17 in our brief, Section 270, and those statutes  
18 were enacted to deal with two specific  
19 international arbitrations that were -- or,  
20 excuse me, international tribunals that were  
21 mentioned by counsel.

22 One is the treaty with Canada -- or  
23 Great Britain involving a dispute over the  
24 sinking of a vessel and the other the mixed  
25 claim commission. Now the mixed claim



1 commission might be closer to what you're  
2 describing.

3           And there, there was an agreement  
4 between Germany and the United States to form  
5 what was an official governmental or  
6 intergovernmental body. It was established by  
7 them. They appointed the arbit- -- the two  
8 governments appointed the arb- -- the members of  
9 the -- of the panel, and it was exercising the  
10 combined governmental power of those two -- of  
11 -- of those two entities.

12           And Congress -- there were -- there  
13 were some problems with the way those two  
14 entities operated in terms of their getting  
15 evidence. Congress passed statutes in 1930 and  
16 1933 which were codified in 270, as we  
17 explained, in an effort to try to enable those  
18 bodies to get evidence by -- by -- and  
19 authorizing them to administer oaths, to issue  
20 subpoenas, which are clearly governmental  
21 things.

22           1782 comes along, and what the -- what  
23 Congress did was, picking up on that same phrase  
24 "international tribunal," put it in 1782 but  
25 eliminated some of the limitations on the

1 operation of those predecessor statutes, which  
2 were limited to situations in which the United  
3 States was a party to the dispute.

4           The rules commission explained that  
5 why should it be limited in that way? I think  
6 that -- and they said they wanted to put it on  
7 the same footing as the foreign government  
8 tribunals, but there -- there -- foreign  
9 governmental establishments, but they shouldn't  
10 be limited, and -- and so they shouldn't be  
11 limited to cases in which the United States is a  
12 party or the United States would get evidence  
13 for itself.

14           So it wanted to remove those  
15 limitations. But it didn't change the term  
16 "international tribunal," which in those prior  
17 statutes was unquestionably limited to  
18 governmental bodies issuing subpoenas and -- and  
19 administering oaths.

20           JUSTICE KAGAN: Mr. Kneedler, can I  
21 ask you about the purpose of this statute and  
22 how it figures here? I mean, as I understand  
23 it, this is a statute that's designed to advance  
24 international comity, and I think, of all the  
25 parties here, you're the expert in international

1 comity.

2 So I guess just to go back to the  
3 Chief Justice's question about why you picked  
4 this position, you know, putting the legal  
5 arguments to the side and focusing more on the  
6 arguments about how this advances or doesn't the  
7 purpose of the statute to advance international  
8 comity and the role of the United States with  
9 respect to foreign nations, essentially, like,  
10 what does the State Department say about this  
11 question?

12 MR. KNEEDLER: Well, the -- the  
13 position of the State Department and the United  
14 States is -- is --

15 JUSTICE KAGAN: Right. I'm -- I'm  
16 asking why?

17 MR. KNEEDLER: Yeah. No, no. Well, I  
18 mean, first of all, we think it's compelled by  
19 the -- by the statute and what it was driving  
20 at, which is comity with other nations, which is  
21 what the State Department was doing and what  
22 Congress was doing.

23 Arbitration is something very  
24 different. And we recognize that when Congress  
25 has addressed the question of evidence, getting

1 evidence in arbitration, in Section 7 of the  
2 Federal Arbitration Act, that applies only  
3 domestically. It -- it -- only the arbitrator  
4 can request information. There's no pretrial  
5 discovery. It's limited to the place where the  
6 arbitrator sits.

7           What -- what is proposed here has none  
8 of those limitations. It could be discovery  
9 about any dispute anywhere in the world between  
10 a government and a -- and an investor that the  
11 United States Government has no responsibility  
12 for.

13           And so the -- the United States would  
14 be reluctant, I think, to -- to endorse a system  
15 in which our courts could intrude into -- into  
16 that foreign system and say you can get  
17 discovery in the United States in aid of that  
18 when that sort of thing is not available  
19 anywhere.

20           JUSTICE BREYER: Suppose we said you  
21 can't.

22           MR. KNEEDLER: Pardon me?

23           JUSTICE BREYER: Suppose we said you  
24 can't, which I mean to say I have the same  
25 question Justice Kagan had. Why?

1                   I mean, these -- these briefs talk  
2 about England. They talk about Spain. They  
3 talk about France. And a lot of them say -- the  
4 Japanese tribunal I think particularly -- say --  
5 say that -- that this can't be used in these  
6 situations anyway unless the arbitrator wants.

7                   MR. KNEEDLER: But --

8                   JUSTICE BREYER: And that meant that  
9 makes it coherent and consistent with local  
10 arbitrators.

11                  MR. KNEEDLER: And that -- and that  
12 would in turn involve the United States court,  
13 as -- as was true in the AlixPartners case here,  
14 and extensive undertakings to say what would --  
15 because -- what would --

16                  JUSTICE BREYER: All right. But  
17 that's -- that's a --

18                  MR. KNEEDLER: -- what -- what does  
19 the arbitrator want?

20                  JUSTICE BREYER: -- is that what is  
21 driving -- is it that, that they're worried that  
22 the court won't be able to say whether a  
23 tribunal in some other country did or did not?  
24 Then say send us a letter. I mean -- I mean, I  
25 can think of many ways around that.

1 MR. KNEEDLER: Well, it -- it's --

2 JUSTICE BREYER: But is that what --  
3 my question --

4 MR. KNEEDLER: Well --

5 JUSTICE BREYER: -- is really Justice  
6 Kagan's, why?

7 MR. KNEEDLER: Well, I --

8 JUSTICE BREYER: What is it that the  
9 State Department --

10 MR. KNEEDLER: -- I understand the  
11 practicality in a particular case, but I think  
12 the -- the -- the points that I'm raising that  
13 have been raised by others raise important  
14 policy questions that are for Congress to  
15 decide.

16 Again, the Federal Arbitration Act is  
17 where Congress has addressed arbitration. It  
18 has provided for the acquisition of evidence  
19 only for domestic arbitrations and in very  
20 limited ways. And before that is extended  
21 elsewhere, that raises serious questions that  
22 the State Department, the United States  
23 Government, would want to focus on. Should it  
24 be limited to situations where the arbitrator is  
25 already appointed? What limitations should be

1 placed on it? Should there be no pretrial  
2 discovery? There are all sorts of -- of issues  
3 that would have to be addressed.

4 And also, if the United States accepts  
5 this sort of -- or United States courts do this,  
6 they're not getting anything by way of comity in  
7 return. There's no such thing as comity with a  
8 foreign arbitration panel established by the  
9 agreement of two parties, whether they're --  
10 even when it's an investor in a foreign state.  
11 There's no comity relationship that is being  
12 served here.

13 If anything, there's the potential for  
14 friction and undermining it because states have  
15 agreed to enter into the -- there are now 2,000  
16 bits in the world. States have offered to enter  
17 into these to simplify the procedure for  
18 resolving these disputes and using arbitration  
19 in the same way a private party does and to de  
20 -- depoliticize and take out of the -- the  
21 diplomatic circle these disputes.

22 But, if you have a U.S. court engaged  
23 in discovery, it creates the potential for --  
24 for controversy and -- and for having the United  
25 States involved that is -- in -- in something

1 that is really none of its business.

