ARE PRIVATE ARBITRAL PANELS TRIBUNALS UNDER § 1782?: ANALYSIS OF CASE LAW AND INTERPRETATIVE APPROACHES

Maria Castro Sanchez[*]

Section 1782 authorizes the use of U.S. style discovery in aid of foreign proceedings. This statute has only been substantively analyzed by the U.S. Supreme Court in *Intel*. Though this case provided guidance on and clarified key issues regarding the application of 1782; it also gave rise to questions regarding its application to foreign *arbitral* proceedings. The recent flood of cases dealing with this issue have come to different conclusions as to its scope and application, with some courts finding that private foreign arbitrations are categorically outside of the scope of the statute and others authorizing its use in both private and investor-state foreign arbitrations. This Note focuses on this circuit split, looking to both the Court's approach in *Intel* as well as the approaches and arguments accepted by the lower courts on either side of the circuit split in order to predict how this issue may be resolved by the U.S. Supreme Court, which has very recently granted certiorari to resolve this issue.

* J.D. 2021, University of Florida Levin College of Law. This Note is dedicated to my family whose support made this Note possible. A special thanks to my partner (Abdel) who was the first to read over this Note. Thanks to everyone on the FJIL board for their hard work and dedication, especially in light of the unique circumstances we faced this year.

INTRODUCTION

As globalization and commercial transactions between parties of different nationalities have increased, demand for adequate and fair resolution of disputes between international parties has similarly increased.[1] International arbitration has emerged as the method that is both the more customizable and predictable method of resolving international disputes than the vagaries of litigation—especially with international parties where the need for a neutral forum and adequate judicial enforcement is especially salient.[2]

Consideration of the nature of the arbitral bodies presiding over international commercial arbitration has become important in light of the application of 28 U.S.C. § 1782(a) providing United States judicial discovery assistance to foreign proceedings. This statute uniquely permits district courts to order discovery "for use in a proceeding in a foreign or

1. *See* Julie Barker, *International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOYOLA L.A. INT'L & COMP. L. REV. 1, 3–4 (1996).

2. *See* Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOYOLA L.A. L. REV. 1337, 1341–42.

international tribunal" upon a petition by "any interested person."[3] The question of whether this expansive discovery statute is available for use in private arbitral proceedings is at the heart of a recently developing circuit split.[4] The resolution to this question could potentially permanently add or remove a powerful discovery tool from the belt of those participating in private international arbitration.

First, this Note will explore the history of discovery under § 1782, followed by a discussion of the circuit split arising prior to the United States Supreme Court's seminal *Intel* decision. Subsequently, this Note will discuss the cases following *Intel*, which have created some confusion as to whether § 1782 encompasses private arbitrations. Next, this Note will examine the parallel *Servotronics* cases, demonstrating the need for U.S. Supreme Court review of this circuit debate. Finally, this Note will scrutinize the principal analytical bases for the post-*Intel* decisions evaluating the relative merits of different cases' approaches to the question of private arbitration under § 1782.

I. WHAT IS § 1782? BACKGROUND BEFORE PRIVATE ARBITRATION CIRCUIT SPLIT

A. *Statutory History*

Section 1782 comes from a history of the United States' lack of avenue for providing aid to foreign courts. As early as 1855, it became evident that the United States had no method of executing foreign letters rogatory seeking aid in discovery.[5] Following some legislative fumbling, Congress passed an Act in 1863, which limited district courts to executing only those letters rogatory issued in suits in which a foreign government had an interest.[6] This led to a period of judicial hostility to requests from

3. 28 U.S.C. § 1782(a) (2021).

4. *Compare* Hanwei Guo v. Deutsche Bank Sec. Inc., 965 F.3d 96, 104–06 (2d Cir. 2020), El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31, 33–34 (5th Cir. 2009), *and* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020) [hereinafter *Servotronics* II], *with* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020) [hereinafter *Servotronics* I], *and* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 713–14 (6th Cir. 2019).

5. *See* Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and A Program for Reform*, 62 YALE L. J. 515, 540 (1953) (describing the history of § 1782 in more depth). Letters rogatory are defined in the U.S. Code of Federal Regulations as a "formal request from a court in which an action is pending, to a foreign court to perform some judicial act…" 22 C.F.R. § 92.54 (2020). Most commonly, this request involves discovery for use in pending proceedings.

6. Jones, *supra* note 5, at 540. Prior to the 1963 enactment, the Attorney General in the mid-1850's actually requested a more thorough approach which would fix the issues associated with letters rogatory, however the due to revisions and indexing errors that act was "buried in oblivion." *Id.*

foreign courts, remedied only by the passage of section 1782.[7]

Section 1782 significantly expanded the scope of aid in discovery for use in foreign proceedings. In its earliest form, it provided for "[t]he deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace. . . ."[8]

The 1964 amendment to § 1782 was the result of research into the extent to which judicial aid to foreign jurisdictions should be granted given the increase in international commerce and the resultant disputes.[9] In 1958 Congress created the Commission on International Rules of Judicial Procedure to investigate how judicial assistance of foreign discovery could be improved.[10]

The 1964 revision to § 1782 further expanded the scope of the provision, allowing district courts to order the production of documents or testimony "for use in a proceeding in a *foreign or international tribunal*," upon request by "a foreign or international tribunal or the application *of any interested person.*"[11] Notably, Congress deleted the "any judicial proceeding" requirement and instead permitted this device *in foreign or international tribunals*.[12]

The final and current version of the § 1782 statute, by its terms, provided for broad discovery. It reads:

> The district court of the district in which a person *resides or is found may* order him to give his testimony or statement or to produce a document or other thing *for use in a proceeding in a foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.[13]

Though district courts are given the discretion to grant or deny

---

7. *Id.* at 541.

8. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949). This reflects a minor edit to the original 1948 text, striking out the word "residing" and replacing "civil action" with "judicial proceeding." § 1782, ch. 117, 62 Stat. 949 (1948).

9. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248 (2004).

10. *Id.*

11. 28 U.S.C. § 1782(a) (1964), amended by 28 U.S.C. § 1782(a) (1996).

12. Though there was a 1996 amendment to § 1782, this amendment pertained to the use of § 1782 discovery in criminal investigations. Act of 1996, Pub. L. No. 104–106, 110 Stat. 486, 486.

13. 28 U.S.C. § 1782(a) (2020) (*emphasis added*).

petitions, written into § 1782(a) are only a few explicit statutory requirements for these petitioners. The first requirement is that the party from whom discovery is requested reside or be found in the district of the granting court's jurisdiction when the application is made.[14] Next, the discovery requested must be "for use" in a foreign proceeding.[15] Finally, the request must be made by a foreign/international tribunal or "any interested person."[16]

B. *Extra-Statutory Requirements Pre-Intel*

Several district courts applied other requirements before granting discovery requests.[17] These requirements stemmed from policy considerations outside of the literal text of the statute. While the district courts were given plenary discretion over which applications could be granted, the courts adding these extra-statutory requirements found that certain *implicit* requirements controlled the judicial exercise of discretion.[18] These extra-statutory requirements provided the basis for a circuit split in this international-based legislation and created different results based on which district the information sought was located.[19]

The first extra-statutory requirement was of imminence. Although *pending* had been removed from the text of the 1964 amendments, some district courts nevertheless read a requirement of *imminence* into § 1782.[20] The Second Circuit held that a § 1782 petition did not meet the "for use" requirement where the evidentiary receipt portion of the

14. *See* 28 U.S.C. § 1782(a) (2020); In re del Valle Ruiz, 939 F.3d 520, 527 (2d Cir. 2019) (stating "the statutory scope of 'found' extends to the limits of personal jurisdiction consistent with due process."); Esses v. Hanania (*In re Esses*), 101 F.3d 873, 875 (2d Cir. 1996).

15. *See* 28 U.S.C. § 1782(a) (2020); *In re del Valle Ruiz*, 939 F.3d at 524; *In re Esses*, 101 F.3d at 875. This question was partially resolved in *Intel* which did not read an imminence requirement into these cases.

16. *See* 28 U.S.C. § 1782(a) (2020); *In re* del Valle Ruiz, 939 F.3d at 524; *In re* Esses, 101 F.3d at 875.

17. *See* cases cited *infra* note 19.

18. Peter Metis, *International Judicial Assistance: Does 28 U.S.C. S 1782 Contain an Implicit Discoverability Requirement?*, 18 FORDHAM INT'L L. J. 332, 351–52 (1994).

