No. 21-518

IN THE SUPREME COURT OF THE UNITED STATES

ALIXPARTNERS, LLP ET AL.,

Petitioners,

v.

THE FUND FOR PROTECTION OF INVESTORS' RIGHTS IN FOREIGN STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the phrase "international tribunal" in 28 U.S.C. § 1782(a) excludes an international arbitral tribunal constituted pursuant to a treaty signed by two sovereign States and charged with the authority to adjudicate with finality whether one of the two sovereigns breached its obligations under the treaty.

PARTIES TO THE PROCEEDINGS

Petitioners are AlixPartners LLP and Mr. Simon Freakley, defendants and appellant below.

Respondent is the Fund for Protection of Investors' Rights in Foreign States, plaintiff and appellee below.

CORPORATE DISCLOSURE STATEMENT

The Fund for Protection of Investors' Rights in Foreign States hereby certifies that there are no corporate parents, affiliates and/or subsidiaries that are publicly held.

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STATEMENT OF THE CASE

The Republic of Lithuania and the Russian Federation are parties to a treaty, the Agreement Between The Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection Of Investments, signed on June 29, 1999 ("the Treaty"). Pursuant to the Treaty, Lithuania agreed to allow Russian investors to bring claims that it breached the Treaty and caused them injury before a tribunal constituted pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.

The Fund for Protection of Investors' Rights in Foreign States ("the Fund" or "Respondent") is a Russian national. It brought proceedings against Lithuania pursuant to the Treaty. Because 28 U.S.C. § 1782(a) ("Section 1782") empowers United States district courts to order discovery "for use in a proceeding in a foreign or international tribunal," the Fund invoked Section 1782 to seek discovery from AlixPartners, LLP and Mr. Simon Freakley (collectively, "AlixPartners" or "Petitioners") for use in a tribunal adjudicating its claims under the Treaty.

The question before the Court is whether Section 1782's reference to "international tribunal" excludes the tribunal in this case. It does not. Nothing in the plain language of Section 1782 provides such an exception. And the legislative history of Section 1782, informed by the United States' long history of international arbitrations concerning disputes under treaties, confirms that applying the term "international tribunal" to the tribunal in this case is uncontroversial.

Petitioners offer no basis for excluding the tribunal in this case from the ambit of Section 1782. Their primary argument is that the tribunal in this case is "private" and not "public" because it is not composed of active jurists. However, this misunderstands the nature of public and private authority. In this case the tribunal is endowed with the authority to act by an instrument of public international law, a treaty. Therefore, it is a public tribunal.

Whether Section 1782's definition of "foreign tribunals" includes tribunals that derive their authority from private instruments such as contracts is not a question present in this case, but in *ZF Automotive US, Inc. v. Luxshare, Ltd*, No. 21-401 ("*ZF Automotive*"). To be clear: as noted by the Second Circuit, no matter what the Court determines in *ZF Automotive*, the tribunal instituted to adjudicate a dispute between Respondent and Lithuania under international law is of a different character. Instituted pursuant to an intergovernmental treaty between Russia and Lithuania and charged with authority delegated by those states to weigh judgment on sovereign acts, such as expropriation and fair and equitable treatment, the tribunal here wields the very governmental authority Petitioners argue international tribunals must have.

I. FACTUAL BACKGROUND

A. The Respondent Seeks Discovery For Use In The International Arbitration Instituted Pursuant To The Treaty.

In April of 2019, the Respondent instituted the arbitration at issue in this case on allegations that

Lithuania expropriated, without due process or compensation, certain investments in AB bankas SNORAS ("Snoras"), a private bank located in Lithuania. *See* Petition Appendix at 4a ("Pet. App."). In particular, the Respondent in that proceeding claims that Lithuania breached Article 6 of the Treaty, which memorializes a reciprocal promise between Lithuania and Russia not to expropriate or nationalize investments made by qualifying investors from the other state without due process and "payment of prompt, adequate and effective compensation." *See id*. at 61a–62a.

The Respondent commenced the arbitration pursuant to Article 10 of the Treaty, which provides both Russia's and Lithuania's consent to arbitrate the claims of the other's qualifying nationals in the event of alleged breaches of the Treaty. *See id*. at 64a. Article 10 provides several routes to resolve a dispute. *See id*. at 64a–65a. Of these, the Respondent instituted an *ad hoc* arbitration in accordance with the Arbitration Rules of UNCITRAL. *See id*. at 65a; *see also* Joint Appendix ("J.A.") at 23a–24a. A tribunal was subsequently constituted, and those proceedings remain ongoing. *See* Pet. App. 42a.

Shortly after commencing the arbitration, Respondent instituted a proceeding against the Petitioners in the United States District Court for the Southern District of New York petitioning for discovery pursuant to Section 1782. *See* J.A. 17a–19a. In particular, the Respondent sought discovery related to Mr. Freakley's role in Lithuania's expropriation, including the circumstances behind his appointment as Snoras's temporary administrator, any instructions Lithuania gave Mr. Freakley in his

time as temporary administer, the nature and conclusions of a confidential report Mr. Freakley drafted on Snoras, Lithuania's "reception" of that report, and any other investigations and reports Mr. Freakley prepared for the Bank of Lithuania. *See id.* at 84a–149a (proposed subpoenas for testimony and production of documents). The Respondent seeks similar information from AlixPartners, LLP, a consulting firm located in New York of which Mr. Freakly is the current CEO. *See id.*; *see also* Pet. App. 7a n.11.

In response to the Section 1782 requests, Lithuania requested the tribunal to enjoin Respondent from pursuing discovery. Pet. App. 43a. The tribunal rejected Lithuania's application. *Id.*; *see also* J.A. 187a–200a (Order on the Respondent's Request regarding the Claimant's application pursuant to Section 1782 of 28 U.S.C.).

B. Section 1782 Was Enacted With International Arbitrations In Mind.

Section 1782 was originally enacted in 1948, albeit in a much narrower form than its modern version. Noticeably absent from the original Section 1782 is the phrase "foreign or international tribunal." Instead, the original version of Section 1782 allowed district courts to oversee depositions "of any witness residing within the United States to be used in any *civil action* pending in any court in a foreign country with which the United States is at peace." *See* Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 869, 949 (emphasis added). Just one year later, Congress broadened the scope of Section 1782 to allow discovery in aid of "any *judicial proceeding* pending in any *court in a foreign country*." *Intel Corp. v. Advanced Micro*

Devices, Inc., 542 U.S. 241, 248 (2004) (emphasis added); *see also*, Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103.

In 1958, Congress responded to a steady growth of international commerce by creating the Commission on International Rules of Judicial Procedure's ("the Rules Commission"), which was tasked to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." Act of Sept. 2, Pub. L. 85-906, § 2, 72 Stat. 1743; S. Rep. No. 2392, 85th Cong., 2d Sess., 3 (1958). The "existing practices of judicial assistance" in 1958 included the narrower predecessor of the modern Section 1782 as well as another series of statutes, 22 U.S.C. §§ 270-270g (collectively, "Section 270"), which "authorized commissioners or members of *international tribunals* to administer oaths, to subpoena witnesses or records, and to charge contempt." *National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189 (2nd Cir. 1999) (emphasis added) ("*NBC*").

The Rules Commission analyzed Section 1782, Section 270, and a series of other statutes and federal rules, and submitted reports and recommendations to Congress. *See* the Rules Commission's Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88, 88th Cong., 1st Sess., 45 (1963) ("Fourth Annual Report"); H.R. Rep. No. 1052, 88th Cong., 1st Sess. (1963) ("House Report"); S. Rep. No. 1580, 88th Cong., 2d Sess. (1964) (1964) ("Senate Report").[1] In 1964, Congress imported

[1] The House and Senate reports are largely the same. And both incorporate the Rule Commission's Fourth Annual Report and its

the Rules Commission's recommendations into *An Act to Improve Judicial Procedures for Serving Documents, Obtaining Evidence, and Proving Documents in Litigation with International Aspects* ("1964 Act"), Pub. L. 88-619, § 9, 78 Stat. 997, which Congress passed unanimously. *See Intel*, 542 U.S. at 248.

Amongst other things, the 1964 Act repealed Section 270 and inserted its scope relating to "international tribunals" into Section 1782, which replaced "judicial proceeding" with "foreign or international tribunal."[2]

Congress used the term "international tribunal" in Section 270 specifically in reference to international arbitrations arising in relation to public international law disputes. Sections 270–270c were enacted in 1930 in response to issues that arose during an international arbitration between the United States and Canada in the *I'm Alone* case[3] and Sections 270d–270g were added in 1933 specifically to facilitate proceedings before the United States-German Mixed Claims Commission.[4] *See* Hans Smit, *Assistance Rendered by the United States in*

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justifications for the amendments Congress unanimously passed.

[2] *See* House Report at 9 ("[T]he assistance made available by subsection (a) [of Section 1782] is also extended to international tribunals and litigants before such tribunals. The assistance thus made available replaces, and eliminates the undesirable limitations of, the assistance extended by sections 270 through 270g of title 22, United States Code which are proposed to be repealed."); Senate Report at 8 (same).

[3] Act of July 3, 1930, ch. 851 § 1-4, 46 Stat. 1005, 1006.

[4] Act of July 3, 1930, ch. 851 §§ 5-8, *as added* June 7, 1933, ch. 50, 48 Stat. 117, 118.

Proceedings Before International Tribunals, 62 COLUM. L. REV. 1264 (1962) ("Smit 1962 Article")[5]; House Report at 5 (noting that Section 270 "proved inadequate" to facilitate the United States-German Mixed Claims Commission in the end); Senate Report at 3 (same). By adopting Section 270's terminology and injecting it into Section 1782, 1964 similarly injected this historical context into the types of proceedings to which district courts can now provide discovery aid.

II. PROCEDURAL BACKGROUND

The District Court for the Southern District of New York granted Respondent's Section 1782 petition on July 8, 2020. Pet. App. 46a. The District Court found that the tribunal "was convened under the authority of the Treaty, a bilateral agreement between and Russia; [the Fund] seeks to enforce rights established by that treaty against Lithuania as a state; and the Arbitration will be conducted pursuant to UNCITRAL rules." *Id*. That very day, the Second Circuit Court of Appeals published its decision in *Guo*, in which it analyzed a separate issue—whether arbitration tribunals constituted pursuant to a private law contract are eligible for judicial discovery assistance under Section 1782. 965 F.3d 96. In *Guo*, the Second Circuit affirmed its prior decision in *NBC*, 165 F.3d 184 (2d Cir. 1999), stating they do not. *Guo*, 965 F.3d at 106-07. However, the Second Circuit stated that "an arbitral body under a bilateral investment treaty may be a 'foreign or

[5] The Fourth Annual Report, which Congress adopted wholesale, cites Smit's 1962 Article extensively when explaining the 1964 Act's amendments. *See* Fourth Annual Report at 45; *see also Intel Corp.*, 542 U.S. at 248.

international tribunal.'" *Id.* at 108 n.7.