2 JUSTICE KAVANAUGH: And that --

3 MR. KNEEDLER: And that's very  
4 different from the relationship with courts in  
5 another country or inter- -- formal  
6 international tribunals, it was mentioned here,  
7 because they're part of what the United States  
8 was trying to do, was to encourage other  
9 governments to do something in a reciprocal way.  
10 The 1964 act actually addresses this. It -- it  
11 wants to improve the -- the methods of  
12 facilitation in litigation, in judicial  
13 assistance --

14 JUSTICE SOTOMAYOR: Counsel, my -- my  
15 --

16 MR. KNEEDLER: -- and encourage others  
17 to do that as well.

18 JUSTICE SOTOMAYOR: -- my problem with  
19 what you're saying is 1782 itself assumes that  
20 the order the district court gives may prescribe  
21 the practices and procedure for discovery,  
22 taking into account what the international  
23 tribunal will do.

24 So going back to Justice Breyer's  
25 question, the international -- we could say or



1 -- or a court looking at this really should see  
2 what the international tribunal wants because  
3 it's required to take that into consideration.  
4 And I would assume it would be an abuse of  
5 discretion to go much further without a  
6 compelling reason.

7           But putting that aside, you've already  
8 said that you agree that "international  
9 tribunal" was intended to cover the U.S.-  
10 Germany state-to-state investment settlement  
11 mechanism and the U.S.-Canada one.

12           MR. KNEEDLER: Right.

13           JUSTICE SOTOMAYOR: Those were created  
14 by treaty of the parties, between the parties.  
15 Each of them gave up their sovereignty to --  
16 well, they didn't give up their sovereignty, but  
17 they agreed to permit suits against each other  
18 by each other and to settle what was essentially  
19 private disputes in a representative capacity.

20           I am still having a very hard time  
21 understanding how your position is not stepping  
22 on issues of foreign relations by stopping  
23 states from creating dispute resolution  
24 mechanisms involving its sovereign powers. I'm  
25 -- I'm having a hard time.

1           What you're basically saying is you  
2           can't -- you have to undergo the expense of  
3           creating and -- of funding an independent body,  
4           of having it do a hundred things at a time or  
5           even maybe one, but you have to go through that  
6           expense because that formality is important to  
7           us.

8           I don't understand that.

9           MR. KNEEDLER: It's not just the  
10          formality. It's the fact that it is -- it's not  
11          an abdication of sovereign authority in that --  
12          in -- in -- in the -- in the the state-to-state  
13          situation, it's an expression of sovereign  
14          authority and that sovereign --

15          JUSTICE SOTOMAYOR: Well, that's what  
16          a treaty is.

17          MR. KNEEDLER: -- governmental  
18          authority --

19          JUSTICE SOTOMAYOR: A treaty is an  
20          expression of state sovereignty that says:  
21          Investors can't sue me, I'm going to give up  
22          that sovereign right. Your investors, my  
23          friend, on the other side of the continent, you  
24          -- your investors can sue me but only in this  
25          way.

1                   MR. KNEEDLER: No -- well, I mean,  
2 first of all, they're not suing, and I think  
3 that's an --

4                   JUSTICE SOTOMAYOR: I think --

5                   MR. KNEEDLER: -- that's an -- that's  
6 a very important distinction. Arbitration is an  
7 alternative to invocation of the judicial  
8 process. And 1782 originally referred only to  
9 courts, and it was slightly expanded in 1964 to  
10 say courts and other quasi-judicial entities.  
11 It's clear that with respect to foreign  
12 governments -- or foreign courts, that 1782 is  
13 talking about governmental bodies.

14                   There -- and the commission's report,  
15 incorporated into the Senate report, makes clear  
16 that Congress wanted to do the same thing and  
17 put them on the same footing as -- as foreign  
18 courts or foreign tribunals.

19                   And -- and it's clear that they were  
20 picking up on the international tribunal as used  
21 in the very specialized way with respect to the  
22 two tribunals that you are mentioning. Both of  
23 -- in both of those situations, the tribunal was  
24 formally and officially created by the  
25 sovereigns themselves, not by some private

1 agreement, and, also, they were exercising  
2 official power. Power is something that's  
3 sovereign. It's -- it's a -- it's a  
4 administration of justice, to use the -- the  
5 term in the definition of "court" that we think  
6 is central here.

7 A private arbitral --  
8 JUSTICE SOTOMAYOR: Thank you,  
9 counsel.

10 MR. KNEEDLER: -- panel is not  
11 administering justice. It's trying to divine  
12 the intent of two parties to an agreement, which  
13 is very different.

14 CHIEF JUSTICE ROBERTS: Thank -- thank  
15 you, Mr. Kneedler.

16 Justice Breyer, anything further?

17 Justice Alito?

18 Justice Kagan?

19 Justice Gorsuch?

20 JUSTICE GORSUCH: Mr. Kneedler, help  
21 me write two paragraphs of this opinion, first,  
22 the paragraph that distinguishes the -- the  
23 arbitration agreement in the second case  
24 involving Lithuania from the U.S.-Canada and  
25 German claims tribunal. That's the first

1 paragraph.

2 MR. KNEEDLER: Okay. With respect to  
3 that, the distinction is in the -- I think you  
4 said the United States-Canada agreement.

5 JUSTICE GORSUCH: Yeah.

6 MR. KNEEDLER: That was a -- that was  
7 a body established by the -- directly  
8 established by the two governments, and they  
9 were exercising official power conferred by the  
10 -- by those two governments.

11 The -- the arbitration in the  
12 AlixPartners case has neither of those  
13 characteristics. Lithuania, like Russia, made a  
14 -- made an offer to arbitrate if the -- if the  
15 investor chooses. When the investor takes the  
16 state up on that, that there forms an agreement  
17 to arbitrate. It's not the treaty. It's the  
18 agreement. The states offer the private  
19 investors acceptance of it.

20 I think that's reflected in this  
21 Court's decision in BG Group about another --  
22 another bid treaty. So the one is -- the -- the  
23 -- the body, which is what the test looks at  
24 under 1782, is private. It's private  
25 arbitrators selected pursuant to an agreement.

1 It's not governmental.

2 JUSTICE GORSUCH: And, second, one  
3 paragraph on how you define a foreign or  
4 international tribunal.

5 MR. KNEEDLER: Well, I -- I think it's  
6 encapsulated with -- with what I said before.  
7 The tribunal has to be established by the  
8 government and has to be exercising governmental  
9 authority, the -- administering justice in the  
10 way we think of governmental courts or  
11 quasi-judicial bodies, which is all that  
12 Congress intended to pick up and that -- that it  
13 did pick up in the 1964 act.

14 Organs of government. And -- and  
15 that, we think, is a foreign tribunal, and the  
16 same principle applies in international  
17 tribunal, which was the form of tribunal that  
18 Congress picked up.

19 It's also important to recognize, for  
20 example, 1782 and the rest of the 1964 act use  
21 the term "letter rogatory."