19. *Id.* at 335–37.

20. *See* Ishihara Chem. Co. v. Shipley Co., 251 F.3d 120, 123, 125 (2d Cir. 2001) (requiring that the proceeding be "imminent—[i.e.,] very likely to occur and very soon to occur," in order for a § 1782 petition to be granted); In re Request for Assistance from Ministry of Legal Affs. of Trinidad & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988), (suggesting that district judges must look to whether a proceeding is very likely to occur before granting a § 1782 petition); *but see,* In re Letter of Request from Crown Prosecution Serv. of United Kingdom (*In re Crown Prosecution*), 870 F.2d 686, 691 (D.C. Cir. 1989) (requiring only that the proceeding be "within reasonable contemplation").

proceeding had already passed.[21] The Court required that the foreign proceedings be "very likely to occur and very soon."[22]

By contrast, other courts did not require a proceeding to be imminent. The D.C. Circuit in *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*[23] affirmed the grant of a § 1782 petition where the discovery sought exceeded the scope of the one then-pending indictment and was to be used for gathering evidence in a related investigation against another individual.[24] The court found that applicants only needed to show that the proceedings for which the discovery would be used were in reasonable contemplation.[25] This meant that applicants did not have to be currently engaged in pending litigation.

The second extra-statutory requirement that split the circuits was the foreign discoverability requirement.[26] This threshold discovery requirement asked the district courts to look to the foreign jurisdiction's discovery procedures and determine whether the information sought would be discoverable under the laws of the foreign tribunal.[27]

In *John Deere Ltd. v. Sperry Corp.*,[28] the Third Circuit held that discretion to grant § 1782 applications from individual petitioners, and not through letters rogatory, or other diplomatic channels, was limited to only that information discoverable under the laws of the jurisdiction in which the discovery will be used.[29] Though the court denied a foreign *admissibility* requirement, it still imposed the additional foreign discovery requirement.[30] The court here seemed to be concerned primarily with § 1782 being used as a tool to circumvent foreign jurisdiction's discovery limitations.[31]

Unlike the Third Circuit, the Second Circuit permitted the judge to use discretion when analyzing cases where the discovery sought would not be discoverable in the foreign proceeding.[32] In *Foden v. Gianoli-*

---

21. *Ishihara*, 251 F.3d at 126.
22. *Id.* at 123, 125.
23. 870 F.2d 686 (D.C. Cir. 1989).
24. *Id.* at 689, 691, 693.
25. *Id.* at 694.
26. *See* cases cited *infra* note 32.
27. *See* In re Application of Asta Medica, S.A., 981 F.2d 1, 6–7 (1st Cir. 1992) (requiring a threshold showing of discoverability reasoning that such a permissive interpretation would place U.S. litigants abroad at a disadvantage and would contravene principles of comity and reciprocity); In re Request for Assistance from Ministry of Legal Affs. of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988) (stating that district court "must decide whether the evidence would be discoverable in the foreign country before granting assistance").
28. *Deere*, 754 F.2d at 132.
29. *Id.* at 136.
30. *Id.* at 138.
31. *Id.* at 136.
32. *See* Malev Hungarian Airlines v. United Tech. Int'l Inc., 964 F.2d 97, 100 (2d Cir. 1992) (finding that a threshold discoverability requirement contravened the plain text and legislative

Aldunate,[33] the Court looked at § 1782's legislative history and congressional intent and determined that there was no implicit discoverability requirement.[34] While the Third Circuit in the *John Deere* case found the question of circumvention of foreign procedures and offense from foreign jurisdictions dispositive,[35] the Second Circuit found the plain text interpretation along with the legislative intent of the 1964 amendments of expanding aid to foreign tribunals and granting wide discretion to district court judges inexorably led to the determination that there was no threshold requirement.[36] The court suggested that these policy considerations would better be addressed by the district judge's discretion to deny petitions which would implicate these considerations.[37]

C. *The Supreme Court Addresses § 1782 in Intel*

1. *Intel* Clarifies the Question of Extra-Statutory Requirements

The debate regarding these extra-statutory requirements was addressed by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*,[38] the first, and *only*, time that the Court directly addressed the application of § 1782.[39] This seminal case resolved the circuit split regarding a threshold discoverability requirement and the imminent litigation requirement. The Court clarified certain ambiguities regarding the interested party and provided factors that should guide the district judge's discretion to grant or deny these petitions.

Intel arose from an antitrust dispute between Advanced Micro Devices and Intel to be settled by the Directorate-General for Competition (DG-Competition) of the Commission of European Communities (European Commission).[40] AMD alleged that Intel engaged in anti-competitive practices in violation of the European competition law and requested that the DG-Competition seek discovery

---

intent behind § 1782); Foden v. Gianoli-Aldunate, 3 F.3d 54, 59-62 (2d Cir. 1993) (holding that while an extra-statutory threshold finding of foreign discoverability was not required by § 1782, district court judges may and should consider the concerns of comity and avoiding offense to foreign jurisdictions through their discretion to deny petitions).

33. *Foden*, 3 F.3d at 54.

34. *Id.* at 59–60.

35. *Deere*, 754 F.2d at 136.

36. *Foden*, 3 F.2d at 59–60.

37. *Id.* at 62.

38. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

39. Hanwei Guo v. Deutsche Bank Sec. Inc., 965 F.3d 96, 103 (2d Cir. 2020) (stating that "the Supreme Court issued its seminal decision in *Intel*—the only Supreme Court case to address § 1782.").

40. *Intel*, 542 U.S. 241, 246, 250 (2004). The DG-Competition is the primary enforcer of antitrust violations, acting through the European Commission to resolved disputes arising between European Union members. *Id.* at 250.

of documents.[41] AMD's § 1782 petition followed the DG-Competition's denial of the request.[42]

Intel allowed the Court not only to resolve the circuit split, but also to directly analyze the comity and international relations implications of § 1782's application to unwilling tribunals.[43] The Court resolved the circuit split, holding that: (1) the proceeding for use in which the discovery is sought need only be within *reasonable contemplation*[44] and (2) there is no foreign or domestic discoverability requirement.[45] Though resolving these circuit disputes in favor of a broader interpretation of the statute, the Court reined in the impacts of these broad holdings by emphasizing the importance of the district court's discretion to *deny* these petitions.[46]

The Court provided a set of considerations for district judges to use in exercising their discretion.[47] These *Intel* factors resolved concerns regarding the comity and parity of U.S. parties in foreign disputes raised by the breadth of this expansive discovery mechanism. The *Intel* discretionary factors create the framework guiding uniformity in the way district court discretion is exercised. The first *Intel* factor suggests discretion should be exercised in favor of petitions where the party from whom discovery is sought is not a participant in the foreign proceedings.[48] Next, district courts should look to whether the foreign tribunal would be receptive to evidence gained through the procedure, looking to the nature of the tribunal and proceedings.[49] The third *Intel* factor takes comity and parity into account and asks courts to consider whether the applicant is attempting to circumvent foreign restrictions on discovery.[50] Finally, the last *Intel* factor departs from considerations of international relations and simply asks the court to consider whether the discovery request is unduly burdensome or intrusive.[51]

---

41. *Id.* at 250.

42. *Id.* at 251.

43. In fact, the European commission took "the highly unusual step" of submitting an amicus brief because they so stringently opposed the grant of discovery in this case. Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572), 2003 WL 23138389.

44. *Intel*, 542 U.S. at 259.

45. *Id*. at 260–63.

46. *Id.* at 264 (stating that "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so").

47. *Id.* at 247, 264.

48. *Id.* at 264.

49. *Id.*

50. *Intel*, 542 U.S. at 264–65.

51. *Id.* at 265.