Despite this case not involving a private contract, Petitioners filed a motion for reconsideration on July 22, 2020, requesting the District Court to consider the impact on *Guo* on its order granting Respondent's application. *See* Pet. App. at 35a. With its motion for reconsideration pending, Petitioners filed a notice appealing the District Court's July order on August 7, 2020. *Id.*

The District Court denied Petitioners' motion for reconsideration on August 25, 2020, finding that its July order did not conflict with *Guo* because the Second Circuit's decision specifically differentiated bilateral investment treaty arbitrations from those arbitrations whose "adjudicative authority [derives][solely] from the parties' agreement." *Id.* at 39a (quoting *Guo*, 965 F.3d at 108 n.7). Then, on July 15, 2021, the Second Circuit affirmed the District Court's orders, holding that neither *Guo*, *NBC*, nor this Court's opinion in *Intel* are inconsistent with the District Court's finding that an arbitration tribunal constituted pursuant to a bilateral investment treaty is an international tribunal within the meaning of Section 1782. *See id.* at 12a–22a. Petitioners thereafter petitioned the Second Circuit for a panel rehearing or rehearing *en banc*, which was denied on September 10, 2021. Pet. App. 52a-53a.

SUMMARY OF THE ARGUMENT

Section 1782 provides discovery assistance in United States federal courts for all "foreign or international tribunals." Petitioners attempt to carve an exception to this rule to exclude the tribunal in this case—an *ad hoc* international arbitral tribunal

instituted pursuant to an intergovernmental agreement finds no support in the plain language of the statute or the historical context of the term "international tribunal."

I. The characteristics of the tribunal in this case confirms that it is "international tribunal" Endowed with authority by the Treaty.

A. The nature of the tribunal and the authority it wields confirms its status as an "international tribunal." By agreeing to the Treaty, both Russia and Lithuania agreed that an arbitration tribunal has authority "to sit in judgment on [their] sovereign acts." *BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 58 (2014) (Roberts, C.J., dissenting). Petitioners ignore this fact and instead focus on the manner in which the tribunal is constituted. This is a mistake made in a broader attempt to conflate the issue of this case with an existing circuit split over the application of Section 1782 to "private" arbitration pursuant to private law contracts is mistaken. While the tribunal here is constituted of private individuals, they are charged with authority by virtue of an agreement between sovereign states to finally adjudicate the propriety of sovereign acts under international law.

B. Section 1782's plain language clearly includes the tribunal in this case. Congress intentionally used broad, generic terms when inserting the phrase "foreign or international tribunal" into Section 1782. *See Intel*, 542 U.S. at 263 n.15. Nothing in the ordinary meaning of "international" or "tribunal" excludes the tribunal here—even as the terms were understood in 1964. The broad scope of these terms must be given effect.

See Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1751 (2020).

C. The other statutes impacted by the 1964 Act do not conflict with applying the term "international tribunal" to the tribunal here. Section 1782's use of the phrase "practice and procedure of the foreign country or the international tribunal" does not limit the statute's application to a foreign governmental body or an "intergovernmental agency established by multiple nations." *See* U.S. Br. at 18. Nor do the terms used in Sections 1696 and 1782 somehow limit Congress's use of "international tribunal" to traditional governmental bodies. All of these statutes utilize general terms to broaden the impact of the 1964 Act. Even the 1964 Act's title suggests the broad range of improvements to undefined adjudicatory bodies "*with International Aspects*." *See* 1964 Act. This is all but confirmed by the fact that, as Petitioners point out, Congress has used specific qualifiers to define "tribunal" more narrowly—even when referring to arbitral tribunals specifically. *See* 22 U.S.C. § 1650a.

D. The Federal Arbitration Act ("FAA") does not conflict with Section 1782's application to the tribunal in this case. The FAA governs domestic arbitrations. While the discovery provisions of the FAA are not identical to the scope provided in Section 1782, this Court in *Intel* has already held that Section 1782's applicability is not meant to be analogous to domestic litigation. 542 U.S. at 263. Furthermore, while the FAA incorporates two international conventions, it does so to effectuate the enforcement of international arbitration awards, not to limit or expand the discovery applicable to those arbitrations.

II. Applying Section 1782 to the tribunal in this case is reinforced by the statute's historical context.

A. This Court has already recognized that the legislative history behind Section 1782 evidences an intent to expand, not limit the application of the statute to various types of international tribunals. *See Intel*, 542 U.S. at 258. The Court does not need to guess whether that broad application was intended to apply to the tribunal here. Section 1782's use of "international tribunal" comes from a previous series of statutes that were enacted to directly address two international arbitrations between sovereigns instituted pursuant to intergovernmental agreements: the *I'm Alone Case* and the United States-German Mixed Claims Commissions.

B. The international arbitrations relating to treaty disputes that pre-date the 1964 Act were substantially similar to the tribunal in this case, confirming that the Second Circuit was correct to affirm the district court's approval of Respondent's Section 1782 application. The United States' involvement in international arbitrations relating to the impact of sovereign acts on private individuals dates back to 1782 and the Jay Treaty. Like the *I'm Alone* proceedings and the United-States Mixed Claims Commissions, the nature of the Jay Treaty's institution of arbitration panels (or "commissions") confirms that Petitioners' concerns over the nature of the tribunal here are uncontroversial and irrelevant to the application of Section 1782. Those tribunals were instituted pursuant to intergovernmental agreements to adjudicate individuals' claims against a sovereign state. The panels in those proceedings

were composed of private individuals appointed by the parties. And the decisions of those tribunals were not appealable. While states in those treaties brought claims against one another on behalf of their nationals, that makes no difference. The ability of individuals to bring claims on their own behalf under modern bilateral investment treaties does not change the nature of the tribunal's authority.

III. The Second Circuit's decision rightly affirmed the district court's approval of Respondent's Section 1782 application. Petitioners take issue with the fact that the Second Circuit employed the functional analysis it developed in *Guo*, only to give most weight to the fact that the tribunal here was instituted pursuant to a treaty and features a sovereign state as a party. *First*, the Second Circuit's functional analysis was meant to be flexible, equipping courts with tools to exercise their discretion when applying Section 1782. *Second*, as shown above, it is the root of the tribunal's authority in the Treaty, and its ability to pass final judgment over a sovereign state, that most evidently separates it from the arbitral tribunals adjudicating private contractual commercial claims. Respondent take no position on the Second Circuit's historical decision to exclude arbitration tribunals constituted pursuant to private agreements from the ambit of "foreign tribunals" under Section 1782. As an adjudicatory body charged by sovereign states by way of an intergovernmental agreement to adjudicate the propriety of sovereign acts with finality, the tribunal here comfortably fits within the definition of "international tribunal" as Congress intended in 1964.

ARGUMENT

I. A TRIBUNAL CONSTITUTED PURSUANT TO A TREATY IS AN "INTERNATIONAL TRIBUNAL" WITHIN THE MEANING OF SECTION 1782.

28 U.S.C. § 1782(a) empowers United States district courts to order discovery "for use in a proceeding in a foreign or international tribunal." The parties and the Solicitor General agree that, in this case, discovery is sought for use in an adjudicatory body that calls itself a "tribunal" and derives its authority from a treaty signed by Lithuania and the Russia. In particular, the tribunal, constituted pursuant to a clause in the Treaty, will determine whether the Republic of Lithuania breached its obligations to the Russian Federation under the Treaty. *See* Pet. App. 64a–65a (Treaty, art. 10(2)(d)). As a result, the United States District Court of the Southern District of New York did have authority to order the Petitioners to produce documents for use in the proceedings at issue because it is a proceeding in an "international tribunal."

The Respondent would stop there in its analysis of Section 1782. The Second Circuit made the same choice.

Petitioners and the Solicitor General, however, would have this Court exclude the international tribunal in this case from the ambit of Section 1782 because the Treaty provided that individual investors affected by Lithuania's conduct can proceed directly against Lithuania in an arbitration tribunal composed of private individuals and not necessarily sitting judges. In other words, Petitioners and the

Solicitor General would have this Court read Section 1782 as if the words "provided it is not an international arbitral tribunal" were found immediately after the operative language quoted above even when, as is the case here, the arbitrators derived their authority from a treaty signed by two sovereigns. There is no support for this arbitrary exception in the statute, its legislative history, or common sense.

A. In This Case, An International Tribunal Has Been Constituted Pursuant To An Investment Treaty Between Russia and Lithuania.

This Court has previously had the opportunity to consider the nature of tribunals constituted under international investment treaties in *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2014). As noted therein, pursuant to such treaties, sovereign states "grant[] to private adjudicators not necessarily of [their] own choosing, who can meet literally anywhere in the world, a power it typically reserves to [their] own courts, if it grants it at all: the power to sit in judgment on [their] sovereign acts." *Id.* at 58 (Roberts, C.J., dissenting).

The same is true here. Under the Treaty, Russia and Lithuania agreed that qualifying Russian nationals affected by Lithuania's breaches of the Treaty could submit claims that Lithuania breached the Treaty to an *ad hoc* tribunal (and Russia reciprocated, agreeing to allow qualifying Lithuanian nationals to submit similar claims that Russia breached the Treaty to *ad hoc* tribunals). *See* Pet. App. 64a–65a (Treaty, art. 10). As a result, in the proceedings at issue in this case, the tribunal will

resolve with binding finality whether Lithuania breached the Treaty and to what extent the Respondent is entitled to compensation for such breaches. *See* Pet. App. 59a–60a, 61a–62a (Treaty, arts. 3, 6).

Petitioners attempt to label these disputes under the Treaty as "commercial"—no different from a dispute over whether the right kinds of chickens were delivered pursuant to a contract between private parties. *See* Pet. Br. 2, 35.[6] That is incorrect. The Treaty, like most bilateral investment treaties, creates an *ad hoc* judicial body that passes judgment over whether sovereign acts violated the treaty, going well beyond a determination of mere commercial rights. *See* Restat. 3d of the Foreign Relations Law of the U.S., §§ 102(3), 301(1), 321 (3rd 1987).