22 JUSTICE GORSUCH: Right.

23 MR. KNEEDLER: Which is a -- which is  
24 something only courts issue, not -- and -- and  
25 -- and things like that are scattered throughout

1 the 1964 act, references to tribunal officer or  
2 -- or agency, which has a governmental  
3 character. Rules of practice of a foreign  
4 government, which is suggesting -- or the  
5 tribunal, which is suggesting standing bodies  
6 having their -- their own rules. So the statute  
7 and -- and -- and its history and its precursors  
8 are -- are all pervasively imbued with a  
9 governmental character.

10 It's hard to come away with reading  
11 these statutes, their background, the reports  
12 explaining what the commission was up to,  
13 without saying these are governmental and has  
14 not -- there's not a mention of arbitration  
15 there, which I said has always been treated  
16 differently.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: As has been noted,  
21 Mr. Kneeder, you know the foreign relations  
22 implications and undoubtedly have consulted with  
23 the State Department at length on this, so I  
24 just want to -- you to tie up. Ruling for the  
25 Respondent in the investor state case, the

1 second case, would cause problems for comity and  
2 U.S. foreign relations because?

3 MR. KNEEDLER: Well, I -- you know, I  
4 can't be specific about it. I mean, the main  
5 point I'm -- the main point I'm making is that  
6 international comity is with foreign  
7 governments, and this isn't -- this isn't that.  
8 And the United States gets nothing in return in  
9 comity by opening its courts to do this. It  
10 exposes U.S. litigants, but another litigant  
11 who's in a foreign country would not -- would  
12 not be exposed to the same sort of thing.

13 And so, when it comes to international  
14 comity, often what the United States wants to do  
15 is to do something reciprocal, to adopt  
16 something and hope other countries will do it,  
17 which is what the 1964 act was about.

18 But opening up U.S. courts  
19 unilaterally to this sort of discovery that has  
20 never been permitted, even in domestic  
21 arbitration, is a unilateral act with a -- with  
22 an ad hoc panel in a -- you know, somewhere  
23 around the world that -- that could upset a  
24 foreign government with no -- with no benefit,  
25 comity interchange for the United States.



1 JUSTICE KAGAN: And it's not --

2 JUSTICE KAVANAUGH: Go ahead.

3 JUSTICE KAGAN: May I?

4 JUSTICE KAVANAUGH: Mm-hmm.

5 JUSTICE KAGAN: It's not true that the  
6 foreign countries with whom the United States  
7 has entered into the treaty would expect this in  
8 any way, is -- is -- is that correct?

9 MR. KNEEDLER: Well, I think that's  
10 also part of it. I mean, you know, maybe some  
11 -- maybe one would, but there's no reason to  
12 think that they would or, frankly, that they  
13 should.

14 And before we enter into that sort of  
15 thing, it seems to me it's -- it's not just a --  
16 a question of treaties, but -- but we're talking  
17 about judicial procedure, and it's something  
18 that Congress can weigh the various policies, as  
19 I mentioned, should there be conditions on the  
20 -- on the acquisition of evidence.

21 What -- what should the timing be?  
22 Are there certain types of foreign bits that  
23 should be accepted and not others? And I think  
24 the State Department would -- would -- would  
25 want to weigh -- we all would want to weigh in

1 on the particulars of how that should happen  
2 rather than reading this into a -- a 1964  
3 statute that -- that there's no indication had  
4 anything to do with arbitration.

5 The United States had not even  
6 ratified the New York convention on  
7 international commercial arbitration in 1964  
8 when -- when this -- when this was enacted.

9 JUSTICE KAVANAUGH: And you alluded to  
10 this earlier, I think, but I want to make sure  
11 I'm clear, that you think it could cause a  
12 problem if a U.S. court were resolving discovery  
13 disputes, including in the second case, because  
14 a state, foreign state, would be a party in that  
15 --

16 MR. KNEEDLER: I --

17 JUSTICE KAVANAUGH: -- and that can  
18 create problems, but I just want you to --

19 MR. KNEEDLER: I --

20 JUSTICE KAVANAUGH: -- spell that out.

21 MR. KNEEDLER: I'm not saying that  
22 every -- every -- I'm -- I'm making sort of a  
23 more general point. I'm not saying that any one  
24 dispute would be -- would be a problem, or I'm  
25 not saying in this particular case.

1           What I am saying is that -- that the  
2           situation -- situation is instinct with the --  
3           with that potential. And there's no -- nothing  
4           in the statute that controls it. And it would  
5           be -- this Court in Intel declined to impose  
6           rules about when you can seek discovery and the  
7           timing and all of that.

8           And -- but -- so I think it would --  
9           that would not be an appropriate solution here  
10          either. Before the gate is opened at all, I  
11          think there should be either an act of Congress  
12          or a treaty that is specifically addressed to  
13          arbitration rather than judicial assistance with  
14          courts.

15                   JUSTICE KAVANAUGH: Thank you.

16                   CHIEF JUSTICE ROBERTS: Justice  
17          Barrett?

18                   JUSTICE BARRETT: I just have one  
19          clarifying question. Justice Kagan asked you  
20          about what another country might expect. And  
21          I'm wondering whether the expectations of the  
22          countries factor into this calculus at all or  
23          what they might have intended in a treaty?

24                   Justice Sotomayor pointed out that, if  
25          there's some formality involved, that might

1 create more expense for the foreign countries.

2 So what if they said we want this  
3 private -- you know, there's some existing  
4 private arbitrator and we're going to call this,  
5 however, for purposes of disputes arising under,  
6 you know, this agreement, the Lithuanian-Russian  
7 tribunal.

8 Could they, even though maybe the body  
9 otherwise doesn't have the kinds of  
10 characteristics that you're identifying, could  
11 they simply by designating it as such reflect an  
12 intent to designate a private body, private  
13 arbitrator, as one that exercises sort of  
14 governmental authority?

15 MR. KNEEDLER: I -- I -- I think that  
16 would be problematic too. I mean, I -- I think  
17 the -- I think the formality, I mean, the -- the  
18 question is what was Congress intending. And I  
19 think -- I think Congress was -- had  
20 specifically in mind formality because the  
21 exercise of sovereign power is a formal power.

22 You want -- you want it written in  
23 law. You want it -- you want it regular.

24 JUSTICE BARRETT: So the formality of  
25 saying we want to call this the Lithuanian-

1 Russian tribunal simply for this purpose, but  
2 it's an -- otherwise, it's a standing body that  
3 handles private disputes, that kind of formality  
4 wouldn't calculate what the countries did?

5 MR. KNEEDLER: Well, I -- I, you know,  
6 I -- I'm not aware of a situation like that.  
7 And I think it would be prudent to, you know,  
8 reserve that because the -- the characters --  
9 the -- the central character of the bit here is  
10 one that is very common. And I think that's all  
11 the Court needs to decide and should reserve  
12 that and I think also should reserve the  
13 state-to-state question in situations that don't  
14 involve the kind of presentation of claims to a  
15 commission. There's sort of litigation before a  
16 commission in that situation. That may be  
17 different from a boundary dispute between states  
18 or things that are -- that are really sovereign.  
19 And, you know, those might be put to one side  
20 for another reason.

21 But I think the touchstone ought to be  
22 the test that I -- I suggested, which is a  
23 simple one: Was it established by a government  
24 or governments and is it exercising governmental  
25 power or, the equivalent in the international

1 format, is it exercising official power on  
2 behalf of the two governments?