2. *Intel* Creates Ambiguity Regarding the Meaning of Tribunal

The Court's *Intel* factors provided the balance between unduly restricting legislation which is both textually broad and is described as broad by its primary drafter,[52] and public policy considerations of parity and comity. In resolving the circuit disputes regarding foreign discoverability and the imminence requirement, the Court inadvertently created a new split between the circuits regarding the scope of § 1782. In holding that AMD's discovery request *could be* granted by the district courts, the Court implicitly found that the European Commission, acting through the DG-Competition, constitutes a foreign tribunal.[53] *Intel* invited federal courts to question whether international arbitral tribunals fell within the ambit of § 1782's discovery provisions— disturbing the previously unanimous agreement to the contrary.[54]

D. *Pre*-Intel *Treatment of Private Arbitration Under § 1782*

1. The Second Circuit Sets the Stage

In 1999, the Second Circuit unequivocally found that the scope of § 1782 did not extend to private arbitral institutions.[55] In *National Broadcasting Co. v. Bear Stearns & Co*., the court quashed subpoenas issued pursuant to § 1782 for use in an international commercial arbitration administered under the International Chamber of Commerce.[56] The Second Circuit began by looking at the text of the statute. Giving the terms "foreign or international tribunal" their ordinary

---

52. *See* Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT'L ARB. 295, 330 (2003) (stating that, "[s]ection 1782 was drafted deliberately in broad terms to encourage the courts to be as liberal and flexible as possible."). Author Smit refers to his being deemed the "dominant drafter" of § 1782 in a D.C. Circuit opinion written by Justice Ginsburg. *Id.* at 298 n.6.

53. *Intel*, 542 U.S. at 258 (stating "[w]e have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit.").

54. *See* Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. S1782*, 17 AM. REV. INT'L ARB. 45, 45 (2006). Prior to the 2004 *Intel* decision, circuit courts seemed uniform in their decision to deny discovery to arbitral tribunals, however there seemed to be some debate between district courts before the Second Circuit ruled on National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999). *See generally* Republic of Kaz. v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999) (holding "we conclude that the term 'foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations."); In re Medway Power, 985 F. Supp. 402, 405 (S.D.N.Y. 1997) (holding that unofficial, private arbitrations do not fall under the ambit of § 1782).

55. National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc. (*National Broadcasting*), 165 F.3d 184, 191 (2d Cir. 1999).

56. *Id*. at 185–86.

meaning, they found that the text *was* broad enough to encompass private arbitral bodies but did not necessarily include them.[57]

Finding the plain text reading of the statute ambiguous, the Second Circuit then analyzed the legislative history and Congressional intent surrounding the statute.[58] The court noted that the 1964 amendment, replacing "judicial proceedings" with "foreign tribunal," was meant to broaden the scope of the district court's ability to grant § 1782 petitions.[59] However, the court found it important that neither the House nor Senate reports surrounding the 1964 amendments explicitly mentioned private proceedings to resolve disputes.[60]

The court ultimately found the lack of evidence in the legislative history of this novel application, "which lay far beyond the realm of the earlier statute,"[61] was sufficient to justify finding that the legislation did not apply.[62] The court suggested that Congress would need to explicitly clarify this new scope of discovery.[63] It also noted that the predecessor to § 1782, which provided limited discovery aid in foreign proceedings, used the term "international tribunal" to refer to intergovernmental tribunals.[64] The court suggested that the change in the 1964 amendment to § 1782 was only meant to extend the scope to intergovernmental tribunals not involving the U.S.[65]

2. The Fifth Circuit Cements the Categorical Bar on § 1782 For Use in Private Arbitrations

In the same year the Second Circuit decided *National Broadcasting*, the Fifth Circuit decided a similar issue in *Republic of Kazakhstan v. Biedermann (Biedermann)*.[66] The "foreign proceeding" in question at *Biedermann* was an arbitration through the Arbitration Institute of the Stockholm Chamber of Commerce.[67] Unlike *National Broadcasting*, one of the parties to this arbitration was a foreign State,[68] however the Fifth Circuit did not find this to be notable in the case.[69] Rather, the court

57. *Id.* at 188.
58. *Id.* at 188–90.
59. *Id.* at 189–90.
60. *National Broadcasting*, 165 F. 3d at 189.
61. *Id.* at 190.
62. *Id.* at 191.
63. *Id.* at 190.
64. *Id*. at 189.
65. *Id.* at 190.
66. Republic of Kaz. v. Biedermann Int'l (*Biedermann*), 168 F.3d 880 (5th Cir. 1999).
67. *Id.* at 881.
68. *Id.*
69. This is noteworthy given the Fifth Circuit's post-*Intel* treatment of other investor-state arbitrations. For instance, in *Republic of Ecuador v. Connor*, the Fifth Circuit, in finding that Chevron, which had sought aid under § 1782, was estopped from objecting to a § 1782 grant under

followed the Second Circuit's analysis of the text of the statute and the legislative history.[70]

The court next looked at public policy to inform Congressional intent. It examined discovery provisions for domestic arbitration, noting that parties to wholly domestic arbitration could not seek compelled discovery.[71] The court suggested that Congress could not have intended for § 1782 to grant parties engaged in foreign arbitration greater access to judicial aid in discovery than their domestic counterparts.[72]

Finally, the court looked at the actual effects of applying § 1782's broad discovery provision to arbitration.[73] Arbitration of commercial disputes had the advantage of speedily and efficiently resolving disputes.[74] Discovery disputes stemming from these broad requests for information would bog down the arbitration process.[75] Further, the court noted the importance of the contractual nature of arbitration and parties' abilities to contract for discovery procedures.[76]

II. POST-*INTEL* TREATMENT OF PRIVATE ARBITRATION UNDER § 1782

A. *Post*-Intel *Circuit Split*

The Second Circuit's analysis in *National Broadcasting* is one that was later adopted by tribunals, even post-*Intel*. Circuits advocating this view harmonized this approach with the Court's *Intel* analysis since this holding was limited to determining that the DG-Competition, a more administrative, public arbitral body, was an appropriate foreign tribunal for the purposes of the statute, given its European Commission authority.

The Second Circuit determined that *Intel* did not change the *National Broadcasting* analysis and upheld the view of § 1782 as being limited to judicial or administrative quasi-judicial proceedings.[77] The majority of the circuits that have ruled on this issue have adopted this view.[78]

However, while these circuits continued with the *Biedermann* and *National Broadcasting* view of § 1782, other circuits considered *Intel* as having abrogated this previous precedent. Both the Fourth and Sixth

---

Biedermann, declined to explicitly rule on the question of whether such investor-state arbitrations could be considered under § 1782 in light of *Intel*, though it "arguably" could be considered as such. Republic of Ecuador v. Connor, 708 F.3d 651, 657–58 (5th Cir. 2013).

70. *Biedermann*, 168 F.3d at 881–82.

71. *Id.* at 882–83.

72. *Id.* at 883.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Biedermann*, 168 F.3d at 883.

77. *See* Hanwei Guo v. Deutsche Bank Sec. Inc., 965 F.3d 96, 100 (2d Cir. 2020).

78. *See* La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008*)*; *Servotronics II*, 975 F.3d at 695–96.

Circuit have addressed this issue head on and have permitted § 1782 applications to be granted for use in private arbitration.[79]

1. The Second Circuit Maintains the Status Quo in *Guo*

In *Hanwei Guo v. Detsche Bank Securities Inc, et al*,[80] the Second Circuit maintained that *Intel* had not altered its interpretation of § 1782 as not applying to private arbitrations.[81] This 2020 case cemented the divide between districts regarding whether private arbitration constituted a tribunal under § 1782. This case dealt with discovery sought for use in an arbitration proceeding before the China International Economic and Trade Arbitration Commission (CIETAC).[82] This arbitral panel was part of the China Council for the Promotion of International Trade, established by the Chinese government.[83]

The court first examined *Intel* and determined that it did not conflict with its decision in *National Broadcasting*.[84] The court took a narrow view of the *Intel* holding as limited to considering the Directorate General-Competition a tribunal under the statute, not all private party arbitrations.[85] The reference to Hans Smit's article explicitly including arbitral tribunals under the statute was merely dicta, in the view of the second circuit.[86] Even if it were not, the court held that an *arbitral tribunal*, per Professor Smit's statement, did not necessarily encompass private arbitral tribunals, but might have referred only to those tribunals created and empowered by a state.[87]

The court then turned to the statute's legislative history, which under *Intel* supported a broad and expansive view of the 1964 amendments to § 1782.[88] Rather than abrogating *National Broadcasting*, the court suggested that this was consistent with *National Broadcasting*, which also affirmed Congressional intent to broaden the reach of discovery, but not enough to encompass *private* international arbitration.[89]

Finding the *National Broadcasting* holding sound, the Court found it was bound by the previous precedent and must analyze this case according to *National Broadcasting*.[90] It then turned to consider whether