The nature of the tribunal in this case is perhaps most obvious considering what Petitioners cannot deny. For example, Petitioners cannot contest that the adjudicatory body charged with resolving the dispute under the Treaty refers to itself as a "tribunal." *See generally* J.A. 187a–200a (Order on the Respondent's Request regarding the Claimant's application pursuant to Section 1782 of 28 U.S.C.) (tribunal's order referring to itself as "the Tribunal"). Indeed, the appellation "tribunal" comes from the arbitration rules specified by the Treaty (the UNCITRAL Arbitration Rules). *See*, *e.g.*, J.A. 156a (UNCITRAL Rules, Section II) ("Composition of the arbitral *tribunal*") (emphasis added).[7] Nor can

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[6] It is notable that Petitioners cite no authority for this proposition. *See* Pet. Br. at 34–35. *Cf. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

[7] In their submission, Petitioners emphasize that the Treaty also

Petitioners contest that the "tribunal" constituted to resolve the Treaty dispute in this case is "international." Indeed, it would be inconceivable to argue otherwise. The dispute arises under a treaty between Lithuania and Russia protecting investments made by the nationals of one state within the borders of the other.

Most importantly, as discussed further below, the tribunal owes its authority to that same international legal instrument, the Treaty. The tribunal is no creature of a domestic legal system.

Faced with the obvious, Petitioners instead seek to diminish the legal authority of this particular international tribunal based on the manner in which it was constituted. *See* Pet. Br. at 32. To be sure, the arbitrators in this case are private individuals appointed by Lithuania and Respondent (and the presiding arbitrator was appointed jointly by Lithuania and Respondent). That procedure, however, was prescribed by the Treaty, which also dictates: (*i*) the scope of Lithuania's obligations under the Treaty; (*ii*) the jurisdiction of the tribunal authorized to adjudicate the dispute over sovereign

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allows qualifying investors to pursue other dispute mechanisms, such as Lithuanian domestic courts or arbitration before the International Chamber of Commerce (ICC). *See* Pet. Br. at 2–3, 30; *see also* Pet. App. 64a–65a (Treaty, art. 10). The ICC Rules similarly refer to the adjudication body designated for resolving disputes there under as a "tribunal." *See* ICC Arbitration Rules, art. 2, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (defining "arbitral tribunal" as "one or more arbitrators"). At the same time, it is inconceivable that Petitioners would deny that the Lithuanian domestic courts do not constitute tribunals. Therefore, the observation is of no relevance.

acts; (*iii*) the rules applicable to the arbitration; (*iv*) the finality of any award rendered in the arbitration; and (*v*) the obligation of Lithuania to abide by any award rendered in the arbitration. Pet. App. 59a–65a. Thus, Petitioners' argument turns a blind eye to the fundamental importance of the Treaty's role in the authority of the tribunal. Building upon Chief Justice John Marshall's statement on the nature of states' jurisdiction, the entire basis for international tribunals "must be traced up to the consent of the nation itself." *See* DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 24 (1939) (quoting *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)). Here, the Treaty is a product of two sovereign states' consent[8] and it dictates all of the substance and procedure of the arbitration before the tribunal. *See* Pet. App. 64a–65a (Treaty, art. 10(2)(d)) (designating *ad hoc* arbitration in accordance with the UNCITRAL Rules).

Given that the tribunal's "nature" is wholly derived from the Treaty, the Second Circuit was correct to put great weight on the Treaty's role in the arbitration to conclude that the tribunal is in fact an "international tribunal."[9] *See* Pet. App. 19a ("Critically, the arbitral panel in this case derives its adjudicatory authority from the Treaty, a bilateral investment treaty between foreign States entered into by those States to adjudicate disputes arising from

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[8] *See BG Grp. PLC,* 572 U.S. at 37 ("As a general matter, a treaty is a contract, though between nations.").

[9] The Second Circuit has previously held that arbitral tribunals constituted pursuant to private agreements are not "foreign tribunals" within the meaning of Section 1782. *See generally Guo*, 965 F.3d 96; *NBC*, 165 F.3d 184. This brief takes no position on that question.

certain varieties of foreign investment. . . .").

B. There Is Nothing In The Plain Language of Section 1782 That Would Justify Excluding The Tribunal In This Case From The Class of International Tribunals Eligible For Discovery.

Congress purposefully left the term "international tribunal" undefined in Section 1782. *See, e.g., Intel*, 542 U.S. at 263 n.15 (noting that "Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal'"). In *Intel*, the Court afforded the general phrase "international tribunal" its full weight and accordingly found that the Directorate-General for Competition ("DG Competition") of the Commission of the European Communities ("European Commission") fell within the metes and bounds of Section 1782. *Id.* at 258. The Court came to this conclusion despite the fact that the DG-Competition was an investigatory, not an adjudicatory, body. *Id.* at 254. The facts in *Intel* test the concept of what constitutes an "international tribunal" much more than the facts of this case. If the DG-Competition qualifies as an "international tribunal," there can be no doubt that the tribunal under the Treaty does as well.

Faced with Congress's purposeful use of a general term, the burden is on Petitioners to establish the exclusion of this international tribunal from the broad class of international tribunals eligible for discovery under Section 1782. *Smith v. United States*, 508 U.S. 223, 228-30 (1993). This analysis must be based on an "examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v.*

Argus Leader Media, 139 S. Ct. 2356, 2364 (2019); *FCC v. AT&T Inc*., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'"). Specifically, the Court must look to how Congress understood the terms when it amended the statute in 1964 with the passage the 1964 Act. *See Bostock*, 140 S. Ct. at 1750 ("[T]he law's ordinary meaning at the time of enactment usually governs").

Starting with the root word, "tribunal," a review of 1964 sources show that multiple definitions existed at the time Congress passed the 1964 Act. Unsurprisingly, both Petitioners and the Solicitor General focus on the narrowest versions of the term to insist that the word "tribunal" was defined only "to encompass courts and other governmental entities." Pet. Br. at 20 (citing Black's Law Dictionary 1677 (4th Ed. 1951) ("[t]he seat of a judge," "a judicial court"); Webster's New International Dictionary of the English Language 2707 (3d ed. 1961) ("*Webster's*") ("the seat of a judge"; "a court or forum of justice"); Oxford English Dictionary (1933, reprinted 1961) ("[a] court of justice"; "a judicial assembly")).

But even these narrow definitions encompass an *ad hoc* tribunal constituted pursuant to the Treaty as a "tribunal" as that in 1964. As noted above, and discussed in *BG Group PLC v. Republic of Argentina*, the tribunal in this case was delegated the very authority that a state's own judiciary branch would yield—indeed, as Petitions note, the Treaty equates the Lithuanian courts and arbitration under the UNCITRAL Rules. *See supra,* Section I(A); *BG Grp. PLC*, 572 U.S. at 58 (Roberts, C.J., dissenting); Pet. Br. at 30. It is therefore clear that Russia and

Lithuania viewed the arbitral tribunal as a "forum of justice" equivalent to a court. Similarly, the fact that Black's Law Dictionary qualifies its definition as a "judicial" court at the time also confirms that a body exercising judicial functions is included in the definition of tribunal—and not just a "court."

Even if the Court did not find that the tribunal fits within the definitions above, both Petitioners and the Solicitor General cannot deny that broader understandings of "tribunal" existed in 1964. For example, Petitioners cut short *Webster's* full definition of "tribunal," which in total reads:

> "court or forum of justice : **a person or body of persons having authority to hear and decide disputes so as to bind the disputants**."

Webster's at 2441 (emphasis added); *see also*, Pet. Br. at 20. *Webster's* also provided additional definitions for "tribunal," including: (1) "the seat of a judge *or one acting as a judge*" or (2) "*something that decides* or judges : something that determines or directs a judgment or course of action." *Webster's* at 2441 (emphasis added); *see also Smith*, 508 U.S. at 228 (referring to dictionary definitions when determining the ordinary meaning of the word "use" in 18 U.S.C. § 924(c)(1)). It is appropriate to consider all of these definitions of "tribunal" considering that, as the Court noted in *Intel*, Congress used a general term without any explicit limitation. *See Intel*, 542 U.S. at 263 n.15. The tribunal in this case surely constitutes "body of persons having authority to hear and decide disputes so as to bind the disputants." The Treaty itself makes that explicitly clear.

Despite these definitions, Petitioners ask the Court to impose an exception to a general term. But Petitioners have provided no basis for doing so. It is one thing for Petitioners to suggest that Section 1782's term "tribunal" includes traditional governmental courts. "But it is quite another to conclude that, as a result, the phrase also *excludes* any other use." *Smith*, 508 U.S. at 230. Courts must afford general terms their full range of applicability—even when Congress may not have fully realized the implications at the time of drafting. *See Bostock*, 140 S. Ct. at 1751 ("'[I]n the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'") (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012) (stating that it is "presumed point to using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions.").

It is therefore irrelevant that bilateral investment treaties signed prior to 1964 did not include clauses giving investors a direct right of action analogous to the ones that began appearing in 1970.[10]

[10] It is worth noting that, by 1964, over 25 bilateral investment treaties had been signed, all with *ad hoc state*-to-state dispute arbitration clauses. *See*, *e.g.*, Treaty for the Promotion and Protection of Investments, Pak.-Fed. Rep. Ger., art. 11, Nov. 25, 1959, 457 U.N.T.S. 23 ("(1) In the event of disputes as to the interpretation or application of the present Treaty, the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship. (2) If no such solution is forthcoming, the dispute shall be submitted (a) to the International Court of Justice if both Parties so agree or (b) if they do not so agree to ***an arbitration tribunal*** upon the request of either Party")

See Pet. Br. at 35. All that matters is whether the tribunal's nature, as defined by the Treaty, fits within the confines of the general term "tribunal" with the sole limiting qualifier of "international"—a term Petitioners admit was broadly defined as "commonly related to the 'intercourse of nations' or actions 'participated in by two [or] more nations.'" Pet. Br. at 20 n.8 (quoting *Websters* at 1181).

Combining the root word with its qualifier, an inevitable conclusion appears: the tribunal in this case is an adjudicatory body enacted pursuant to the Treaty, an agreement signed between two sovereign states. And the Treaty endows the tribunal with ability to "hear and decide disputes" arising from investments within the "intercourse of nations" "so as to bind the disputants."[11] *See* Pet. App. 56a (describing the purpose of the Treaty as "establish[ing] favourable conditions" for

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(emphasis added); *see also* Agreement on the Encouragement and Reciprocal Protection of Investments, Belg.-Indon., art. 10, Jan. 15, 1970, 843 U.N.T.S. 19 ("Each Contracting Party hereby irrevocably and anticipatory gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the Convention of Washington of 18 March 1965, at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure"). These clauses likewise created "tribunals" and were largely similar to the mixed claims commissions that had been used to decide expropriation disputes for almost 200 years following the Jay Treaty. *See infra* Section II(B).