3 And that should be the touchstone. If  
4 there are questions about the interpretation of  
5 a particular agreement, if the -- if the foreign  
6 treaty you're describing was just trying to get  
7 around that or something labeling it, I don't  
8 think that would count. I -- I think they --  
9 they have -- if it's going to be governmental,  
10 they have to develop it and establish it as --  
11 establish it as government.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Mr. Davies.

15 ORAL ARGUMENT OF ANDREW R. DAVIES  
16 ON BEHALF OF THE RESPONDENT IN 21-401

17 MR. DAVIES: Mr. Chief Justice, and  
18 may it please the Court:

19 Congress has authorized assistance to  
20 foreign tribunals. The best, most natural  
21 interpretation of that broad phrase includes a  
22 foreign-seated commercial arbitral tribunal.

23 A commercial arbitral tribunal is a  
24 tribunal because it's authorized to render an  
25 adjudication of the parties' legal rights that

1 is final, unless it's set aside by a reviewing  
2 court. That's consistent with this Court's  
3 interpretation of tribunal in Intel and with  
4 contemporaneous usage of "tribunal" to mean  
5 commercial arbitral tribunals.

6           And a foreign-seated commercial  
7 arbitral tribunal is foreign because its legal  
8 domicile or its juridical home is in another  
9 jurisdiction. There is no basis to draw an  
10 arbitrary line at the tribunals of foreign  
11 countries. That limitation is not supported by  
12 the statutory language or context or by Intel.

13           Providing assistance to commercial  
14 arbitral tribunals seated in other countries  
15 promotes cross-border commercial arbitration and  
16 international comity. It allows foreign  
17 tribunals handling cross-border commercial  
18 disputes to make better informed evidence-based  
19 decisions, provides access to evidence that  
20 would otherwise be out of reach, and it  
21 encourages other countries in turn to  
22 reciprocate by assisting arbitral tribunals  
23 here, and that, in turn, promotes this country's  
24 pro-arbitration policy.

25           And the statute does this with a range

1 of safeguards. Parties that don't want  
2 assistance can opt out by agreeing not to seek  
3 it. The arbitral institutions can prohibit or  
4 limit it through their rules. And we're talking  
5 here only about a grant of authority to  
6 entertain a request.

7 As this case shows, nothing requires a  
8 district court to grant all of the assistance  
9 that's requested or any of it.

10 I'll be pleased to answer the Court's  
11 questions.

12 CHIEF JUSTICE ROBERTS: Counsel, we  
13 just heard from the government's representative,  
14 who made a number of representations about the  
15 government's views with relation to other  
16 governments around the world.

17 Now they're -- those are, of course,  
18 not determinative. But I wonder if you have a  
19 response to those concerns.

20 MR. DAVIES: Mr. Chief Justice, the  
21 government and the Petitioners are taking an  
22 awfully narrow view of comity. This Court in  
23 Mitsubishi Motors and in Scherk in the course of  
24 enforcing arbitration agreements noted that  
25 arbitration does promote international comity in



1 the international commerce space.

2 And -- and so it really is very narrow  
3 a view that they are taking. And as I've said,  
4 it really does promote comity. It does  
5 encourage other countries to assist tribunals  
6 here.

7 And I know that my friend was  
8 dismissive of the number of countries that have,  
9 in fact, reciprocated, but the countries that  
10 have are major arbitral centers. It's the  
11 United Kingdom. It's France. It's Sweden.  
12 It's Switzerland. So there is some evidence  
13 that the reciprocation, the comity, has actually  
14 happened.

15 JUSTICE GORSUCH: Counsel, I think  
16 that the concern was, in addition to what you  
17 described, more of a -- a question of Congress's  
18 prerogatives here and -- and the political  
19 branches' prerogatives in this area, the State  
20 Department and other branches, parts of the  
21 executive branch.

22 In 1964, a foreign tribunal, an  
23 international tribunal, there's a lot of  
24 evidence that it was a court or something very  
25 much like a court, and arbitration on the scale

1 that we're talking about today was unknown.

2 And that maybe we could rejigger the  
3 Intel factors to say you've got to ask the  
4 arbitrator first and he's got to agree or we --  
5 we -- there's a lot of workarounds that we -- we  
6 could patch up, I suppose. That's the argument  
7 I understand you to be making.

8 But that the government's position is,  
9 well, maybe it would like to be heard on some of  
10 these things in -- in a legislative process and  
11 that 1782 was itself a product of legislation,  
12 and the court's jurisdiction in these matters,  
13 especially involving foreign international  
14 questions, questions of comity, are usually  
15 resolved by the political branches rather than  
16 by -- by this one.

17 So I -- I -- I -- I took that to be  
18 the thrust of Mr. Kneedler's presentation.  
19 Could you address that?

20 MR. DAVIES: There was a process  
21 leading up to the 1964 statute. This statute  
22 was --

23 JUSTICE GORSUCH: Well, of course.  
24 And, again, and I hate to repeat myself, but, in  
25 1964, I don't think anybody thought Congress was

1 contemplating the world in which we live today  
2 with respect to international arbitration, okay?

3           And -- and -- and so, again, if -- if  
4 that's true, take that premise, all right, and  
5 you may contest it, but just accept it for  
6 purposes of the question that I think there's a  
7 lot of evidence in the statute, letters  
8 rogatory, processes and procedures, 16 -- what  
9 is it, 1965 -- sorry, 1696, 1781, those  
10 provisions, a lot of evidence there talking  
11 about courts.

12           And that, to the extent we're going to  
13 start invoking comity, shouldn't this Court be  
14 hesitant to -- to -- to -- to step into that  
15 kind of international breach?

16           MR. DAVIES: No. Congress has already  
17 enacted a statute that covers foreign tribunals,  
18 including foreign-seated commercial arbitral  
19 tribunals. If -- okay.

20           JUSTICE GORSUCH: Again, I'm going to  
21 ask you one more time. Assume that that's  
22 really, you know, not as clear as you think it  
23 is. Okay?

24           Why shouldn't I err in the other  
25 direction of allowing the political branches to

1 address this question first?

2 MR. DAVIES: It sounds as though the  
3 political branches want to be heard in respect  
4 of a potential amendment to the statute. I  
5 think that -- that may be appropriate.

6 JUSTICE GORSUCH: All right.

7 MR. DAVIES: If there are unforeseen  
8 applications of the --

9 JUSTICE GORSUCH: I understand you  
10 contest the premise of the question.

11 MR. DAVIES: To -- to -- to address  
12 the -- the question about the fact that there is  
13 no basis to -- to limit this statute to the  
14 tribunals of foreign countries, I mean, that's  
15 not something that's supported by  
16 contemporaneous usage.

17 And, in fact, it's not supported by  
18 Intel either. In Intel, the tribunal was a  
19 tribunal because it had a quasi-judicial  
20 adjudicative function. The Court referred to  
21 its authority to determine liability, a  
22 disposition that'll be final unless overturned  
23 by a reviewing court.

24 And it's significant that, in Intel,  
25 the government urged the Court to rule on the

1 basis that that tribunal was governmental in  
2 nature. It's at page 16 of the government's  
3 amicus brief in Intel. The Court clearly paid  
4 close attention to the government's amicus brief  
5 in Intel but did not accept that -- that basis  
6 for ruling.

7           And really to go back to the  
8 legislative history, we don't think the Court  
9 needs to look at the legislative history. We  
10 think that, in context, the text of the statute  
11 is clear enough, and so there is no need.