79. *See Servotronics I*, 954 F.3d at 210; Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 715 (6th Cir. 2019).
80. *Guo*, 965 F.3d 96, 100 (2d Cir. 2020).
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 104–05.
85. *Id.* at 105.
86. *Guo*, 965 F.3d at 105.
87. *Id.*
88. *Id.* at 106; Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258–59 (2004).
89. *Guo*, 965 F.3d at 106.
90. *Id.* at 106–07.

the CIETAC proceedings constituted private international commercial arbitration under *National Broadcasting*.[91]

National Broadcasting held that international tribunals wholly created by private parties did not fall within § 1782's definition of a tribunal.[92] Though CIETAC was originally created by the People's Republic of China, the court held that the analysis did not end there.[93] Rather, the court had to look to "whether the body in question possesses the functional attributes most commonly associated with private arbitration."[94] This inquiry would reflect the "functional approach adopted by the *Intel* court,"[95] and look to factors like the degree of state affiliation and independence the arbitral body had from the State that created it and the degree of private party, contractual control over the proceedings.[96]

The court's state affiliation analysis looked at the extent of state direction that CIETAC received.[97] CIETAC did not receive guidance from the State in choosing arbitrators or in its proceedings, which were confidential, limiting opportunities for state intervention.[98] The court found that CIETAC's independence and autonomy suggested a low degree of state affiliation.[99]

The court next turned to the State's ability to review the result of the arbitration.[100] The court determined that the State's limited review of arbitral awards, essentially limited to the review undertaken by the United States under the New York Convention as to whether to set aside a foreign arbitral award, was not sufficient to render CIETAC a tribunal under § 1782.[101] Permitting arbitration with this base level of state involvement would require that nearly all arbitration taking place abroad would fall under the scope of § 1782, as many states have adopted the New York Convention and this same review procedure.[102]

Finally, the court looked to CIETAC's jurisdiction and whether it exceeded the bounds of the private parties' contractual agreement.[103] The court determined that CIETAC's authority was limited to what was

91. *Id.*
92. *Id.* at 107.
93. *Id.*
94. *Guo,* 965 F.3d at 107.
95. *Id.* at 107.
96. *Id.*
97. *Id.* at 107.
98. *Id.*
99. *Id.*
100. *Guo*, 965 F.3d at 107
101. *Id.* at 107–08.
102. *Id.*
103. *Id*. at 108.

conferred on them by the parties' agreement.[104] Unlike state-affiliated tribunals, CIETAC did not have any governmental backing granting it jurisdiction.[105]

In affirming the denial of § 1782 aid for use in the CIETAC proceeding, the court held that CIETAC did not constitute a foreign tribunal.[106] In so doing, the court expanded *National Broadcasting*'s analysis to include more than just the *origin* of the tribunal. Rather, the court rooted its analysis on the same functional approach taken by the *Intel* court and looked to the quasi-judicial and state-sponsored features of the arbitral tribunal. If the arbitral tribunal is essentially an extension of the state's power, then it falls under the ambit of § 1782, like the DG-Competition in *Intel.*

While the *Guo* court took a restrictive view of *Intel* and of the definition of foreign tribunal, it notably did not address this question regarding tribunals established pursuant to bilateral investment treaty. The court suggested that these BIT-based arbitral bodies and disputes may be different from other arbitral proceedings and may constitute tribunals under § 1782.[107]

2. The Sixth Circuit Expands the Scope of § 1782

Unlike the Second Circuit, the Sixth Circuit determined that *Intel* had changed the analysis regarding whether arbitral tribunals fell within the ambit of § 1782. The court addressed this same issue of whether a private arbitration fell within the ambit of § 1782 in *Abdul Latif Jameel Transportation Co. v. FedEx Corp.*.[108]

In *ALJ Transportation*, the Sixth Circuit held that a § 1782 discovery application could be granted for use in a private commercial arbitration under the rules of the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA).[109] The DIFC-LCIA is a "joint venture"[110] of the DIFC Arbitration Institute and the LCIA.[111] The DIFC is a statutorily established arbitral tribunal.[112] Its awards are directly reviewable by the DIFC Court and also subject to limited review by the United Arab Emirates for failure to conform with public policy.[113] Like

104. *Id.*
105. *Id.*
106. *Guo*, 965 F.3d at 108.
107. *Id.* at 108, n.7.
108. Abdul Latif Jameel Transp. Co. v. FedEx Corp. [hereinafter *ALJ Transp.*], 939 F.3d 710, 713–14 (6th Cir. 2019).
109. *Id*. at 730–31.
110. *Id*. at 714–15.
111. *Id.* at 714–15.
112. *Id.* at 715.
113. *ALJ Transp.*, 939 F.3d at 715.

the CIETAC panel in *Guo*, the DIFC-LCIA panel consisted of members appointed by this institute.[114]

The court first approached the question with a textual analysis of § 1782, particularly on the meaning of the word tribunal. First, the court looked at the dictionary definition of tribunal as used in 1964, the year the statute adopted the "foreign tribunal" language.[115] Several legal and some non-legal dictionaries defined "tribunal" broadly enough to encapsulate private arbitrations.[116] However, these mixed results did not resolve the question.

The court next turned to the use of the term "tribunal" in legal writing in general. The court found support for the "historical and continuing usage of the word to describe private arbitrations."[117] The court looked to state court as well as federal court usage of the term tribunal to describe private agreements to arbitrate.[118]

Finally, the court looked to the use of "tribunal" in other parts of the statute. The court specifically addressed the statute's reference to taking discovery pursuant to the "practice and procedure of the foreign country or the international tribunal."[119] It found that this particular sentence did not support the position that tribunals were limited to governmental entities but was instead a provision permitting the district court to borrow from the tribunal's evidentiary procedures.[120]

Concluding that a textual analysis of the provision does not preclude the application to private arbitration, the court next turned to *Intel*. The court acknowledged that *Intel* did not speak directly to the issue of § 1782 as applied to private arbitrations.[121] However, the court determined that the *Intel* court's reasoning in allowing the Directorate-General for Competition to be considered a tribunal under the legislation suggested that tribunal applies to non-judicial proceedings which are "quasi-judicial."[122] Unlike the court in *Guo*, the court here accorded great weight to the Supreme Court's reference to Hans Smit's article.[123] The court found support in its holding that § 1782 applied to private arbitration from *Intel.*[124]

The court also reviewed the circuit decisions holding that private arbitral panels did not fall under § 1782, looking at the precedent set by

114. *Id.*
115. *Id*. at 717.
116. *Id*. at 719–20.
117. *Id*. at 720.
118. *Id*. at 721–22.
119. *ALJ Transp.*, 939 F.3d at 722.
120. *Id.* at 722–23.
121. *Id.* at 723.
122. *Id*. at 724.
123. *Id.*
124. *Id.* at 723.

National Broadcasting and *Biedermann*. It found that the *National Broadcasting*'s and *Biedermann*'s reliance on legislative history was unnecessary given the textual support for the broader use of tribunal from both the dictionary definition as well as courts' long-term use of the term in this way.[125] Even if this analysis were necessary, the court found the *National Broadcasting* and *Biedermann* courts' analysis of the legislative history lacking.[126] The court found the statements used by these courts actually supported a broader, rather than narrower, reading of § 1782.[127]

Lastly, the court looked at the policy implications of providing for this broad discovery tool in private arbitrations. First, it turned to the comparison of this foreign discovery procedure to what is offered for domestic arbitration under the Federal Arbitration Act.[128] The court found unpersuasive concerns regarding the fairness of permitting this broad discovery for private international arbitration proceedings but not to corresponding domestic proceedings.[129] Citing *Intel*'s rejection of the foreign discoverability requirement as analogous, the court determined that proportionality arguments regarding the breadth of this discovery tool did not control.[130] As with the foreign discoverability concern, the court found that applying a categorical bar on discovery for use in private arbitration simply because such discovery would not be available in domestic proceedings was inappropriate.[131]

The court next considered the impacts of permitting this discovery on the efficiency of arbitral proceedings. The court found this concern could be remedied by the district court's discretion to deny discovery requests that it deems too burdensome.[132] In exercising their discretion, district court judges could consider the appropriateness of the discovery sought for the more expedited arbitration context.[133]

Finally, the court considered the appropriateness of expanding § 1782 to include private arbitration in light of the "twin aims" of § 1782. These aims are of "providing efficient assistance to participants in international litigation, and encouraging foreign countries by example to provide similar assistance."[134] Though providing discovery assistance for use in