[11] Indeed, *Webster's* defines "arbitration" to fit well within the confines of "tribunal" as "the hearing and determination of a case between parties in controversy by a person or persons chosen by the parties or appointed under statutory authority. . . ." *Webster's* at 110.

international investments). Indeed, the Treaty requires the state parties to abide by the terms of the award issued by the tribunal.

This conclusion is further supported by contemporaneous writings specific to the subject of international tribunals. Manley O. Hudson's 1944 treatise, *International Tribunals: Past and Future*, for example, defined "international tribunals" to include *ad hoc* adjudicating bodies created under intergovernmental agreements, including those that adjudicate cases "related to private claims[.]" *See* MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 3–4 (1944) (discussing "Evolution of International Tribunals"). Durward V. Sandifer's 1939 treatise, Evidence Before International Tribunals, similarly treated the term "international tribunal" broadly to include both the standing Permanent Court of International Justice as well as *ad hoc* tribunals constituted pursuant to an intergovernmental agreement.[12] *See* Sandifer, *supra*, at 6 (referring (referring to "[t]he *ad hoc* character of most international tribunals"); *id.* at 24 (characterizing *ad hoc* international tribunals as "[i]nternational judicial proceedings"). Hudson's and Sandifer's treatises are no anomaly. They simply confirm a long historical practice preceding the 1964 Act. *See infra*, Section II(B). In fact, the United States signed several multilateral treaties which used the term "tribunal" to describe arbitral tribunals established pursuant to intergovernmental agreements by this time. *See* Convention for the Pacific Settlement of International Disputes, arts. 21,

[12] At the time of the treatise, Sandifer was the Assistant to the Legal Advisor of the Department of State. *Id.*

24-25, July 29, 1899, 32 Stat. 1799; Convention for the Pacific Settlement of International Disputes, arts. 42, 45-46, Oct. 18, 1907, 36 Stat. 2199. The writings underpinning the 1964 Act recognize and indeed developed from this history. *See infra*, Section II(A).

C. Nothing Else In The 1964 Act Dictates The Exclusion This Tribunal From The Class Of "International Tribunals" Eligible For Discovery Under Section 1782.

Unable to exclude the tribunal in this case from the ambit of Section 1782 based on the plain meaning of the term "tribunal," Petitioners and the Solicitor General seek help in the broader context Section 1782 and other sections of the 1964 Act. There is none. Even if one were to look at the remainder of the 1964 Act, nothing therein dictates the exclusion of the tribunal in this case from the ambit of Section 1782. The 1964 Act purposefully uses general terms that complement the broad scope of Section 1782's phrase "foreign or international tribunal." This is evident even in the title of the 1964 Act, which declares that the broad range of improvements Congress drafted would apply to undefined adjudicatory bodies "*with international aspects*." *See* 1964 Act ("An Act To improve judicial procedures for serving documents, obtaining evidence, and proving documents in litigation with international aspects"). The contrary arguments put forward by Petitioners and the Solicitor General ignore this fact and, as a result, are incompatible with this Court's approach in *Intel*.

For example, the Solicitor General argues that the surrounding text of the statute is incompatible with a broad definition of the term "tribunal." *See*

U.S. Br. at 18. Specifically, the Solicitor General points to the language added to Section 1782(a) that allowed district courts to "prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing." *Id.* at 5 (quoting 28 U.S.C. 1782(a)). In the Solicitor General's view, this provision only makes sense in regard to a foreign governmental body or an "intergovernmental agency established by multiple nations." *Id.* at 18. Nothing in the plain text of Section 1782(a), however, supports that conclusion. "Practice and procedure" are themselves general terms, unbound by some arbitrary limitation to the rules of traditional governmental bodies. It is axiomatic that anybody charged with deciding a dispute will have internal practices and procedures. Here, the Treaty dictates that the tribunal is bound and governed by the practice and procedure of the UNCITRAL Rules—rules established by the United Nations Commission on International Trade Law.[13] *See* Pet. App. 65a (Treaty, art. 10(d)).

The Solicitor General also points to Sections 1696 and 1781 as amendments that justify the exclusion of the tribunal here from the ambit of Section 1782. U.S. Br. at 18–19. However, a quick review of Section 1696(a) demonstrates that this is not

[13] Furthermore, the use of the word "may" indicates that the district court can exercise discretion and decline to make such a consideration altogether. *Cf. Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

so:

> The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. . . . Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

28 U.S.C. 1696(a). The Solicitor General argues that the above section "contemplates that such a tribunal is capable of issuing 'a judgment, decree, or order.'" U.S. Br. at 18. Respondent agrees. Indeed, this Court reached that very conclusion, already, in *Intel*. *See Intel Corp.*, 542 U.S. at 258 ("We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit."). But this fact cuts *against* the Solicitor General's argument. Like the European Commission in *Intel*, the tribunal in this case functions as "a first-instance decisionmaker" empowered to render judgments in the form of a final, binding "award." Pet. App. 65a ("The arbitral decision shall be final and binding").

Petitioners spend some time arguing that it is significant that an award rendered by the tribunal in this case would need to be enforced in the United States. *See* Pet. Br. at 19 ("[T]he *need* for judicial enforcement tends to confirm that the arbitral panels *lack* essential governmental authority."). This argument also proves too much. *First*, as noted above, an award rendered by the tribunal in this case is

binding on Lithuania under the terms of the Treaty and must be respected. *See* Pet. App. 65a (Treaty. art. 10(3)) ("The arbitral decision shall be final and binding on both parties of the dispute. Each Contracting Party shall undertake to execute such decision in accordance with its legislation."). *Second*, any judgment or order issued by a court or other tribunal outside the United States (whether foreign or international in character) would likewise require recognition and enforcement to have effect on par with domestic judgments and orders. *See Hilton v. Guyot*, 159 U.S. 113, 182 (1895); *see also* NY CLS CPLR § 5303 (exemplar state statute modeled off of the Uniform Foreign Money-Judgments Recognition Act); the Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *as implemented by* 9 U.S.C.S. §§ 201-208 ("New York Convention"); the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 249, *as implemented by* 9 U.S.C.S. §§ 301-307 ("Panama Convention"); 22 U.S.C. § 1650a.

Section 1781 also does not dictate the exclusion of this tribunal from the ambit of Section 1782. In relevant part, Section 1781(a) provides the Department of State with the authority "to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution." 28 U.S.C. § 1781(a)(1). The United States' focus on letters rogatory as mechanisms only for "matters of comity between governments" might have had merit *if* the statute were truly drafted so narrowly. U.S. Br. at 19 (quoting *Servotronics, Inc. v.*

Rolls-Royce PLC, 975 F.3d 689, 695 (7th Cir. 2020)).[14] But that is not the case. Section 1782(a) refers to both letters rogatory "***or*** requests made" more generally. 28 U.S.C. § 1781(a)(1) (emphasis added). While letters rogatory may traditionally refer to formal request mechanisms passed between governmental authorities, even private arbitral tribunals can make general "requests" for evidence as provided by the statute. *See In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 723 (6th Cir. 2019) (finding that even a "private arbitral panel can make a request for evidence, so [Section 1781] does not indicate that the word 'tribunal' . . . refers only to judicial or other public entities."). Again, where general terms are used, we must give them full credit and apply them in the proper scope.

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[14] The United States also argues that Section 1696(a)'s handling of "service of process" refers to an act exclusive to "comity between governments." *Id.* As a preliminary matter, this Court has already noted that "Section 1696(a) . . . is not limited to service of process," but rather "allows service of 'any document' issued in connection with a foreign proceeding." *Intel*, 542 U.S. at 257 n.10. Misquotations of statutes aside, service is a mechanism to ensure the due process rights of United States residents, no matter the type of entity requesting such service on the other end. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S. Ct. 896, 899 (1988) ("Failure to give notice violates the most rudimentary demands of due process of law.") (quotation marks omitted). Even Section 1782 protects United States citizens' due process rights. An "interested party" must go through the district court in which a third party resides to seek discovery. Furthermore, it must be noted that "tribunal" is a broad term, encompassing some adjudicatory bodies that require service of documents more than others. For example, there is inherently little use for service of documents outside of Section 1782 in the context of investor-state arbitrations where private claimants sue sovereign states.

Congress's use of "tribunal" outside of the 1964 Act also illustrates that the term historically referred to a broad type of adjudicatory body which includes, but is not limited to, arbitral tribunals. As Petitioners readily admit, Congress has defined "tribunal" more narrowly than it did in Section 1782. For example, in 1938, Congress amended the Bankruptcy Act of 1898 and, in doing so, authorized receivers to "prosecute or defend any pending suit or proceeding . . . before any judicial, legislative, or *administrative* tribunal in any jurisdiction." Pub. L. No. 75-696, § 2, 52 Stat. 842, 842–43 (1938); *see also* Pet. Br. at 21 n.9. Similarly, in 1966—just two years after the revision of Section 1782—Congress limited the general term "tribunal" specifically to "*arbitral* tribunals" in 22 U.S.C. § 1650a.[15] 22 U.S.C. § 1650a(a) (emphasis added). Of course, the presence or absence of such qualifying terms transforms the scope of the root word. *See Estes v. Texas*, 381 U.S. 532, 559 (1965) (Warren, C.J., concurring) (analyzing the Sixth Amendments use of "speedy and public" to "qualify the term trial"). And the importance of Section 1650a's use of the term "arbitral tribunal" to specifically implement enforcement mechanisms for ICSID investor-states arbitration awards cannot be overstated. 22 U.S.C. §

[15] Nor was Congress alone in this ordinary meaning of the term. Petitioners also emphasize that the Court utilized the same interpretation as it "had also used the *more specific* term '*arbitral* tribunal' to clarify when it addressed arbitration." Pet. Br. at 21 (emphasis added). As far back as 1898, this Court had used "arbitral" as a qualifier to define a specific type of tribunal. *North Am. Com. Co. v. United States*, 171 U.S. 110 , 133 (1898). Because both Congress and the Court have qualified tribunal with "arbitral" around the time of 1782, it shows that Congress was intentionally using a ***broader*** term to encompass more than traditional courts.

1650a(a). If an investor-state arbitration is considered an "arbitral tribunal," it must also be considered a "tribunal" more generally.