12           JUSTICE BREYER: All right, but I -- I  
13 -- I'm still with Justice Gorsuch's question.  
14 Look, as -- I don't want to rephrase it, because  
15 I think he phrased it exactly right. Assume I  
16 don't agree with you. I do not believe that  
17 this statute is so clear in its history and  
18 language, okay?

19           And I worry because there are lots of  
20 problems once you go to arbitration, for private  
21 commercial arbitration. Company A wants to get  
22 a lot of information before there's even a  
23 proceeding started. Two, they want to get some  
24 information of a kind that the foreign  
25 proceeding wouldn't want to get. It can't under

1 that law. Three, four, five, they're all  
2 listed.

3 And now I understand the government's  
4 view. There are too many problems extending  
5 this. There are only two circuits that have  
6 done it. And maybe -- I don't know about what  
7 the Restatement said. I haven't read it.

8 But go to Congress. Now, we're not  
9 asking people who are penniless and have no  
10 influence to go to Congress. We're asking major  
11 companies in the United States and abroad who  
12 use this system, commercial arbitration, go to  
13 Congress and get it worked out.

14 Now, that I think I learned, whether  
15 he intended to say it or not, I think he did,  
16 from the government. And so don't we want to  
17 know what you think about that?

18 MR. DAVIES: Your Honor, the issues  
19 that -- that have been identified can all be  
20 addressed within the statute encompassing these  
21 types of -- of tribunals.

22 There was a reference to the  
23 difficulty caused when evidence assistance is  
24 sought before an arbitration has begun. Well,  
25 the statute we know already encompasses that

1 because Intel said the proceeding only has to be  
2 in contemplation.

3 For future cases, there could be a  
4 rule that the Intel discretionary factors now  
5 include a requirement to exercise caution before  
6 the tribunal has been constituted. Perhaps you  
7 only grant assistance if there are some kind of  
8 exceptional circumstances.

9 So all of those concerns can be  
10 addressed within the structure of the statute  
11 that we already have.

12 JUSTICE GORSUCH: I think the question  
13 we're -- we're presenting is there are going to  
14 be a lot of these questions, aren't there? I  
15 mean, you're right, 1782, you don't require  
16 proceedings. They don't have to exist.  
17 Arbitration, we contemplate how far -- how close  
18 in time do we have to expect this arbitration to  
19 exist? What if -- how much -- how many of the  
20 arbitrators have to agree, or maybe they don't?

21 It all runs very counter to our  
22 intuitions about arbitration, which is that it's  
23 supposed to be quick, it's supposed to be  
24 governed by an arbitrator, we're not supposed to  
25 have U.S.-style discovery.

1           And 1782 is a very liberal grant of  
2     discovery. And -- and, yes, maybe we can devise  
3     a workaround. I don't doubt it. I mean, I'm --  
4     I'm quite confident Justice Breyer can come up  
5     with an excellent list of factors that I'd  
6     probably vote for if I were a legislator.

7           But I guess the question is why -- why  
8     should we be doing that? Why shouldn't you go  
9     to Congress?

10           MR. DAVIES: Ultimately, the answer to  
11     this is that we -- we have a broad statute. And  
12     -- and there was -- there was reference, when my  
13     friend was arguing, to -- to the phrase "foreign  
14     tribunal" and it having a governmental  
15     limitation.

16           Neither side has been able to point to  
17     usage of that term to mean what it is asking the  
18     Court to rule now. We don't have an example of  
19     it being used to reference arbitral tribunals,  
20     and my friend doesn't have an example of it  
21     being used to reference courts and non-judicial  
22     adjudicative bodies of foreign countries.

23           And that's not terribly surprising,  
24     because Congress and this Court wouldn't have  
25     had much reason prior to the 1970s to be talking



1 about foreign commercial arbitral tribunals at  
2 all. And it's different from "foreign leader"  
3 or "personal privacy." Those are phrases that,  
4 based on usage, have some linguistic resonance  
5 that's narrower than the ordinary meaning of  
6 their terms.

7           And so what Congress has done is used  
8 a broad phrase that didn't then have a  
9 particular narrow meaning. And so there is  
10 really no basis to do anything, other than apply  
11 the most natural meaning of the two words,  
12 "tribunal" as interpreted in Intel to mean an  
13 adjudicative body that has the authority to make  
14 a final ruling subject only to court review, and  
15 -- and "foreign."

16           And we know that in the 1964 statute,  
17 Congress did not use the word "foreign" to mean  
18 foreign governmental. When Congress wanted to  
19 say foreign governmental in the 1964 statute in  
20 Section 5 of it, it used the words "of a foreign  
21 country." That's how it referenced the official  
22 document of a foreign government. When it used  
23 the word "foreign" in Section 2 of the same  
24 statute, it was referring only to things outside  
25 the United States, documents located overseas.

1                   And so putting these terms together,  
2                   which is really all that we can do because there  
3                   was no definition of the term as -- you know, as  
4                   a phrase at that point, that covers foreign  
5                   commercial arbitral tribunals.

6                   CHIEF JUSTICE ROBERTS: Well, what you  
7                   --

8                   JUSTICE SOTOMAYOR: Mr. Davies -- I'm  
9                   sorry.

10                  CHIEF JUSTICE ROBERTS: What you've  
11                  just done in your presentation, of course, is  
12                  take the two words and sever them and focus on  
13                  sort of one -- sort of one at a time and then  
14                  treat those as -- as constituents.

15                  Well, your friend on the other side  
16                  makes the point that you need to look at the  
17                  phrase as a phrase. It's not what does a  
18                  tribunal mean, what does foreign mean? It's  
19                  what is a foreign tribunal?

20                  Do you have any response to that?

21                  MR. DAVIES: Mr. Chief Justice,  
22                  neither side has been able to demonstrate a  
23                  preexisting understanding of the -- of the  
24                  phrase "foreign tribunal."

25                  My friend referenced the Corpus

1 Linguistics study. The -- the Court should  
2 disregard that. That was self-published. It's  
3 full of gaps. It's full of typographical  
4 errors. Self-published three days before the  
5 reply brief was filed. It says that it was done  
6 by -- by some coders. It doesn't tell us --  
7 it's inconsistent whether there were two or  
8 three coders. But, ultimately, all it ends up  
9 doing is establishing that the phrase didn't  
10 really have a meaning as of 1964. They only  
11 were able to come up with a couple of hundred  
12 usages ever.

13           And so here, really what the Court can  
14 do is to look to the words that were used,  
15 "tribunal" as interpreted in Intel and as used  
16 at the time to mean commercial arbitral  
17 tribunal, and "foreign" as used in the 1964  
18 statute to mean outside the United States.

19           I do accept that the 1958 statute that  
20 established the commission used the expression  
21 "agencies," but that was not the expression that  
22 Congress used when it came to write the 1964  
23 statute. It used a different phrase, "foreign  
24 tribunal," presumably to mean something  
25 different.

1           And my friend referenced the fact that  
2           for decades after the -- the statute was  
3           enacted, it was understood that it didn't apply  
4           to foreign commercial tribunals. That's really  
5           not right. And the absence of commentary one  
6           way or the other on this really doesn't tell us  
7           that there was an understanding that it didn't  
8           apply to foreign commercial tribunals.