125. *ALJ Transp.*, 939 F.3d at 726–27.
126. *Id.* at 727.
127. *Id.* at 728.
128. *Id*.
129. *Id.* at 728–29.
130. *Id.* at 729.
131. *ALJ Transp.*, 939 F.3d at 129.
132. *Id.* at 730.
133. *Id.*
134. *Id. See also* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 252. However, it is important to note that the Supreme Court never adopted this as its official view of Congressional intent in adopting § 1782, rather, the Court in *Intel* simply cites this provision from

arbitration might not serve these purposes as directly as with international tribunals, it did not contravene those goals.[135]

Based on all of these factors and arguments, the Sixth Circuit broke from the Second and Fifth Circuit's precedent and held that private arbitral tribunals fell within the § 1782 definition of tribunals.[136]

These decisions mark a widening circuit split regarding this issue. Just as with the foreign discoverability requirement, these different interpretations between the circuits can cause § 1782 petitioners to "receive different treatment based on the geographic location of the evidence in question."[137]

3. Private Commercial Arbitration vs Investor-State Arbitration

While not within the primary purpose of this Note, it is worth noting the treatment of investor-state arbitration (ISAs) post-*Intel*. In the post-*Intel* era, U.S. courts had routinely found ISAs to fall within the ambit of the statute, before ever addressing the applicability to private commercial arbitrations.[138]

Unlike private commercial arbitration, ISAs arise out of bilateral investment treaties (BITs) or multilateral investment treaties.[139] Under these agreements, the host state essentially waives its sovereign immunity and grants investors acting under the treaty the ability to initiate arbitral proceedings to resolve disputes between them.[140] This creates a standing offer from the State to arbitrate certain disputes.[141] Though the State is

---

the Ninth Circuit's holding in the case at the prior appeal stage. *Intel*, 542 U.S. at 252; *see also* Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002).

135. *ALJ Transp.*, 939 F.3d at 730.

136. *Id.* at 730–31.

137. Metis, *supra* note 18, at 335–36.

138. *See* Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 128 (2012).

139. S.I. Strong, *Discovery Under 28 U.S.C. S 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 332 (2013); *See* Melissa Stear Gorsline & Maria Pradilla Picas, *U.S. Discovery in Aid of Investor-State Arbitrations: A Blessing or A Curse?*, 30 MD. J. INT'L L. 14, 21 (2015).

140. *See* Strong, *supra* note 139 (discussing the grant of jurisdiction undertaken by a State party to a BIT or similar instrument and distinguishing this grant from that given to "first generation international tribunals"). Strong notes that like "first generation tribunals" such as the International Chamber of Commerce (ICC) and the International Court of Justice (ICJ), BITs and other investment treaties involve a grant of jurisdiction to an external tribunal over certain types of claims. *Id.* at 327. Unlike "first generation tribunals" however, the jurisdiction acts as an "offer to arbitrate" and is therefore contingent on the investor's choice. *Id.* at 332–33. In this way, investor state arbitration is the middle ground between "first generation tribunals," which waive a State's ability to litigate certain disputes, and private commercial arbitrations, which are wholly reliant on contract and individual party choices. *Id.*

141. *Id*. at 332 (citing Julian D.M. Lew et al., Comparative International Commercial Arbitration ¶¶ 27-3 to 27–83 (2003)).

generally obligated to submit to arbitration upon request per the BIT, the arbitration is based on the investor's consent.[142] By contrast, private arbitration is entirely a creature of contract and depends on both parties' agreement to arbitrate.[143]

Oxus Gold,[144] a decision rendered just two years after *Intel*, disturbed the placid waters of the definition of a tribunal under § 1782, distinguished between the private arbitral proceedings in *National Broadcasting* and the investor-state proceedings conducted under United Nations Commission on International Trade Law (UNCITRAL) rules.[145] The court held that this proceeding constituted a foreign tribunal because it was "conducted by the United Nations Commission on International Law," and was authorized by the BIT between the UK and the Kyrgyzstan Republic.[146]

Though the court correctly identified the grant of jurisdiction/waiver of sovereign immunity authorized by states pursuant to a BIT, its analysis of the role of UNCITRAL in resolving the dispute is lacking. Contrary to the court's suggestion, UNCITRAL does not conduct or supervise proceedings undertaken under the rules.[147] Further, these rules had been used to provide the framework for a variety of private arbitral proceedings and were meant to aid parties involved in ad hoc arbitration.[148]

The *Oxus* court's overestimation of the judicial and administrative nature of the UNCITRAL Arbitration Rules is represented in cases following *Oxus* distinguishing between private arbitration and ISA and permitting judicial aid for the latter.[149] This confusion regarding the role of arbitral rules under UNCITRAL and the exact nature of investment arbitration remained unaddressed in a later series of cases granting § 1782

142. *Id*. at 325.

143. *See* Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010) (stating that the "fundamental principle that arbitration is a matter of contract").

144. In re Matter of Application of Oxus Gold PLC, No. MISC.06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006).

145. *Id.* at *6.

146. *Id*.

147. *See* Strong, *supra* note 139, at 308.

148. *Id. See generally* G.A. Res. 65/22, UNCITRAL Arbitration Rules (Jan. 10, 2011), (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf). Though the UNCITRAL rules do not provide exclusively for the resolution of investor-state disputes, concerns regarding the private and confidential nature of arbitral proceedings involving investor-state arbitrations pursuant to BITs with huge public policy impacts lead to the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. *See generally*, G.A. Res. 68/109, UNCITRAL Arbitration Rules (Jan. 10, 2011), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf [https://perma.cc/SM4H-TGHS].

149. *See* Strong, *supra* note 139, at 308–09.

applications for use in an investment arbitration surrounding a complex dispute between Chevron and Ecuador.[150]

The distinction between investor-state arbitration and private commercial arbitration has been preserved by at least some courts in the post-*Intel* circuit split. In *Guo*, the court, in a footnote, addressed the requesting party's argument that the private arbitration there was similar enough to an ISA to fall within the ambit of the statute.[151] The court found it unpersuasive, reaffirming its view that while ISAs fell within the ambit of the statute, private commercial arbitrations were distinct and did not constitute tribunals under the statute.[152]

The distinction between investor-state arbitration pursuant to investment treaties and private commercial arbitration for § 1782 purposes has not been parsed out by the courts. *Guo*'s footnote suggests that courts will continue to view these two types of arbitration as distinct without endeavoring an in-depth analysis of the differences between them.[153]

4. *Servotronics*: The Matched Set

The effects of the lack of uniformity for § 1782 petitioners seeking discovery in divergent circuits are apparent in two recent cases reaching the Seventh and Fourth Circuits. These circuits adopted different interpretations of the "tribunal" requirement under the statute. These different interpretations led to the same party being barred from seeking discovery for use in its arbitration in one district court while having the other district court be able to exercise its discretion to grant the application.[154]

In these two cases, § 1782 applicant Servotronics, Inc., a valve manufacturer, sought discovery from two U.S. companies for use in private arbitration in the United Kingdom pursuant to an agreement under

---

150. *Id*. at 311–12 (noting that as a result of the interconnected nature of cases arising out of this dispute, many decisions were based wholly on the precedent from earlier determinations of the issue, leaving a "very sparsely reasoned precedent").

151. *Guo*, 965 F.3d at 108, n.7.

152. *Id.* The court found it key in the distinction between the two that the adjudicatory authority to arbitrate in the case of private arbitration is derived solely from the parties, while ISAs stem from "the intervention or license of any government to adjudicate" these cases. *Id.* The court also noted that ISAs typically involved a private party and a state, making it distinct from disputes between two wholly private parties. *Id.*

153. *See generally* Strong, *supra* note 139, for an in-depth analysis of the differences between investor state and private commercial arbitration. These differences and the merits of permitting § 1782 requests in either context are approached in the post-*Intel* context. The inconsistencies stemming from this distinction are addressed in the analysis section of this paper.