Nor does Petitioners' reliance on 5 U.S.C. § 552b dictate the exclusion of the tribunal in this case from the ambit of Section 1782. Section 552b provides in relevant part that agency meetings can be closed to the public when they concern "the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication . . . or otherwise involving a determination on the record after opportunity for a hearing." 5 U.S.C. § 552b(c)(10). While the statute does separate "arbitration" from foreign courts and international tribunals, the context of the statute indicates that it does so to refer to *domestic* arbitrations. Furthermore, it is worth noting that the statute is drafted redundantly, needlessly separating "civil action" from "proceeding" when obviously the latter term subsumes the former.[16]

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[16] Petitioners' citation to Article I of the United States Constitution and Congress' *Act to Simplify the Payment of Certain Miscellaneous Judgments*, Pub. L. No. 87-187, 75 Stat. 415 (1961), are also irrelevant. *See* Pet. Br. at 21 n.9. The Constitution is obviously within the context of establishing *domestic* tribunals. Its use of the general term "tribunal" has no insight as to its application in the international context. *The Act to Simplify Payments* also misses the mark as it is written in the context of *foreign* tribunals, not international tribunals: "Payment of final judgments rendered by a State or *foreign court or tribunal* against the United States . . . shall be made on settlements by the General Accounting Office . . . ." 75 Stat. at 415 (emphasis added). If anything, these two sources simply

A theme has emerged: Petitioners' cited authority clearly illustrates Congress's ability to limit the scope of an otherwise general term. Congress was aware that it could specify types of foreign or international tribunals to limit or otherwise exclude arbitral tribunals specifically. "Had Congress intended the narrow construction [Petitioners] urge[], it could have so indicated." *Smith*, 508 U.S. at 229. But Congress chose not to do so. The only qualifier Congress imposed was that the tribunal be of a foreign or international nature. And those qualifying terms themselves are broad. *See supra*, Section I(B) (defining "international"). The Court should give credit to that intended effect.

D. Section 1782 Does Not Conflict With The Federal Arbitration Act.

Both Petitioners and the Solicitor General request that the Court curtail the plain meaning of "tribunal" so as not to conflict with the independent workings of the Federal Arbitration Act ("FAA"). Pet. Br. at 28; U.S. Br. at 25. This argument fails due to the fundamental misunderstanding of the FAA's role.

The FAA and Section 1782 are parallel mechanisms that do not intersect or otherwise conflict. Put in their proper places, "Section 1782 is a provision for assistance to tribunals abroad," *Intel*, 542 U.S. at 263, whereas Chapter One of the FAA governs *domestic* arbitrations seated in the United States.[17] *See GE Energy Power Conversion Fr. SAS,*

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emphasize the elasticity of tribunal as a general term.

[17] It is true that the FAA incorporates both the New York and Panama Conventions, 9 U.S.C. §§ 201-208, 301-307, but those international conventions concern only the *enforcement* of arbitration agreements and the resulting awards, *not* the use of

Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1643–44 (2020). Petitioners admit this, stating only that "[i]t would be passing strange" for Congress to allow more expansive discovery in one forum than the other. Pet. Br. at 28–29. But Petitioners ignore the fact that Congress passed the 1964 Act specifically to expand aid in foreign and international proceedings without limitation or reference to domestic proceedings. This Court made that clear in *Intel*, where it "reject[ed] [the] suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding." 542 U.S. at 263. To be sure, the rejection of domestic law comparisons does not amount to an unjust windfall to international litigants. This Court was clear that district courts can wield their discretion and "consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Id.* at 265.[18]

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Because the plain language of the statute comfortably encompasses the tribunal in this case, the

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discovery within the arbitral proceedings. *See BCB Holdings Ltd. v Gov't of Belize*, 110 F. Supp. 3d 233, 242 (D.D.C. 2015) (the New York Convention encourages the recognition and enforcement of international arbitration agreements), *aff'd*, 650 F. App'x 17 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 619 (2017).

[18] It is worth noting that, in recent years, both sovereign respondents and individual investor claimants in bilateral investment treaty disputes have sought to invoke the assistance of the United States courts pursuant to Section 1782. *See*, *e.g.*, *Fed. Republic of Nig. v. VR Advisory Servs.*, No. 20-3909-cv, 2022 WL 320211 (2d Cir. Feb. 3, 2022); *In re Republic of Turkey*, No. 19-20107 (ES) (SCM), 2020 WL 4035499 (D.N.J. July 17, 2020).

analysis should end here. *Food Mktg. Inst.*, 139 S. Ct. at 2364 (finding that, where "a careful examination of the ordinary meaning and structure of the law itself . . . yields a clear answer, judges must stop."). In fact, in *Intel*, Justice Scalia concurred with the majority's broad application of the statute's use of "foreign or international tribunal," noting only that he saw no need to even resort to legislative history. 542 U.S. at 267 (Scalia, J., concurring). The plain terms of Section 1782 were enough to establish that the definition of "foreign or international tribunal" encompassed even quasi-adjudicative bodies that did not function as first-instance decisionmakers. So too are they enough to establish that there is no basis for excluding tribunals constituted pursuant to a bilateral investment treaty from the ambit of the "international tribunals" covered by Section 1782.

II. SECTION 1782'S HISTORIC CONTEXT ALSO DICTATES THAT THE TRIBUNAL IN THIS CASE SHOUD NOT BE EXCLUDED FROM THE CLASS OF "INTERNATIONAL TRIBUNALS" ELIGIBLE FOR DISCOVERY UNDER SECTION 1782.

If the Court were to find Congress's use of the phrase "foreign or international tribunal" so broad as to render it ambiguous, it should look to the historical context of Section 1782 and confirm that the statute does not exclude investor-state arbitrations such as the one instituted between the Fund and Lithuania. This is precisely the interpretive tool the majority employed in *Intel*. 542 U.S. at 255–58. In doing so, the Court concluded that Congress intended to draft Section 1782 to *expand*, not contract, the once strict

confines of the statute to cover adjudicatory and quasi-adjudicatory bodies aside from conventional first-instance decision-making courts. *Id.* at 247 ("Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.").

As the Second Circuit properly noted, while Congress's expansion of Section 1782 was "broad, [it was] not boundless." Pet. App. 13a. But the limits of the term "international tribunal" do not exclude the tribunal here. And the legislative history bears that out. "Foreign tribunal" means an adjudicatory or quasi-adjudicatory body of a foreign state. "International tribunal," on the other hand, means an adjudicatory body created by an *intergovernmental agreement*, such as the Treaty. These definitions reveal themselves in the paper trail illustrating how and why Congress inserted the term "international tribunal" in Section 1782(a) in 1964.

A. Section 1782's Legislative History Directly Ties "International Tribunal" To International Arbitrations Arising Under Treaties.

Contemporaneous reports from the House and Senate emphasize that the root "word 'tribunal' [was] used [in Section 1782] to make it clear that assistance is *not* confined to proceedings before conventional courts." House Report at 9 (emphasis added); *see also* Senate Report at 7 (same); *see also Intel*, 542 U.S. at 258.[19] More specifically, the 1964 Act adopted the

[19] This alone confirms that Congress meant to refer to the broader definition of the term than traditional courts of justice.

qualified term "*international* tribunal" directly from Section 270. And, pertinent to this case, Section 270's original use of "international tribunal" was intertwined with international arbitration pursuant to intergovernmental agreements very similar to the proceedings between the Fund and Lithuania.

As Hans Smit, "the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782,"[20] recounted, the various provisions of Section 270 were enacted in the 1930s in response to two international arbitrations arising under intergovernmental agreements—one between the United States and Canada in the *I'm Alone* case[21] and the other before the United States-German Mixed Claims Commission.[22] *See supra* Factual Background (I)(B); Smit 1962 Article at 1264; House Report at 5 (noting that Section 270 "proved inadequate" to facilitate the United States-German Mixed Claims Commission in the end); Senate Report at 3 (same). This legislative history contradicts Petitioners' and the Solicitor General's attempts to exclude the tribunal in this case from the ambit of Section 1782. Notably, Petitioners misquote the Fourth Annual Report when arguing that "international tribunals" were in reference to "proceedings […] pending before investigative magistrates in foreign countries," "the constant growth of administrative and quasi-judicial proceedings all over the world," and "proceedings

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See supra, Section I(A).

[20] *In re Letter of Request from Crown Prosecution Serv. of U.K.*, 870 F.2d 686, 689 (D.C. Cir. 1989) (Ginsburg, J.).

[21] Act of July 3, 1930, ch. 851 § 1-4, 46 Stat. 1005, 1006.

[22] Act of July 3, 1930, ch. 851 §§ 5-8, *as added* June 7, 1933, ch. 50, 48 Stat. 117, 118.

before a foreign administrative tribunal or quasi-judicial agency." Pet. Br. at 25. The Fourth Annual Report lists these forums to define "foreign tribunal," mentioning *afterward* that "[f]inally, the assistance made available by subsection (a) is also extended to international tribunals and litigants before such tribunals." Fourth Annual Report at 45.

"[I]nternational tribunal" was termed to *include* international arbitration tribunals arising from intergovernmental agreements. In fact, the international tribunals at issue in the cases that spawned Section 270's enactment (and therefore Congress's first use of the term "international arbitration") were similar to the tribunal and the Treaty in this case.

B. The Tribunal In This Case Is Substantively Similar To The Tribunals Charged With Adjudicating The Claims Of Individuals Against Sovereigns Predating 1964.

The long history of international arbitral tribunals constituted pursuant to intergovernmental agreements for the purposes of adjudicating the rights of individuals harmed by sovereign states predates both the *I'm Alone Case* and the United States-German Mixed Claims Commissions—the bases for the term "international tribunal" in Section 270 and, by extension, Section 1782. That history, which dates back to the Jay Treaty[23] and was a core innovation brought to the international scene by the United States, involves tribunals that were substantively

[23] Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105.

similar to the tribunal in this case. As a result, that history, as demonstrated below, contradicts the notion that there are elements of the tribunal in this case that warrant its exclusion from the ambit of "international tribunals" covered by Section 1782.