9           In fact, there's little evidence that  
10          this statute was used by private litigants for  
11          much of anything prior to the 1990s. It may be  
12          that this statute just sort of passed into --  
13          into obscurity. That's what had happened with  
14          the 1855 statute that started this. And so  
15          little evidence it was used for much of anything  
16          before the 1990s.

17          If I could address some of the -- the  
18          policy issues that were discussed during my  
19          friend's presentation.

20          Really, this does support commercial  
21          arbitration, and in the international commercial  
22          context, the considerations are different than  
23          they are in purely domestic arbitrations.

24          Evidence gathering, discovery, is not  
25          alien to foreign commercial arbitrations. And

1 this is all subject to the proviso that, if the  
2 parties don't want it or the institutions don't  
3 want it, then they can prohibit it.

4 And there was a reference in the  
5 government's presentation --

6 CHIEF JUSTICE ROBERTS: You mean in a  
7 case-by-case basis the arbitrators would  
8 prohibit it?

9 MR. DAVIES: Well, the parties could  
10 prohibit it in their arbitration agreements.

11 CHIEF JUSTICE ROBERTS: Oh.

12 MR. DAVIES: And the arbitration  
13 institutions could prohibit it in the rules that  
14 apply to -- to all of the arbitrations that they  
15 perform.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 MR. DAVIES: There was a reference to  
18 the -- the -- the conflict or the asymmetry with  
19 Section 7 of the -- of the Federal Arbitration  
20 Act.

21 And, to be sure, there is an asymmetry  
22 because Section 1782 permits assistance to  
23 foreign tribunals that's not available for  
24 domestic arbitral proceedings or domestic  
25 judicial proceedings, pre-filing discovery,

1 requests by interested non-parties. But I think  
2 that's -- that's explicable on -- on two  
3 potential bases.

4 One is the policy ground. I've talked  
5 about, you know, Congress was trying to assist  
6 in the resolution of cross-border commercial  
7 disputes. It's not that Americans are targeted  
8 by Section 1782 requests. American businesses  
9 themselves are involved in foreign arbitral  
10 proceedings and, therefore, can use the  
11 assistance that it offers.

12 And I think the other explanation,  
13 potential explanation for this asymmetry is much  
14 more prosaic. I mean, we have three different  
15 regimes, assistance to foreign proceedings,  
16 assistance to domestic arbitral proceedings, and  
17 domestic judicial proceedings, all enacted  
18 separately decades apart with little evidence  
19 that Congress has ever really considered whether  
20 they fit together and, if so, how.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Breyer, anything further?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Barrett? No?

3 Thank you, counsel.

4 Mr. Yanos.

5 ORAL ARGUMENT OF ALEXANDER A. YANOS

6 ON BEHALF OF THE RESPONDENT IN 21-518

7 MR. YANOS: Thank you, Mr. Chief

8 Justice, and may it please the Court:

9 I -- I want to begin with, since I'm  
10 last in the order, with some of the questions  
11 that arose earlier today.

12 I heard the United States say over and  
13 again that arbitration was not contemplated in  
14 Section 1782. I think that's just flat wrong.

15 First of all, it's irrelevant in any  
16 event because, as -- as Justice Scalia in his  
17 concurrence in Intel pointed out and as this  
18 Court described in *Bostock*, what's important is  
19 what the language of the statute says, not what  
20 was intended in the minds of various Senate  
21 reports.

22 But, in any event, the Senate report  
23 and the House report contemporaneously  
24 emphasized the importance of that German Mixed  
25 Claims Commission to its desire to amend

1 Section 1782 as it did.

2 And I think it's worth recalling that  
3 the German Mixed Claims Commission set up a  
4 tribunal where each government appointed one  
5 commissioner and then -- and the -- the word  
6 used is an "umpire" as the -- effectively the  
7 chair. That's an arbitration. That's plain and  
8 simple.

9 So it can't be the case that no  
10 arbitrations were contemplated within the  
11 meaning of the concept of tribunal. And that  
12 was an international tribunal, and ours is as  
13 well.

14 And with that, I welcome the Court's  
15 questions.

16 If there are none, I want to --

17 CHIEF JUSTICE ROBERTS: Well, I --  
18 I'll begin with the same question I had for your  
19 friend. What -- what do you -- how do you react  
20 to the government's representations of the  
21 foreign policy impacts?

22 Again, the decision on what the  
23 statute means is, of course, ours. But we do  
24 look to what the position of the United States  
25 is when -- particularly when dealing with



1 something that has an effect on foreign affairs.

2 MR. YANOS: Absolutely. I -- that's  
3 actually exactly where I was going to go.

4 The first thing I would mention is  
5 that a number of sovereigns have invoked  
6 Section 1782 in connection with bilateral  
7 investment treaty disputes, Turkey, Ecuador.  
8 That's -- that's in -- in our brief in one of  
9 the footnotes.

10 So it's not only investors who have  
11 invoked Section 1782 to obtain third-party  
12 discovery. So, you know, comity should --  
13 should take that into account as well.

14 And the other is that, obviously, the  
15 Mixed Claims Commission had no ability to  
16 reciprocate to the United States when it was  
17 coming to discovery. So comity is not purely a  
18 bilateral question. It's a question of  
19 respecting international tribunals created by  
20 sovereigns or imbued with authority by  
21 sovereigns and giving those tribunals respect  
22 and promote -- you know, assisting them.

23 And I should mention that Mixed Claims  
24 Commissions existed well beyond the  
25 German-American Mixed Claims Commission. There

1 were a number formed involving foreign  
2 sovereigns like Mexico and France, and, of  
3 course, the U.S. was an innovator in this  
4 respect going all the way back to the Jay  
5 Treaty, but those were effectively disputes  
6 involving private property.

7 Starting with the Jay Treaty, the  
8 whole point was that there were U.S. citizens  
9 whose property was damaged by the Brit --  
10 British forces, and there were British subjects  
11 whose property was -- was damaged by United  
12 States forces, and this was an opportunity where  
13 there was espousal, of course, for one  
14 government to represent those interests in a  
15 dispute.

16 And that's exactly what's happening  
17 here, except that we've cut out, as -- as I  
18 think it was Justice Kagan mentioned --

19 CHIEF JUSTICE ROBERTS: Well, the  
20 extent -- the extent to which any proceeds would  
21 be distributed, that -- that wasn't resolved. I  
22 mean, it was a case involving the state.

23 MR. YANOS: The state was representing  
24 the individual, and the property that -- the  
25 funds that were received by the state were then

1 provided to the individual.

2 And that's how the Mixed Claims  
3 Commission worked as well. I --

4 CHIEF JUSTICE ROBERTS: I -- I guess,  
5 tell me again exactly what your reliance on the  
6 Jay Treaty and the original trial action is. I  
7 don't see that as a private entity. I don't see  
8 in which way -- in what way it is distinct from  
9 simply a case.

10 MR. YANOS: Oh, well, because in -- in  
11 -- whether we're talking about the Jay Treaty or  
12 the Mixed Claims Commission, each sovereign  
13 appointed a commissioner and then the two  
14 sovereigns jointly appointed an umpire.