154. Servotronics, Inc. v. Rolls-Royce PLC (*Servotronics II*), 975 F.3d 689, 690 (7th Cir. 2020); Servotronics, Inc. v. Boeing Co. (*Servotronics I*), 954 F.3d 209, 210, 216 (4th Cir. 2020).

the Chartered Institute of Arbitrators (CIArb).[155] This dispute arose when a Boeing engine, manufactured and installed by Rolls-Royce, caught fire and damaged a Boeing aircraft.[156] Following a settlement between the two, Rolls-Royce sought indemnification from Servotronics for damages, claiming that the engine fire was due to a malfunction with the engine valves that Servotronics had supplied.[157] Rolls-Royce submitted the dispute to arbitration in the UK under the CIArb rules pursuant to their long-term agreement.[158]

Servotronics sought discovery from Boeing in two separate § 1782 applications. It sought documents from Boeing's headquarters in the Northern District of Illinois.[159] It also sought depositions from employees in the Charleston facility located in the District of South Carolina[160]. The District Court for the Northern District of Illinois initially granted the application.[161] By contrast, the district court in South Carolina denied Servotronics' § 1782 application.[162] These applications were appealed up to the Fourth and Seventh Circuit Courts of Appeals.[163]

a. The Fourth Circuit *Servotronics* Opinion

In *Servotronics, Inc. v. Boeing Co.* (*Servotronics I*),[164] the Fourth Circuit joined the Sixth Circuit in holding that a private arbitration could constitute a tribunal under § 1782. The court first addressed the arguments each party raised concerning the *Biedermann* and *National Broadcasting* precedent.[165] It then looked to the Congressional intent surrounding the 1964 amendment to § 1782 and the use of the word "tribunal."[166] Finally, the court looked at the Federal Arbitration Act (FAA) and any conflicts that would arise from permitting § 1782 to be used in foreign arbitrations.[167]

The district court relied on *Biedermann* and *National Broadcasting* in denying the § 1782 application, finding it undisturbed by *Intel*.[168] In addressing whether it should rely on these two precedential cases, the court first noted that the Sixth Circuit in *ALJ Transportation* was the first

155. *Servotronics II*, 975 F.3d at 691; *Servotronics I*, 954 F.3d at 210–11.
156. *Servotronics II*, 975 F.3d at 690–91; *Servotronics I*, 954 F.3d at 210.
157. *Servotronics II*, 975 F.3d at 690–91; *Servotronics I*, 954 F.3d at 210.
158. *Servotronics II*, 975 F.3d at 691; *Servotronics I*, 954 F.3d at 210–11.
159. *Servotronics II*, 975 F.3d at 691.
160. *Servotronics I*, 954 F.3d at 211.
161. *Servotronics II*, 975 F.3d at 691.
162. *Servotronics I*, 954 F.3d at 210–11.
163. *See Servotronics I*, 954 F. 3d at 210; *Servotronics II*, 975 F.3d. at 691.
164. *Id.* at 209.
165. *Id.* at 212.
166. *Id.* at 213.
167. *Id.* at 212–14.
168. *Id.* at 212.

circuit court to address the question of § 1782 for use in foreign arbitration since *Intel.*[169] The court noted that the *ALJ Transportation* case cast doubt on the *Biedermann* and *National Broadcasting* precedent and created a split of authority.[170] Given that no Fourth Circuit case spoke to this exact issue, the court found it did not have to defer to *Biedermann* or *National Broadcasting*.[171]

The court found the record surrounding § 1782 supported an expansive reading of the statute Congress's intent was to increase the avenues for assistance in resolving disputes before all foreign tribunals.[172] This change was meant to reflect assistance in connection with more than just foreign courts, and also include quasi-judicial proceedings abroad.[173]

Finally, the court turned to the policy arguments. The court began by highlighting Congress's endorsement and regulation of arbitration through the FAA.[174] The FAA both provided the procedures governing arbitrations, including permitting court supervision and enforcement of arbitral awards.[175] This made arbitration a product of government conferred authority under U.S. law.[176] The same level of regulation present in the FAA was evidenced in the UK Arbitration Act which governed the arbitral tribunal governing the dispute.[177] The UK arbitral panel under which the dispute would be resolved had sufficient government authority that it would meet even the restrictive pre-*Intel* view of what functionally could be considered a "tribunal."[178]

The court also addressed the practical effects of permitting § 1782 discovery for use in private arbitrations. Although use of the full extent of U.S. discovery procedures would burden the more efficient resolution contracted for in arbitration clauses, this all or nothing conception of § 1782 misinterprets its scope and function.[179] Section 1782 was not meant to authorize a full discovery for a party to an arbitration.[180] Rather, the statute authorizes the district court to gather information for use in a foreign tribunal in the stead of that tribunal.[181]

---

169. *Servotronics I*, 954 F.3d at 212.
170. *Id*.
171. *Id*.
172. *Id.* at 212–13.
173. *Id*. at 213.
174. *Id*.
175. *Servotronics I*, 954 F.3d at 213.
176. *Id.*
177. *Id.* at 214.
178. *Id.*
179. *Id.*
180. *Id.* The court noted that the text of the provision does not even mention the word discovery. *Id.* It just alludes to the use of U.S. evidentiary rules in gathering the information in the absence of the district court's statement to the contrary. *Id.*
181. *Id.* at 214–15.

Next, the court turned to the possible conflict with the FAA by authorizing discovery in foreign arbitration beyond what is permitted in domestic arbitration. Specifically at issue, was the expansion of foreign discovery aid in allowing any interested person to petition for § 1782 aid, the extension of subpoena power beyond the district of the seat of arbitration, and authorizing non-parties to appear in depositions.[182] The court, however, keyed these "expansions" as a distinct procedure stating that § 1782 permits district courts, where information is sought, to act "effectively as a surrogate" for the foreign tribunal. [183] Under § 1782, the court acts to enforce some measure of information gathering, just as UK courts do under the UK Arbitration Act, allowing arbitrators access to subpoenaed testimony and documents.[184] The provision may expand the scope of the foreign arbitration's authority beyond what comparable U.S. arbitrations or even the foreign panel would have under its own laws; however, this expansion reflects Congressional policymaking to allow broader discovery in these cases.[185]

Finally, just as the *ALJ Transportation* court suggested, the court here suggested that analogizing and comparing the permitted discovery under the FAA to that permitted under § 1782 was not within the scope of review for this question.[186] In rejecting the discoverability requirement, the *Intel* court disclaimed the need for analogous domestic discovery in applying § 1782.[187]

b. The Seventh Circuit *Servotronics* Opinion

In a parallel case, the Seventh Circuit analyzed the same facts to come to a different conclusion. In *Servotronics v. Rolls-Royce* (*Servotronics II*), the court held that the arbitral panel acting under CIArb rules did not constitute a foreign "tribunal" under § 1782. This result widened the existing circuit divide, as the Seventh Circuit sided with the Sixth, Fifth, and Second Circuits regarding this question of first impression in this circuit.[188]

Like the Fourth Circuit, the court in *Servotronics II* looked at the precedent set by other circuits and whether *Intel* had changed the applicability of *National Broadcasting* and *Biedermann*. Notably, at the

182. *Id.* at 215.

183. *Servotronics I*, 954 F.3d at 215.

184. *Id.*

185. *Id.*

186. *Id*. at 216.

187. *Id.* (stating "§ 1782 'is a provision for assistance to tribunals abroad [that] does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist [in the United States]." *Id.* (citing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 263 (2004)).

188. Servotronics, Inc. v. Rolls-Royce PLC (*Servotronics II*), 975 F.3d 689, 692 (7th Cir. 2020).

time of this case, the Second Circuit had already affirmed its *National Broadcasting* interpretation of § 1782.[189] Considering the circuit court split regarding *Intel*'s effects on this question, the court found that *Intel* itself did not "tip the scales in favor of either side of the circuit split."[190]

Finding the definition of "tribunal" inconclusive, the court turned to the statutory context.[191] The court began by looking at the "statutory charge" the Commission International Rules of Judicial Procedure followed in drafting the rule.[192] This charge did not include investigation into improving judicial assistance for private foreign arbitration, rather it spoke more broadly to the "existing practices of judicial assistance and cooperation between the United States and foreign countries . . ."[193] The Commission's work yielded three other statutes dealing with letters rogatory and foreign litigation service of process.[194] "Service-of-process assistance and letters rogatory—governed by §§ 1696 and 1781—are matters of comity between governments, which suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels."[195]

Like the Sixth Circuit in the *ALJ Transportation* case, the court in *Servotronics II* looked at the use of the term "tribunal" in other parts of § 1782.[196] Unlike the court in *ALJ Transportation*, the Seventh Circuit deemed that the provision allowing the discovery to take place as proscribed by the court or be "in whole or part the *practice and procedure of the foreign country or the international tribunal*"[197] suggests a more limited reading of the term "tribunal."[198] Since private foreign arbitrations do not have the same practice and procedures that foreign administrative and quasi-governmental tribunals do, they are not included within the meaning of this phrase.[199]