First, the historical use of arbitrations to resolve disputes concerning the impact of a sovereign's conduct on nationals of another sovereign state dispels the notion, espoused by Petitioners and the Solicitor General, that investment treaty arbitration was unheard of before 1964. *See* Pet. Br. at 35; U.S. Br. at 28. Indeed, many commentators have ascribed the birth of the use of arbitration to resolve claims concerning the impact of a sovereign state's conduct on a national of a different sovereign state to 1794 when the United States and Great Britain signed the Jay Treaty. *See* Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, BRIT. Y.B. INT'L L. 97 (1992) ("Arbitration as a method of inter-State dispute settlement in the modern period is often treated as having been inaugurated in proceedings under the Jay Treaty of 1794.") (collecting sources). In particular, under the Jay Treaty, two sovereign states agreed to set up two *ad hoc* arbitral tribunals (known then as "commissions") to settle the claims of individual citizens against the United Kingdom and the United States for expropriation and property destruction arising from the Revolutionary War. O. Thomas Johnson J. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Law*, Y.B. ON INT'L INVESTMENT L. & POL'Y 645, 649 (2011).[24] Significantly, although the

[24] One commission was tasked with dealing with claims of British

claims were presented by the sovereigns based on the doctrine of espousal, the Jay Treaty provided that the two states would pay any awards directly to the citizens affected by the state's actions. Jay Treaty, arts. 6-7. Similar commissions were established by the United States in the wake of the Civil War. *See* The Treaty of Amity (Treaty of Washington), U.S.-Gr. Brit., May 8, 1871, 17 Stat. 863, T.S. No. 133 (establishing the so-called Alabama Claims Arbitration); *see also* Hudson, *supra*, at 5 (observing that "[t]he success of the *Alabama Claims arbitration* stimulated a remarkable activity in the field of international arbitration."). Other sovereigns adopted the model innovated by the United States, leading to mixed claims commissions involving various European sovereigns and other sovereign states in North and South America. Johnson & Gimblett, *supra*, at 649-650 n.22 (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 522 (7th ed. 2008)) ("As Brownlie notes, '[c]laims settlement conventions included conventions between Mexico and the United States of 1839, 1848, 1868, and 1923; the Venezuela arbitrations of 1903 involved claims of ten states against Venezuela; and conventions between Great Britain and the United States of 1853, 1871, and 1908.'"); *see also id*. at 662 (discussing two Mixed Claims Commissions Mexico and the United States agreed to establish to consider the claims of

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subjects' loans owed to them by U.S. nationals that U.S. courts had confiscated. Richard B. Lillich, *The Jay Treaty Commissions*, 37(2) ST. JOHN'S L. REV. 260, 268-269 (1963). The other dealt with claims of United States citizens against the British government for the seizure of American-owned commercial ships and cargoes bound for France—which, at that time, was at war with Great Britain. *Id.* at 276.

U.S. nationals, as well as subsequent mixed claims commissions Mexico agreed to establish with several European nations).

Eventually, the *I'm Alone* case derived from a treaty between United States and Canada that provided dispute resolution where loss or injury occurred in the event one state's authorities boarded the private vessel bearing the other state's flag. *See* Convention on Prevention of Smuggling of Intoxicating Liquors, U.S.-Gr. Brit., art. IV, Jan. 23, 1924, 43 Stat. 1761, T. S. No. 685 ("U.S.-Canada Treaty"). Compared to the Jay Treaty, the U.S.-Canada Treaty is even more closely related to the Treaty in this case as its dispute resolution mechanism was not aimed at resolving disputes concerning injuries that had already occurred. Instead, the U.S.-Canada Treaty was a forward-looking open offer for future arbitration if injuries were to arise later. *Id.* It is also worth noting that the treaty referred to the arbitral panel as a "tribunal," reflecting the common usage of the term. *Id.*; *see supra*, Section I(A).

The United States-Germany Mixed Claim Commission was also the byproduct of an intergovernmental agreement. Under the Treaty of Berlin, the Mixed Claims Commission was charged with resolving United States nationals' losses resulting from Germany's Conduct during World War I. *See* Agreement for a Mixed Claims Commissions, U.S.-Ger., Aug. 10, 1922, 42 Stat. 2200, T. S. No. 665 ("Berlin Treaty").

Second, while Petitioners focus on the composition of the tribunal in this case, Pet. Br. at 32, the history of the mixed claims commissions shows

that private individuals, including but not limited to jurists, have been appointed to serve as arbitrators of *ad hoc* international tribunals long before 1964. *See* Hudson, *supra*, at 18; Sandifer, *supra*, at 6 (discussing the "*ad hoc* character of most international tribunals" and its effect on the development of a uniform body of evidence rules). For example, the United States and Great Britain appointed the members of the commissions under the Jay Treaty. Jay Treaty, arts. 5-7. This was also the case in both the United States-Germany Mixed Claims Commission and the *I'm Alone* arbitration. Though domestic judges were often appointed as arbitrators, there was no requirement for states to do so. This is best seen in the United States-Germany Mixed Claims Commission's proceedings. While Supreme Court Justice Owen J. Roberts acted as "umpire" for the conclusion of the proceedings, Chandler P. Anderson, an "outstanding international lawyer," acted as the American Commissioner for many years. *See* Joseph Conrad Fehr, *Work of the Mixed Claims Commission*; 25 A.B.A. J. 845, 846 (1939); *see also* Berlin Treaty, art. II.[25]

What matters is not the position the arbitrator held before the appointment, but the authority endowed upon the arbitrator after the appointment is confirmed, by the operative treaty. *See supra*, Section I(A). By no means did the commissioners' authority to judge sovereign states stem from their pre-existing status as a governmental figure (if they had such

[25] In the *I'm Alone* arbitration, each state appointed a justice of their respective supreme court, but this was not a requirement under the operative treaty. *See* U.S.-Canada Treaty, art. IV (providing the appointment of "two persons" to decide issues).

status to begin with), but from treaties under which they were authorized to rule. *See*, *e.g.*, Joint Interim Report of the Commissioners dated the 30th June, 1933, I'm Alone Case (1935) ("[T]he Commissioners, in the exercise of their duty under the authority conferred upon them by the appointment aforesaid. . . ."); *see also supra*, Section I(A) (explaining the Treaty's delegation of authority). Allowing private parties to wield this governmental authority is neither a controversial nor unique concept. The United States enjoys a long domestic history of allowing private individuals to execute domestic governmental functions. *See Filarsky v. Delia*, 566 U.S. 377, 385-86 (2012) (summarizing a long history of "[p]rivate citizens . . . actively involved in government work").

Third, these commissions were not subject to appellate review. Under the Jay Treaty, both states also agreed that the decisions of the Commissions were "final and conclusive," with no appeal available. Jay Treaty, arts. 5-7. The Berlin Treaty similarly states that "[t]he decisions of the commission . . . shall be accepted as final and binding upon the two Governments." Berlin Treaty, art.VI. Of no surprise, the United States-Canada treaty is entirely silent on the possibility of an appeal, indicating no appellate right existed. *See* U.S.-Canada Treaty, art. IV. To date, the availability of an appeal for disputes between states is a rarity.[26] The International Court

[26] In fact, the availability of rehearing was not always granted. Umpire Thornton of the United States-Mexican Mixed Claims Commission of 1868 held that under the governing convention, he was without power to even rehear a case in which he already rendered a final decision. Sandifer, *supra*, at 293.

of Justice, the Permanent Court of International Justice, and the International Tribunal for the Law of the Sea statutes do not provide for appeals. *See* Statute of the International Court of Justice, art. 60, June 26, 1945, 59 Stat. 1063, 33 U.N.T.S. 993 ("The judgment is final and without appeal."); Statute of the Court of International Justice, art. 60, Dec. 13, 1920, League of Nations, 6 T. S. No. 379 ("The judgment is final and without appeal."); Statute of the International Tribunal for the Law of the Sea, art. 33, Dec. 10, 1982, 1833 U.N.T.S. 561 ("The decision of the Tribunal is final and shall be complied with by all the parties to the dispute."). While exceptions do exist, such as the World Trade Organization system, they are limited. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.[27]

Among the listed similarities so far, there is one

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[27] Of note, the Appellate Body is currently unable to review appeals given the United States' refusal to appoint new persons. Bruce Baschuk, *Biden Picks Up Where Trump Left Off In Hard-Line Stances at WTO*, BLOOMBERG (Feb. 22, 2021), https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto (last visited Feb. 22, 2022) (discussing President Biden's refusal to appoint new members to the WTO's appellate body); WTO, Appellate Body, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Feb. 22, 2022) ("Currently, the Appellate Body is unable to review appeals given its ongoing vacancies. The term of the last sitting Appellate Body member expired on 30 November 2020."). One can reasonably infer that the United States must not believe that the appeals mechanism is essential for inter-state disputes.

noticeable difference between this long line of international arbitral tribunals and modern bilateral investment tribunals: the parties of early tribunals consisted of two states that brought claims on their citizens' behalf. In the past, sovereign states relied upon the doctrine of espousal[28] to vindicate injuries to their nationals inflicted by other States. This legal fiction conflated an injury to a national with an injury to its state. *See* KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 50 (2011). As a result, a state brought forth its injured nationals' claims as its own. *See* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 160 (2005). But this difference does not undermine the status of an *ad hoc* investor state tribunal, established pursuant to a treaty, as an "international tribunal." Bilateral investment treaties simply give individual investors standing as third-party beneficiaries to an agreement between sovereign states. Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56(2) HARV. INT'L L. J. 353, 365 (2015). As a result, the nature of the tribunal's delegated governmental authority remains unchanged despite individuals' newfound ability to bring their own claims.

Of no surprise, the above history of the United States' involvement with international arbitration led Hans Smit to define "international tribunal" as one that "owes both its existence and its powers to an international agreement[.]" Smit 1962 Article at

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[28] Also known as the doctrine of diplomatic protection, as the Solicitor General uses the phrase. *See* U.S. Br. at 27–28.

1267. The Rules Commission's Fourth Annual Report (as incorporated into both the House and Senate Reports) explains the term "international tribunals" by citing the very page on which this very definition appears in Smit's article. Fourth Annual Report, p. 45; *see also* House Report at 9; Senate Report at 8.[29] Neither Smit nor the Rules Commission's definition were anomalies of the times. As mentioned above, other contemporaneous writings comport with definition. *See supra*, Section I(B). Combined, these examples and definitions confirm that there exist no grounds to arbitrarily exempt the tribunal in this case from the scope of Section 1782.

III. THE SECOND CIRCUIT'S DECISION WAS CORRECT.

The plain language of Section 1782, combined with its historical context, confirms the propriety of the Second Circuit's holding. As already shown, Congress intended to keep Section 1782 broad, accounting for the fact that the types of tribunals requiring assistance from the United States Courts would vary significantly around the world. *See supra*,

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[29] Smit reiterated this definition in a later article published in 1965: "Under Section 1781, . . . [t]he term tribunal encompasses all bodies that have adjudicatory power, and is intended to include not only civil, criminal, and administrative courts (whether sitting as a panel or composed of a single judge), but also *arbitral tribunals* or single arbitrators." Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1021 (1965) (emphasis added, internal footnotes omitted). Smit continued, stating: "International tribunals are specifically named in order that in these times of increasing adjudication on the international level an international adjudicatory body should be granted the same assistance as tribunals of individual countries." *Id.*

Section I. At the same time, Section 1782 afforded judges great discretion to determine whether the extension of such assistance appropriate in a particular case. As a result, the Second Circuit properly implemented the functional analysis it set out previously in *In re Guo*, 965 F.3d 96 (2d Cir. 2020) ("*Guo*""). *See* Pet. App. 10a–23a.