15 Those persons were not, at the moment  
16 they were serving on this Commission, operating  
17 as a U.S. -- whether they were previously a U.S.  
18 judge or a judge from Great Britain or Germany,  
19 at the moment they were serving as commissioners  
20 or arbitrators or umpires, they were sitting in  
21 a completely different capacity.

22 They were arbitrators. They were  
23 sitting in a dispute effectively private between  
24 two sovereigns. In our case, the sovereign has  
25 appointed one arbitrator. The -- the foreign

1 investor has appointed the second arbitrator.  
2 And the two jointly have -- have appointed the  
3 chair.

4 But what -- what's most important is  
5 that the arbitration could not -- the arbitral  
6 tribunal could not exist without the impetus of  
7 the treaty both in terms of the offer to  
8 arbitrate but also the arbitration -- the law  
9 applicable to the dispute. As -- as the Chief  
10 Justice noted in -- in the dissent in BG, this  
11 is a fundamentally sovereign dispute.

12 The -- the sovereign is allowing a  
13 tribunal to sit in judgment of its legislation,  
14 of its sovereign acts. Did it breach the  
15 treaty? Did it -- did it engage in  
16 expropriation without compensation? Did it  
17 treat an individual unfairly or inequitably?  
18 Did it fail to provide full protection and  
19 security? These are --

20 JUSTICE GORSUCH: Mr. Yanos, let me  
21 see if I --

22 MR. YANOS: Yes. Thank you.

23 JUSTICE GORSUCH: -- I mean, I think I  
24 -- I take your point to the Chief Justice that  
25 any account on the other side has to recognize

1 the existence of these arbitral panels between  
2 Canada and the Mixed Claims Commission with  
3 Germany.

4 But I also take the distinction that's  
5 being proffered by the other side to go  
6 something like this, all right, that there it  
7 was state-to-state. Here, there's a private  
8 party involved.

9 There, there was some exercise of  
10 governmental authority. Those commissions could  
11 -- for example, I think the U.S.-Canada one  
12 could issue subpoenas, administer oaths. Here,  
13 there's none of that.

14 And, here, additionally, though there  
15 is a treaty, as you point out, between states,  
16 there's just no indication that -- that in -- in  
17 -- in reaching those treaties, they understood  
18 -- those states understood that they could be  
19 subjecting themselves to full U.S. discovery.

20 And there's some indication that they  
21 thought they wouldn't be doing that by agreeing  
22 to arbitration, which takes us back to, in my  
23 mind, again, the kind of, well, if we're really  
24 not sure here, right, what -- what they signed  
25 up for or what this statute says, shouldn't this

1 be left to Congress?

2 There's a lot there to unpack. Have  
3 at it.

4 MR. YANOS: I look forward to it.

5 The first thing I would remind the  
6 Court is that this is third-party discovery.  
7 This is not an end-around discovery within the  
8 arbitration process. I'm not seeking --

9 JUSTICE GORSUCH: That -- that -- that  
10 doesn't work for me, all right? And I -- I'm  
11 just putting my cards on the table.

12 MR. YANOS: Okay.

13 JUSTICE GORSUCH: I understand that,  
14 yes, it's third-party discovery, but, boy, I  
15 don't know anybody who represents a party who  
16 doesn't dread the scope of third-party subpoena  
17 practice and the expense and the delay that's  
18 involved.

19 And, again, before we'd assume that --  
20 that -- that foreign states have signed up for  
21 that in America, shouldn't we be a little -- a  
22 little cautious?

23 MR. YANOS: Well, I -- I appreciate  
24 the point, although I would again remind you  
25 that sovereigns themselves have invoked 1782 in

1 the U.S. to obtain discovery from third parties  
2 as well.

3 But I -- I think that the broader  
4 point is that whether -- whether we're talking  
5 about third-party discovery in support of, you  
6 know, criminal court proceedings in Spain or a  
7 bilateral investment treaty dispute in France in  
8 relation to a treaty signed by Russia and  
9 Lithuania, nobody out -- outside of the U.S.  
10 signed up for third-party discovery dealing with  
11 those issues, but Congress decided that it  
12 wanted to provide support to those foreign or  
13 international tribunals.

14 And that's what this Court is  
15 enforcing. And I think that's where -- where we  
16 need to -- to, you know, put our focus. And  
17 that's why I mentioned the -- fundamentally, you  
18 know, whether we take it as a phrase,  
19 "international tribunal," or we -- we take the  
20 two constituent elements, an "international"  
21 "tribunal," we know that the tribunal could be  
22 arbitral because the German Mixed Claims  
23 Commission was an arbitral tribunal.

24 So then the question is, does the word  
25 "international" carry so much water that it says

1 no, it can't possibly be an investment treaty  
2 arbitration tribunal; it has to only be a  
3 tribunal where two -- the two sovereigns are  
4 involved? And I just don't see that the word  
5 "international" can carry that -- that kind of  
6 weight.

7 JUSTICE SOTOMAYOR: Mr. Yanos, I agree  
8 with you that some international tribunals,  
9 particularly those that prosecute individuals,  
10 often don't involve the foreign states in the  
11 litigation. So we have plenty of those around.  
12 Why they're international, we can discuss.

13 But I'd like you to go back to Justice  
14 Gorsuch's question. The other side says there  
15 are important distinctions that take this away  
16 from those other forms of arbitration. The  
17 first, and not unimportantly, is that the  
18 agreement doesn't create the arbitration  
19 mechanism. The agreement has to be invoked by a  
20 private party or by the government. So that's a  
21 big distinction in their mind.

22 Others are that the parties are -- are  
23 not resolving state-to-state disputes but  
24 private litigant disputes. So there it's a  
25 private dispute, not a government-to-government



1 dispute.

2 So could you address those two  
3 differences?

4 MR. YANOS: Yes. First of all, to  
5 answer the second part of your question first, I  
6 think it's highly important that this tribunal  
7 is deciding whether Lithuania breached its  
8 obligations to Russia.

9 It -- it is a hybridized institution,  
10 a bilateral investment treaty tribunal, right,  
11 because it is at once public international law  
12 and private international law. The -- the --  
13 there -- it's a dispute where there's been an  
14 offer created in a -- required in a treaty and  
15 an acceptance provided by an individual.

16 But then the arbitral tribunal itself  
17 has to answer a very particular question. The  
18 question is, did Lithuania breach its  
19 obligations to Russia? Not did it breach its  
20 obligations to an individual like my client?  
21 Did it breach its obligations to Russia?

22 And the obligations are to Russia that  
23 it would not take citizens' property without  
24 fair, prompt, and adequate compensation, that it  
25 would treat them fairly and equitably. Those

1 are promises that Lithuania did not make to my  
2 client. My client is not a party to the treaty.  
3 It made that promise to Russia, to the Russian  
4 Federation.

5           And so it is a fundamentally  
6 international dispute from that perspective, and  
7 that's why -- what I meant when I said that the  
8 law applicable is the law of the treaty, the law  
9 between two sovereigns.

10           And then, to -- to come back to the  
11 first part of your question, which is, yes, it  
12 is true, again, that there was a private  
13 litigant that accepted the offer of arbitration  
14 in the treaty, but, again, the first part is --  
15 is -- is fundamental as well, that the sovereign  
16 made the offer, and the reason the sovereign  
17 made the offer is because it was required to do  
18 so in the context of reciprocal promises to --  
19 between sovereigns.