Like the Fourth Circuit in the sister *Servotronics* case, this court addressed the Federal Arbitration Act (FAA). Unlike the Fourth Circuit, the court found that allowing § 1782 to apply to foreign arbitrations would cause a "serious conflict" with the FAA's rules governing

189. *Id*. at 693
190. *Id*.
191. *Id*. at 694.
192. *Id*.
193. *Id.* (citing Act of Sept. 2, 1958, Pub. L. No. 85-906 § 2, 72 Stat. 1743).
194. *Servotronics II*, 975 F.3d at 694.
195. *Id.* at 695.
196. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 723 (6th Cir. 2019); *Servotronics II*, 975 F.3d at 695.
197. *Servotronics II*, 975 F.3d at 695 (emphasis in original) (citing 28 U.S.C. § 1782(a)).
198. *Id.*
199. *Id*.

domestic discovery.[200] One of the greatest sources of conflict stems from who may seek the discovery aid. While § 1782 permits any interested parties to seek broad discovery aid, the FAA only permits the arbitration panel itself to summon witnesses to the panel.[201] The court also flagged the FAA's applicability to certain *foreign* arbitral proceedings as another possible source of conflict.[202]

III. RESOLVING THE CIRCUIT SPLIT: NEED FOR U.S. SUPREME COURT REVIEW

The *Servotronics* cases demonstrate the practical impacts of the lack of judicial clarity on the question of what constitutes a tribunal. Though presented with the exact same factual scenario on a question of first impression, the Seventh and Fourth Circuits came to very different conclusions regarding the applicability of § 1782 to private arbitrations in the post-*Intel* context. This disparate application of the law between circuits has the potential to create forum shopping and inequitable results for parties proceeding on the same facts. This unequal result has been aptly demonstrated by the *Servotronics* matched set, leaving no doubts as to the existence of a circuit split. The existence of this split is evident in the Supreme Court's decision to grant review on this issue in this context. On March 22, 2021, the Court granted certiorari on the Seventh Circuit's *Servotronics* case.[203]

A. *Plain Meaning Textual Analysis*

Throughout the post-*Intel* cases, courts have routinely begun by analyzing the plain meaning of the term "foreign or international tribunal" in § 1782(a).[204] The Seventh Circuit's decision in *Servotonics I* and the Sixth's opinion in *ALJ Transportation* provide thorough and detailed textual analyses of the term.

Both of these opinions began by looking to dictionary definitions of tribunal.[205] Both determined that this analysis alone did not conclusively resolve the question, though even the Seventh Circuit conceded that the definition was broad enough to encompass private arbitration.[206] The Sixth Circuit also looked to the use of the term "tribunal" in other legal

200. *Id.*

201. *Id.*

202. *Id*. at 695–96.

203. Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021).

204. 28 U.S.C. 1782(a).

205. *Servotronics II*, 975 F.3d at 693; Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*ALJ Transp.*), 939 F.3d 710, 719–20 (6th Cir. 2019).

206. *Servotronics II*, 975 F.3d at 694; *ALJ Transp.*, 939 F.3d at 720.

writing and found added support for the determination that the term encompasses private arbitral bodies.[207]

Unlike other courts to address the issue, both the Seventh and Sixth Circuit opinions looked to the statutory context.[208] Looking to the same three uses of the term "tribunal" in the statute, the courts came to different conclusions. The *Servotronics I* court found the context supported a limited reading of tribunal to only include judicial and administrative tribunals having a practice or procedure of discovery, and not private.[209] Addressing the same part of the statute, the *ALJ Transportation* court determined that this use was consistent with authorizing district courts to borrow the practice or procedure of other tribunals, if they chose.[210]

Though both opinions provide thorough examinations of the plain text meaning of "tribunal" in the statute, the Sixth Circuit's analysis comes to the correct conclusion. The Seventh Circuit's analysis relied on §§ 1696 and 1781, which deal with letters rogatory and service of process requests.[211] Because arbitral tribunals have no authority to issue service of process requests or letters rogatory, the court found tribunals in this context could not mean private arbitral tribunals.[212]

This reading, however, fails to account for two key points. First, § 1781 refers to letters rogatory or "request[s] made,"[213] implying that the drafters envisioned these provisions to apply even to arbitral bodies which can only make *requests* for evidence.[214] Second, the Supreme Court in *Intel* rejected the argument that interested parties had to be limited to litigants to be consistent with § 1696, since private parties could not serve process unless they filed suit.[215] Rather, the Supreme Court determined that the provision permits "service of 'any document' issued in connection with a foreign proceeding."[216]

B. *Legislative Intent*

Upon a finding of ambiguity under the textual analysis, nearly every other court to address this post-*Intel* issue turned to legislative history. *Intel* notably provided a thorough legislative history for the 1964

207. *ALJ Transp.*, 939 F. 3d at 720–22.

208. *Servotronics I*, 975 F.3d at 694–95; *ALJ Transp.*, 939 F.3d at 722–23. It is worthy of noting that an analysis of the statutory context of the term "tribunal" is absent in the seminal *National Broadcasting* and *Biedermann* decisions which, upon finding the dictionary use of the term did not unambiguously solve the question, then turned to legislative history.

209. *Servotronics II*, 975 F.3d at 695.

210. *ALJ Transp.*, 939 F.3d at 722–23.

211. *Servotronics II*, 975 F.3d at 695.

212. *Id.*

213. *Id.* at 691. *See also* 28 U.S.C. § 1781(a)(1) (2021).

214. *Servotronics II*, 975 F.3d at 695.

215. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 255–57, n.10 (2004).

216. *Id.*

amendments. The analysis provided by the Supreme Court in *Intel* regarding the legislative history seems to suggest a broad reading of the statute as a whole.

However, while the Supreme Court's reading of the history suggests this expansive approach, the Court never addressed the question of whether § 1782 can be for use in private arbitration. In fact, the Court's reference to arbitration is contained, not in the legislative history, but instead from a law review article by a drafter of the revised statute.[217] Post-*Intel* cases holding that private arbitral panels did not constitute tribunals, emphasized that this expansive language was not part of the original senate report and could not speak to legislative history as a whole. This critique seems in line with *any* analysis of legislative history, including Congressional reports which do not necessarily indicate the intent of every congress member to vote on the legislation.[218]

While the direct reference to an "arbitral tribunal"[219] was dictum, the Court's report of the legislative history and statutory construction support a broad view of the statute. Though the only direct reference to arbitration in the case was in the footnote, it's equally true that the only evidence to the contrary is the lack of explicit reference to arbitration in the legislative history. The lack of evidence regarding Congressional intent as to the application of § 1782 to arbitral proceedings and the support of an overall broad reading of the text in light of the 1964 amendments suggest that the legislative history is either neutral or supportive of the Fourth and Sixth Circuit's approach to this question.[220]

C. *The* Intel *Functional Approach*

While *Intel* marks a turning point in the definition of "tribunal" under § 1782, leading two circuit courts to read it as encompassing private arbitration, it's notable that *Intel* does *not* hold this.[221] In fact, *Intel* did not even deal with arbitration at all. Rather, the Supreme Court in *Intel* held that the DG-Competition constituted a foreign tribunal because it

---

217. *See generally* Smit, *supra* note 52.

218. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) ("Of course that does not necessarily say anything about what Congress as a whole thought. Assuming that all the members of the three Committees in question (as opposed to just the relevant Sub committees) actually adverted to the interpretive point at issue here-which is probably an unrealistic assumption-and assuming further that they were in unanimous agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House.").

219. *Id.* at 258.

220. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 212–15 (4th Cir. 2020); Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 724 (6th Cir. 2019).

221. Ex rel Winning (HK) Int'l Shipping Co., No. 09-22659-MC, 2010 WL 1796579, at *7 (S.D. Fla. Apr. 30, 2010) (stating that, "as conceded by almost all of the post-Intel rulings, the Supreme Court in Intel never addressed the issue of whether a private arbitration forum qualified as a tribunal under section 1782").

acted as a "first instance decision-maker" that rendered "dispositive rulings" which were subject to judicial review.[222] This analysis gave rise to a functional assessment of arbitral tribunals. Some courts have permitted § 1782 petitions for use in foreign arbitrations because the arbitral tribunals have been quasi-judicial and have acted as first instance decision-makers rendering final judgments subject to judicial review.