Petitioners' issue with the below decision is rooted in the weight the Second Circuit afforded to the particular *Guo* factors. Specifically, the Second Circuit found significant the fact that the tribunal derived from the Treaty, an intergovernmental agreement, and that Lithuania, a sovereign state, was a party to the proceedings. Pet. App. 19a–20a, 21a. As already explained, these factors are, in fact, dispositive. The Treaty endows upon the tribunal authority to adjudicate a state's exercise of sovereign authority with finality. *See supra*, Section I(A). But the importance of these characteristics only emphasizes how "revolutionary" bilateral investment treaties are compared to other forms of international tribunals. *BG Grp. PLC*, 572 U.S. at 57 (Roberts, C.J., dissenting) (quoting JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 137 (2010)). The "uniqueness and power [of these treaties] should not be over-looked." *Id.* And the Second Circuit heeded that advice.

Starting from the beginning, under the first factor, the Second Circuit noted that the arbitral tribunal in this case retains independence from both Russia and Lithuania. Pet. App. 17a. But so too did the long line of mixed claim commissions that formed Congress's understanding of international tribunals. *See supra*, Section II(B). Nonetheless, the tribunal's

affiliation with two sovereigns is maintained within the Treaty, which delegates governmental power to assert liability upon sovereign states.

Similarly, under the second factor, the Second Circuit did not find dispositive the lack of appellate review over the tribunal's decision. Pet. App. 18a–19a. This makes sense. As the Court noted, it is logical to decrease the ability of a sovereign state as party of the arbitration to control the outcome. *Id.* Furthermore, the binding finality of the tribunal's decision in no way contradicts its adjudicatory nature—rather, it confirms it.

As for the third *Guo* factor, it comes as no surprise that the nature of the tribunal's jurisdiction derives from the Treaty, which inextricably infuses the states' authority into the arbitral tribunal. *Id.* 19a–20a; *see supra*, Section I(A).

Even the fourth *Guo* factor, which looks to how the arbitrators are selected, can be traced to how commissioners and arbitrators were appointed to the early international arbitral tribunals. Pet. App. 20a–21a. The only difference now is that one private party appoints an arbitrator along with the host state it sues. But that private party appoints an arbitrator only based on the authority derived from the Treaty.

Finally, the fifth catch-all *Guo* factor allows courts to consider any other elements that may make an arbitral tribunal more or less private. Below, the Second Circuit correctly gave great weight to the fact that Lithuania, a sovereign state, is a party to the Arbitration. *Id.* 21. It cannot be overstated the amount of authority investor-state tribunals wield, passing judgement on a sovereign state's

governmental acts.

Combining these factors together affirms that the Second Circuit's decision is sound. And it aligns with the findings of most courts across the nation. While a Circuit split exists as to the applicability of Section 1782 to arbitration tribunals constituted pursuant to private law contracts, courts have uniformly agreed that investor-state arbitral tribunals that derive authority from intergovernmental agreements are "international tribunals" within the meaning of the statute. *See* LUCAS V. M. BENTO, THE GLOBALIZATION OF DISCOVERY: THE LAW AND PRACTICE UNDER 29 U.S.C. § 1782, §6.01[C], at 109 (2019); *see also Islamic Republic of Pak. v. Arnold & Porter Kaye Scholer LLP*, No. 18-103, 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) (noting that courts "have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties, and specifically by the ICSID, qualify as international tribunals under the statute.").[30] A finding to the contrary would uproot

[30] *See, e.g., In re Ex Parte Warren,* No. 20 Misc. 208 (PGG), 2020 WL 6162214, at *5 (S.D.N.Y. Oct. 21, 2020); *In re Chevron Corp.,* 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff'd sub nom by Chevron Corp. v. Berlinger,* 629 F.3d 297 (2d Cir. 2011); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.,* No. 3:09 Misc. 265, 2009 WL 2877156, at *2-4 (D. Conn. Aug. 27, 2009); *In re Chevron Corp.,* 633 F.3d 153, 161 (3d Cir. 2011); *In re Republic of Turkey,* No. 19-20107 (ES) (SCM), 2020 WL 4035499, at *3 (D.N.J. July 17, 2020); *Islamic Republic of Pak.,* 2019 WL 1559433, at *6-7; *In re Gov't of the Lao People's Democratic Republic,* No. 1:15- MC-00018, 2016 WL 1389764, at *6 (D. N. Mar. I. Apr. 7, 2016); *Republic of Ecuador v. Stratus Consulting, Inc.,* No. 13-cv-01112-REB-KLM, 2013 WL 2352425, at *2 (D. Colo. May 29, 2013); *In re Mesa Power Grp., LLC,* No. 2:11-mc-280-ES, 2012 WL 6060941, at *5 (D.N.J. Nov. 20, 2012); *Republic of Ecuador v.*

otherwise harmonious interpretations of Section 1782 that are firmly rooted in the historical understanding of what constitutes an "international tribunal."

CONCLUSION

The Second Circuit's decision should be affirmed.

Respectfully submitted,

February 23, 2022

Bjorkman, 801 F. Supp. 2d 1121, 1124 (D. Colo. 2011), *aff'd*, 735 F.3d 1179 (10th Cir. 2013); *In re Republic of Ecuador,* No. 1:10-MC-00040 GSA, 2010 WL 4027740, at *1-2 (E.D. Cal. Oct. 13, 2010); *In re Veiga,* 746 F. Supp. 2d 8, 23 (D.D.C. 2010); *In re Chevron Corp.,* 753 F. Supp. 2d 536, 539 (D. Md. 2010); *In re Oxus Gold PLC,* No. MISC: 06-82, 2006 WL 2927615, at *5–6 (D.N.J. Oct. 10, 2006); *In re Ex Parte Eni S.P.A.,* No. 20-mc-334- MN, 2021 WL 1063390, at *3 (D. Del. Mar. 19, 2021); *Republic of Kaz. v. Lawler,* No. MC-19-00035-PHX-DWL, 2019 WL 5558997, at *2 (D. Ariz. Oct. 28, 2019).

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APPENDIX

APPENDIX A: FEDERAL ARBITATION ACT

9 U.S.C. § 201 Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter [9 USCS §§ 201 et seq.].

9 U.S.C. § 202 Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title [9 USCS § 2], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 203 Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated

in section 460 of title 28 [28 USCS § 460]) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 204 Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title [9 USCS § 203] may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

9 U.S.C. § 205 Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title [9 USCS §§ 1 et seq.] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

9 U.S.C. § 206 Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter [9 USCS §§ 201 et seq.] may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

9 U.S.C. § 207 Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter [9 USCS §§ 201 et seq.] for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 208 Chapter 1; residual application

Chapter 1 [9 USCS §§ 1 et seq.] applies to actions and proceedings brought under this chapter [9 USCS §§ 201 et seq.] to the extent that chapter is not in conflict with this chapter [9 USCS §§ 201 et seq.] or the Convention as ratified by the United States.

9 U.S.C. § 301 Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter [9 USCS §§ 301 et seq.].

9 U.S.C. § 302 Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title [9 USCS §§ 202, 203, 204, 205, and 207] shall apply to this chapter [9 USCS §§ 301 et seq.] as if specifically set forth herein, except that for the purposes of this chapter [9 USCS §§ 301 et seq.] "the Convention" shall mean the Inter-American Convention.

9 U.S.C. § 303 Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter [9 USCS §§ 301 et seq.] may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

9 U.S.C. § 304 Recognition and enforcement of foreign arbitral decisions and awards;

reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter [9 USCS §§ 301 et seq.] only if that State has ratified or acceded to the Inter-American Convention.

9 U.S.C. § 305 Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

9 U.S.C. § 306 Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter [9 USCS §§ 301 et

seq.] the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter [9 USCS §§ 301 et seq.].

9 U.S.C. § 307 Chapter 1; residual application

Chapter 1 [9 USCS §§ 1 et seq.] applies to actions and proceedings brought under this chapter [9 USCS §§ 301 et seq.] to the extent chapter 1 [9 USCS §§ 1 et seq.] is not in conflict with this chapter [9 USCS §§ 301 et seq.] or the Inter-American Convention as ratified by the United States.

APPENDIX B: 5 U.S.C.S. § 552B

Open meetings

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to— . . .

> (10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title [5 USCS § 554] or otherwise involving a determination on the record after opportunity for a hearing.

APPENDIX C: TREATY OF AMITY, COMMERCE AND NAVIGATION, U.S.-GR. BRIT., NOV. 19, 1794, 8 STAT. 116, T.S. NO. 105

Article 5

Whereas doubts have arisen what River was truly intended under the name of the River st Croix mentioned in the said Treaty of Peace and forming a part of the boundary therein described, that question shall be referred to the final Decision of Commissioners to be appointed in the following Manner-Viz-

One Commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and Consent of the Senate thereof, and the said two Commissioners shall agree on the choice of a third, or, if they cannot so agree, They shall each propose one Person, and of the two names so proposed one shall be drawn by Lot, in the presence of the two original Commissioners. And the three Commissioners so appointed shall be Sworn impartially to examine and decide the said question according to such Evidence as shall respectively be laid before Them on the part of the British Government and of the United States. The said Commissioners shall meet at Halifax and shall have power to adjourn to such other place or places as they shall think fit. They shall have power to appoint a Secretary, and to employ such Surveyors or other Persons as they shall judge necessary. The said Commissioners shall by a Declaration under their Hands and Seals, decide what River is the River St Croix intended by the Treaty.

The said Declaration shall contain a description

of the said River, and shall particularize the Latitude and Longitude of its mouth and of its Source. Duplicates of this Declaration ant of the State meets of their Accounts, and of the Journal of their proceedings, shall be delivered by them to the Agent of His Majesty, and to the Agent of the United States, who may be respectively appointed and authorized to manage the business on behalf of the respective Governments. And both parties agree to consider such decision as final and conclusive, so as that the same shall never thereafter be called into question, or made the subject of dispute or difference between them.

Article 6

Whereas it is alledged by divers British Merchants and others His Majesty's Subjects, that Debts to a considerable amount which were bona fide contracted before the Peace, still remain owing to them by Citizens or Inhabitants of the United States, and that by the operation of various lawful Impediments since the Peace, not only the full recovery of the said Debts has been delayed, but also the Value and Security thereof, have been in several instances impaired and lessened, so that by the ordinary course of Judicial proceedings the British Creditors, cannot now obtain and actually have and receive full and adequate Compensation for the losses and damages which they have thereby sustained: It is agreed that in all such Cases where full Compensation for such losses and damages cannot, for whatever reason, be actually obtained had and received by the said Creditors in the ordinary course of Justice, The United States will make full and complete Compensation for the same to the said Creditors; But

it is distinctly understood, that this provision is to extend to such losses only, as have been occasioned by the lawful impediments aforesaid, and is not to extend to losses occasioned by such Insolvency of the Debtors or other Causes as would equally have operated to produce such loss, if the said impediments had not existed, nor to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the Claimant.