20           If I may address one other point, and  
21 this is -- this relates to the policy  
22 considerations. This treaty and many, many  
23 other treaties include language that says that  
24 the investor has the opportunity to decide. We  
25 could have gone to the Lithuanian courts or we

1 could have commenced an arbitration to resolve  
2 the dispute as to whether our property was  
3 expropriated.

4           And as was noted in the earlier  
5 colloquy, 1782 does not require a proceeding to  
6 have been initiated in order to come to the U.S.  
7 courts, okay? You can contemplate a proceeding.

8           So what would be the effect of saying  
9 that a bilateral investment treaty tribunal is  
10 not an international tribunal within the meaning  
11 of the statute? Litigants would simply bring  
12 their discovery applications sooner. They would  
13 say, well, I haven't filed; I have sent a  
14 trigger letter. The trigger letter, which is --  
15 in -- in my world, the -- the parlance of that  
16 is a notice of -- of a dispute under the treaty.  
17 It doesn't have to accept a particular form of  
18 dispute resolution that can be done later.

19           So the litigant can say: I have  
20 notified the state of my -- of the fact of a  
21 dispute, but I haven't decided. I may go to  
22 court; I may go to arbitration. So, since the  
23 court option is clearly a foreign tribunal  
24 within the meaning of 1782, let's have my  
25 discovery now, and then I'll file the request

1 later.

2 So we'd effectively only be forcing  
3 litigants to bring disputes earlier. It would  
4 also be asymmetrical because the -- the  
5 governments would not have the opportunity to  
6 make the same application, so you wouldn't have  
7 Turkey or Lithuania or Ecuador seeking  
8 discovery.

9 So I think our result is much better  
10 from an international law standpoint.

11 CHIEF JUSTICE ROBERTS: Counsel, you  
12 generously cited my dissent in the BG Group  
13 case. I went and looked back at it. It turns  
14 out that seven members of the Court joined  
15 Justice Breyer's majority opinion. What do I --

16 MR. YANOS: And I was counsel --

17 CHIEF JUSTICE ROBERTS: -- what do I  
18 do with that?

19 MR. YANOS: -- for the petitioner in  
20 that case.

21 CHIEF JUSTICE ROBERTS: Oh. Well,  
22 congratulations.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: I mean, does  
25 that affect the point for which you was citing

1 -- you were citing the dissent?

2 MR. YANOS: No, it doesn't because I  
3 don't think Justice Breyer argued that it was  
4 any less of a sovereign capacity that -- that  
5 the agreements were being made in the treaty.

6 My point was only that I thought that  
7 the dissent more fundamentally described the --  
8 the nature of what is agreed in a bilateral  
9 investment treaty. The -- the majority opinion  
10 didn't really go into it as -- in as great a  
11 detail. But that wasn't, of course, what --  
12 what the fundamental issue was in the case,  
13 although perhaps the dissent would have argued  
14 it was.

15 JUSTICE BREYER: It was a very good  
16 dissent. Just not good enough to join it.

17 CHIEF JUSTICE ROBERTS: Justice --  
18 Justice Kennedy thought so but no one else.

19 MR. YANOS: Yes.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer, anything further? No?

22 Justice Alito, anything else? Okay.

23 Justice Gorsuch?

24 Justice Kavanaugh? No?

25 Thank you, counsel.

1 MR. YANOS: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Martinez.

3 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

4 ON BEHALF OF THE PETITIONERS IN 21-401

5 MR. MARTINEZ: Three quick points,

6 Your Honors.

7 First of all, this case turns on the  
8 text and history of the key phrase and in  
9 particular the -- the meaning of the entire  
10 phrase "foreign tribunal" or "foreign  
11 international tribunal."

12 Luxshare has conceded what I think was  
13 apparent from their briefs, which is that they  
14 don't have any evidence, any example, of the  
15 phrase "foreign tribunal," the one that is used  
16 in this statute, ever being used to cover  
17 private arbitrations. They don't give us a  
18 dictionary example. They don't give us a  
19 statute. They don't give us a court decision, a  
20 newspaper, nothing.

21 And so instead what they do is they  
22 criticize our use of -- our statutory arguments.  
23 They say we don't have an example either. But  
24 that's not right. We have the Corpus  
25 Linguistics study, which if you want to look at

1 it or not, we think you should look at it.

2 My friend criticized the study in  
3 various ways. We think you can judge for  
4 yourself. There's a 283-page appendix that is  
5 appended to the study that let's you kind of  
6 check their work.

7 More importantly, though, it's just  
8 not true, as my friend said, that we have not  
9 cited a single example of anyone using the  
10 phrase foreign tribunal to go beyond courts to  
11 cover other types of quasi -- of governmental  
12 entities. The very best example of that is this  
13 exact statute, this exact statute.

14 The Rules Commission itself said we're  
15 using the word "foreign tribunal" because we  
16 want to pick up quasi-judicial agencies, foreign  
17 administrative tribunals, and investigating  
18 magistrates. So this example, I think, refutes  
19 their case. And in the absence of any example  
20 on their side, I think we win sort of the plain  
21 text argument. And I think that's true in both  
22 cases.

23 If you look at the text, the  
24 surrounding context, and the history, I think we  
25 have the better reading.

1           Second, I just want to touch on the  
2 possible work-around Justice Breyer suggested,  
3 which is essentially allowing this kind of  
4 discovery only when the arbitrator says it's  
5 okay. We don't think that's work -- a workable  
6 solution for a couple of reasons.

7           First of all, Intel forecloses it,  
8 because Intel contemplates that 1782 can be used  
9 pre-arbitration. So that's a categorical  
10 problem. My friend on the other side says:  
11 Okay, well, you can essentially rewrite Intel by  
12 making it essentially a requirement. I don't  
13 think this Court is -- I don't think anyone's  
14 asked the Court to rewrite Intel. And that's  
15 not really presented or a good solution.

16           Because of the Intel problem, what  
17 would then happen, Justice Breyer, is that the  
18 parties would have to argue about what a  
19 hypothetical arbitrator, if and when he is later  
20 appointed, would do and how that person might  
21 conceivably think about the possible use of 1782  
22 evidence.

23           So they're going to be just guessing.  
24 And they're not going to be guessing in a place  
25 where they're going to have a lot of guidance



1 because in a lot of the arbitration contracts,  
2 it doesn't specify this -- this -- the rules  
3 governing discovery.

4 In a lot of those contracts and under  
5 the laws of the countries, it basically says the  
6 arbitrator gets to decide. So they are going to  
7 be doing guesswork. And in a lot of cases  
8 courts are going to be guessing wrong or doing a  
9 lot of work and then it turns out that the  
10 arbitrator didn't want the information anyway.

11 It also doesn't solve the comity  
12 problem, the fact that the United States would  
13 be an outlier, because the U.S.-style discovery  
14 is so broad, and 1782 is so easily abused to get  
15 evidence, even evidence that's outside the  
16 United States, so long as you have someone in  
17 the United States that you can go after to -- to  
18 seek that evidence from.

19 What all this means is that the  
20 solution here is to go to Congress. If Congress  
21 wants to fix this statute or tailor it in any of  
22 these ways that anyone has suggested here,  
23 that's the appropriate solution. We ask you to  
24 reverse.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:51 a.m., the case  
3 was submitted.)

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