This functional approach is evidenced by the Second Circuit's opinion in *Guo*. There, the court found that the limited review permitted by CIETAC and lack of State conferred jurisdictional grant did not render it a first instance decision-maker considered a tribunal for § 1782 for *Intel* purposes.[223] The court's analysis in this case highlights the issue with treating ISAs and private arbitrations differently.

One question highlighted by this approach is whether the different treatment of investor-state arbitration and private arbitration is warranted. ISAs and private arbitrations bear many similarities. The functional analysis under *Intel* has highlighted two questions: (1) degree of state affiliation and (2) judicial reviewability and enforcement. These are two areas where the differences between private arbitration and ISAs pursuant to investment treaties are more illusory than functional.

As to the question of degree of state affiliation, ISAs involve one State party and a national of another state.[224] This does constitute some degree of state affiliation, as the State is essentially permitting foreign investors to act as private attorney generals with the ability to initiate arbitral proceedings to redress government breaches of treaty protections.[225] This grant of jurisdiction does not generally broaden the power of arbitral tribunals to resolve the disputes.[226] Rather, it permits investors to choose to pursue arbitration against the State. BITs often contain provisions permitting the investor to seek arbitration administered through some reputable *private* arbitral institution, or through ad hoc arbitration pursuant to rules like the UNCITRAL Rules.[227] These same institutions or rules may be and are frequently employed to resolve private commercial disputes.[228] This demonstrates that the initial grant of state

222. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246–47, 255 (2004).

223. Hanwei Guo v. Deutsche Bank Sec. Inc., 965 F.3d 96, 107–08 (2d Cir. 2020).

224. Martin J. Valasek & Renée Thériault, Investor-State Arbitration in Canada, ACC Docket, October 2011, at S5, S5; *See* Strong, *supra* note 139, at 332; Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 343–44 (2007).

225. Franck, *supra* note 224, at 344.

226. *See* Strong, *supra* note 139, at 354 (noting that the inclusion of certain arbitration rules into investment treaties suggests and indirectly incorporates principles limiting judicial intervention into these arbitrations).

227. *Id*.

228. *Id*. at 361.

authority under investment treaties does not constitute state affiliation of the actual arbitral tribunal before which the case proceeds.[229]

The question of judicial review has been key in certain courts' functional *Intel* analysis.[230] The question of judicial enforcement of awards as well as the bases for review is one that is consistent regardless of whether the arbitral award is for an ISA or private arbitration. Under either type of arbitration proceeding, the review of arbitral awards and the enforcement thereof is guided by treaties or legislation. As a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the U.S., along with 167 other contracting states,[231] is bound to recognize foreign arbitral awards, subject to limited judicial review.[232] This limited review is the same regardless of whether the award results from an investor-state arbitration or a private arbitration, meaning there is no functional difference in the review-ability under these two arbitral regimes.

Under the functional review mechanisms employed by most courts, ISAs and private arbitrations are difficult to distinguish. An approach allowing § 1782 petitions for use in arbitrations pursuant to an investment treaty but not for similar private arbitral tribunals is inconsistent with this functional approach. Under the functional approach, courts with settled law including ISAs as tribunals under § 1782 should logically extend this definition to private arbitral tribunals.

D. *The Policy Arguments: Conflicting Laws and Harm to Arbitration*

The circuit court decisions addressing the interpretation of § 1782 to foreign international arbitration address, not only the textual reading and congressional intent of the statute, but also touch on the policy implications. These concerns are separated into two categories: (1) asymmetric effects on information gathering available for foreign

---

229. Note, investment arbitrations pursuant to the world Bank's International Centre for Settlement of Investment Disputes (ICSID) do have a more state affiliated basis. Unlike arbitrations under the ICC or pursuant to ad hoc rules, the ICSID Convention entitles Member states to select four panel arbitrators who may be called upon by the ICSID to arbitrate disputes. However, parties arbitrating under the ICSID need not choose from these member State panelists and may elect arbitrators without the ICSID choosing from the panel. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090, art. 12–16 [hereinafter "ICSID Convention"].

230. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214 (4th Cir. 2020); Hanwei Guo v. Deutsche Bank Sec. Inc., 965 F.3d 96, 107–08 (2d Cir. 2020). *See also* Alejandro A. Nava Cuenca, *Debunking the Myths: International Commercial Arbitration and Section 1782(a)*, 46 YALE J. INT'L L. 155, 183 (2021).

231. New York Arbitration Convention*, Contracting States - List of Contracting States*, https://www.newyorkconvention.org/list+of+contracting+states [https://perma.cc/7XUS-SNB6] (last visited Mar. 1, 2021).

232. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.

disputes versus for domestic, and (2) burdening the otherwise efficient arbitral process.

1. Asymmetrical Effects: Judicial Discovery Aid in Domestic Arbitration vs Foreign Arbitration

This concern arises from the parallel application of the FAA governing information gathering in domestic arbitration and § 1782 providing additional aid for use in foreign arbitrations. These concerns have been addressed by cases on both sides of the dispute. Both the Fourth Circuit's *Servotronics II* opinion and the Sixth Circuit's *ALJ Transportation* opinion acknowledged these legitimate policy concerns but determined that the discretion vested in the court to deny these applications and to limit the scope of the discovery could remedy these concerns.[233] By contrast, the Fifth and Seventh Circuits credited these concerns as inconsistent with Congressional intent.[234]

Intel's holding focused on judicial discretion in granting these requests. There, the Supreme Court declined to impose a categorical bar on certain classes of cases under § 1782 to account for policy concerns.[235] This reading to avoid adding extra-statutory requirements makes sense given the possibility of avoiding these potential issues through the exercise of judicial discretion. Even the *Intel* factors themselves contain guidance that could minimize the negative impacts stemming from this broad judicial grant of power to foreign arbitration.[236]

2. Burdening Efficient Arbitration Proceedings

The loss of efficiencies from applying § 1782 to private arbitral proceedings has also been addressed on both sides of the dispute. *Biedermann* and *National Broadcasting* first expressed fears of U.S. style discovery overtaking the limited information gathering permitted under

---

233. Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214–15 (4th Cir. 2020); Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 728 (6th Cir. 2019).

234. Republic of Kaz. v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 695 (7th Cir. 2020).

235. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261–62 (2004).

236. *See* Kenneth Beale, Justin Lugar, and Franz Schwarz, *Solving the § 1782 Puzzle: Bringing Certainty to the Debate of 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J INT'L L. 51, 96–106 (2011) (describing a normative approach to § 1782 guiding judicial discretion in granting these applications). By looking to the application of the *Intel* factors specifically towards the arbitral panel, judicial precedent supporting arbitral proceedings and the actual content of the parties' arbitration agreements, judicial discretion can allay the worst of the effects resulting from the asymmetrical application of the information gathering procedures for use in arbitration. *Id.*

traditional arbitration.[237] However, international arbitrations are not always pursued simply because of the efficiencies gained from simplified proceedings. Rather, concerns about judicial enforceability of judgments issued in international conflicts and the need for a neutral forum often underlie the choice to arbitrate private international disputes.[238]

Further, even if efficiency were foremost on the parties' minds in arbitrating these disputes, the parties' agreement to arbitrate can adequately protect this interest. Parties may contract to limit the scope of discovery and to ensure the arbitration is conducted efficiently.[239]

CONCLUSION

Just as in the pre-*Intel* era, a fundamental difference of interpretation has divided the courts in their definition of a tribunal under § 1782. This difference can and has caused inconvenience for practitioners who may apply for aid for use in the same foreign proceeding and receive different answers depending on where the information sought is found. Though the analyses and arguments have remained relatively consistent throughout cases, the vastly different conclusions underscore the need for judicial review and clarity on this issue. Though it is uncertain whether the Court will grant review of this issue, the Court's decision will likely be guided by *Intel* as well as the circuit interpretations of the statute. The precedent set by *Intel*, the application of a functional test for quasi-judicial tribunals, the plain text as well as legislative history all support an expansive reading of § 1782(a) that should encompass private arbitral panels.

237. El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, 341 F. App'x 31, 34 (5th Cir. 2009); National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 190–91 (2d Cir. 1999); Republic of Kaz. v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999).

238. *See* Nava Cuenca, *supra* note 230, 170–71; Jennifer Sandlin, *Practicalities and Commercial Realities: § 1782 and Its Application to Private Commercial Arbitration*, 44 J. LEGAL PROF. 223, 239 (2020).

239. Sandlin, *supra* note 238, at 240.