For the purpose of ascertaining the amount of any such losses and damages, Five Commissioners shall be appointed and authorized to meet and act in manner following-viz- Two of them shall be appointed by His Majesty, Two of them by the President of the United States by and with the advice and consent of the Senate thereof, and the fifth, by the unanimous voice of the other Four; and if they should not agree in such Choice, then the Commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by Lot in the presence of the Four Original Commissioners. When the Five Commissioners thus appointed shall first meet, they shall before they proceed to act respectively, take the following Oath or Affirmation in the presence of each other, which Oath or Affirmation, being so taken, and duly attested, shall be entered on the Record of their Proceedings, - viz.- I. A: B: One of the Commissioners appointed in pursuance of the 6th Article of the Treaty of Amity, Commerce and Navigation between His Britannick Majesty and The United States of America, do solemnly swear (or affirm) that I will honestly, diligently, impartially, and carefully examine, and to the best of my Judgement, according to Justice and Equity decide all such Complaints, as under the said

Article shall be preferred to the said Commissioners: and that I will forbear to act as a Commissioner in any Case in which I may be personally interested.

Three of the said Commissioners shall constitute a Board, and shall have power to do any act appertaining to the said Commission, provided that one of the Commissioners named on each side, and the Fifth Commissioner shall be present, and all decisions shall be made by the Majority of the Voices of the Commissioners then present. Eighteen Months from the Day on which the said Commissioners shall form a Board, and be ready to proceed to Business are assigned for receiving Complaints and applications, but they are nevertheless authorized in any particular Cases in which it shall appear to them to be reasonable and just to extend the said Term of Eighteen Months, for any term not exceeding Six Months after the expiration thereof. The said Commissioners shall first meet at Philadelphia, but they shall have power to adjourn from Place to Place as they shall see Cause.

The said Commissioners in examining the Complaints and applications so preferred to them, are impowered and required in pursuance of the true intent and meaning of this article to take into their Consideration all claims whether of principal or interest, or balances of principal and interest, and to determine the same respectively according to the merits of the several Cases, due regard being had to all the Circumstances thereof, and as Equity and Justice shall appear to them to require. And the said Commissioners shall have power to examine all such Persons as shall come before them on Oath or Affirmation touching the premises; and also to receive

in Evidence according as they may think most consistent with Equity and Justice all written positions, or Books or Papers, or Copies or Extracts thereof. Every such Deposition, Book or Paper or Copy or Extract being duly authenticated either according to the legal Forms now respectively existing in the two Countries, or in such other manner as the said Commissioners shall see cause to require or allow.

The award of the said Commissioners or of any three of them as aforesaid shall in all Cases be final and conclusive both as to the Justice of the Claim, and to the amount of the Sum to be paid to the Creditor or Claimant. And the United States undertake to cause the Sum so awarded to be paid in Specie to such Creditor or Claimant without deduction; and at such Time or Times, and at such Place or Places, as shall be awarded by the said Commissioners, and on Condition of such Releases or assignments to be given by the Creditor or Claimant as by the said Commissioners may be directed; Provided always that no such payment shall be fixed by the said Commissioners to take place sooner then twelve months from the Day of the Exchange of the Ratifications of this Treaty.

Article 7

Whereas Complaints have been made by divers Merchants and others, Citizens of the United States, that during the course of the War in which His Majesty is now engaged they have sustained considerable losses and damage by reason of irregular or illegal Captures or Condemnations of their vessels and other property under Colour of authority or

Commissions from His Majesty, and that from various Circumstances belonging to the said Cases adequate Compensation for the losses and damages so sustained cannot now be actually obtained, had and received by the ordinary Course of Judicial proceedings; It is agreed that in all such Cases where adequate Compensation cannot for whatever reason be now actually obtained, had and received by the said Merchants and others in the ordinary course of Justice, full and Complete Compensation for the same will be made by the British Government to the said Complainants. But it is distinctly understood, that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the Claimant. That for the purpose of ascertaining the amount of any such losses and damages Five Commissioners shall be appointed and authorized to act in London exactly in the manner directed with respect to those mentioned in the preceding Article, and after having taken the same Oath or Affirmation (mutatis mutandis). The same term of Eighteen Months is also assigned for the reception of Claims, and they are in like manner authorised to extend the same in particular Cases. They shall receive Testimony, Books, Papers and Evidence in the same latitude, and exercise the like discretion, and powers respecting that subject, and shall decide the Claims in question, according to the merits of the several Cases, and to Justice Equity and the Laws of Nations. The award of the said Commissioners or any such three of them as aforesaid, shall in all Cases be final and conclusive both as to the Justice of the Claim and the amount of the Sum to be paid to the Claimant; and His Britannick Majesty undertakes to cause the same

to be paid to such Claimant in Specie, without any Deduction, at such place or places, and at such Time or Times as shall be awarded by the said Commissioners and on Condition of such releases or assignments to be given by the Claimant, as by the said Commissioners may be directed. And whereas certain merchants and others, His Majesty's Subjects, complain that in the course of the war they have sustained Loss and Damage by reason of the Capture of their Vessels and Merchandize taken within the Limits and Jurisdiction of the States, and brought into the Ports of the same, or taken by Vessels originally armed in Ports of the said States:

It is agreed that in all such cases where Restitution shall not have been made agreeably to the tenor of the letter from Mr. Jefferson to Mr. Hammond dated at Philadelphia September 5th 1793. A Copy of which is annexed to this Treaty, the Complaints of the parties shall be, and hereby are referred to the Commissioners to be appointed by virtue of this article, who are hereby authorized and required to proceed in the like manner relative to these as to the other Cases committed to them, and the United States undertake to pay to the Complainants or Claimants in specie without deduction the amount of such Sums as shall be awarded to them respectively by the said Commissioners and at the times and places which in such awards shall be specified, and on Condition of such Releases or assignments to be given by the Claimants as in the said awards may be directed: And it is further agreed that not only to be now existing Cases of both descriptions, but also all such as shall exist at the Time, of exchanging the Ratifications of this Treaty shall be considered as being within the provisions intent and meaning of this article.

APPENDIX D: AGREEMENT FOR A MIXED CLAIMS COMMISSIONS, U. S.-GER., AUG. 10, 1922, 42 STAT. 2200, T. S. NO. 665

Article II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

Article VI

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The Commission may also appoint and employ any other necessary officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

APPENDIX E: CONVENTION ON PREVENTION OF SMUGGLING OF INTOXICATING LIQUORS, U.S.-GR. BRIT., JAN. 23, 1924, 43 STAT. 1761, T. S. NO. 685

Article IV

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or [Page 160]on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

APPENDIX F: TREATY FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, PAK.-FED. REP. GER., NOV. 25, 1959, 457 U.N.T.S. 23

Article 11

(1) In the event of disputes as to the interpretation or application of the present Treaty, the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship.

(2) If no such solution is forthcoming, the dispute shall be submitted (a) to the International Court of Justice if both Parties so agree or

(b) if they do not so agree to an arbitration tribunal upon the request of either Party.

(3) (a) The tribunal referred to in paragraph (2) (b) above shall be formed in respect of each specific case and it shall consist of three arbitrators. Each Party shall appoint one arbitrator and the two members so appointed shall appoint a chairman who shall be a national of a third country.

(b) Each Party shall appoint its arbitrator within two months after a request to this effect has been made by either Party. If either Party fails to comply with this obligation the arbitrator shall be appointed upon the request of the other Party by the President of the International Court of Justice.

(c) If within one month from the date of their appointment the arbitrators are unable to agree on the chairman of the arbitration tribunal such chairman shall upon the request of either Party be appointed by the President of the International Court of Justice.

(d) If the President of the International Court of

Justice is prevented from acting upon a request under sub-paragraph (b) or sub-paragraph (c) of the present paragraph or if the President is a national of either Party the Vice-President shall make the appointment. If the Vice-President is prevented or if he is a national of either Party the appointment shall be made by the seniormost member of the International Court of Justice who is not a national of either Party.

(e) Unless the Parties otherwise decide, the arbitration tribunal shall determine its own rules of procedure.

(/) The arbitration tribunal shall take its decisions by a majority of votes. Such decisions shall be binding upon the Parties and shall be carried out by them.

APPENDIX G: AGREEMENT ON THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, BELG.-INDON., JAN. 15, 1970, 843 U.N.T.S. 19

Article 10

Each Contracting Party hereby irrevocably and anticipatory gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the Convention of Washington of 18 March 1965, 1 at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure,

APPENDIX H: N.Y. C.P.L.R. ARTICLE 53

§ 5303, Recognition enforcement, and proceedings

(a) Except as is otherwise provided in section fifty-three hundred four of this article or any controlling law of the United States, a court of this state shall recognize a foreign country judgment to which this article applies as conclusive between the parties to the extent that it grants or denies recovery of a sum of money.

(b) If recognition of a foreign country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action on the judgment or a motion for summary judgment in lieu of complaint seeking recognition of the foreign country judgment.

(c) If recognition of a foreign country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim or affirmative defense.

(d) An action to recognize a foreign country judgment must be commenced within the earlier of the time during which the foreign country judgment is effective in the foreign country or twenty years from the date that the foreign country judgment became effective in the foreign country.

APPENDIX I: ACT OF JUNE 22, 1938

Pub. L. 75-696, § 2, 52 Stat. 840, 842–43 (1938)

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto ; and to repeal section 76 thereof and all Acts and parts of Acts inconsistent therewith .

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 to 11, inclusive ; 14 ; 15 ; 17 to 29, inclusive ; 31 ; 32 ; 34 ; 35 ; 37 to 42, inclusive ; 44 to 53, inclusive ; and 55 to 72, inclusive, of an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, as amended, are hereby amended ; and sections 12, 13, 73, 74, 77A, and 77B are hereby amended and incorporated as chapters X, XI, XII, XIII, and XIV ; said amended sections to read as follows :

* * *

"SEC. 2. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.-a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to-

* * *

"(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified ; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to continence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified : Provided, however, That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto ;

APPENDIX J: ACT TO SIMPLIFY THE PAYMENT OF CERTAIN MISCELLANEOUS JUDGMENTS

Pub. L. 87-187, 75 Stat. 415 (1961)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That section 2414 of title 28 of the United States Code is amended to read:

"§ 2414. Payment of judgments and compromise settlements

"Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

"Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

"Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to

judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements."