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By
Keenan Rambo*

I. INTRODUCTION

Expeditious proceedings and low costs provide the foundations of the international arbitral process.[1] However, lower costs regarding the discovery process in international arbitration have become a hotly debated issue over the last two decades. Despite the desire of United States courts to stay out of the arbitral process to avoid creating the delays seen in the United States judicial system, the need for court involvement in private international arbitration is becoming an unavoidable necessity.[2]

This article explores the reasons why parties engaged in private international arbitration should be permitted to compel discovery in district courts through the use of 28 U.S.C. § 1782(a).[3] Section 1782(a) permits a district court to compel a party who resides within its jurisdiction to produce documents to be used in "a proceeding in a foreign or international tribunal" after "the application of any interested person."[4] Given the recent decisions by the Second, Fourth, Sixth, and Seventh Circuit Courts of Appeals, it is unclear whether 28 U.S.C. § 1782(a) encompasses arbitral panels and organizations within its meaning.[5] The first section of this article provides a brief background on the history, current dispute, and potential outcomes of a decision in favor of and against allowing 28 U.S.C. § 1782(a) to compel discovery. The second section provides background to explain the appellate court decisions and how the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.* furthered the argument on both sides.[6] The third and final

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1. DAVID G. EPSTEIN ET AL., CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS 38-39 (5th ed. 2018) (noting that businesses involved in arbitration are fond of the process because it "represents . . . [an] expeditious way for resolving their disputes.").

2. THOMAS E. CARBONNEAU & HENRY ALLEN BLAIR, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE, 13 (8th ed. 2019) ("The federal decisional law seeks to maintain the systemic autonomy of arbitration[] . . . . The aggressive judicial protection of arbitration is meant to eliminate dilatory tactics.").

3. 28 U.S.C. § 1782(a) (2020).

4. *Id*.

5. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 216 (4th Cir. 2020); Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings), 939 F.3d 710, 719-23 (6th Cir. 2019); *contra* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020); Hanwei Guo v. Deutsche Bank Sec., 965 F.3d 96, 106 (2d Cir. 2020).

6. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) ("'[t]he term "tribunal" . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial

section of this article will present an analysis on why Section 1782(a) should be available for foreign arbitration tribunals and parties. This final section discusses how Section 1782(a) encompasses private international arbitration, why differing discovery processes between domestic and international arbitration are irrelevant, and how reading Section 1782(a) in this fashion aligns with Congress's and the Supreme Court's national policy.

II. BACKGROUND: THE PURPOSE, CONTROVERSY, AND POTENTIAL OUTCOMES OF DECISIONS FOR AND AGAINST SECTION 1782(A)

Section 1782(a) allows a district court to order a party within its jurisdiction to produce documents after receiving a request from an interested party.[7] Congress first enacted Section 1782(a) in 1948 in an attempt to aid transnational proceedings.[8] The last fundamental change to Section 1782(a) occurred in 1964 when Congress adopted the broad language "proceeding in a foreign or international tribunal."[9]

Congress adopting this new phrasing has served to cause confusion and disagreement among the Courts of Appeal.[10] The disagreement stems from different interpretations of statutory history and whether Congress intended for the phrase "foreign or international tribunals" to encompass arbitration panels as "tribunals."[11]The Second, Fifth, and Seventh Circuit Courts of Appeals have adopted several different rationales to explain why Section 1782(a) should not encompass arbitration panels. The first argument posed by these appellate courts is that statutory interpretation does not support including arbitration within the term "tribunal."[12] The second argument raised is that Congress would

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agencies . . . .'") (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 (1965))) [hereinafter Smit, *International Litigation*].

7. *See* 28 U.S.C. § 1782(a) (2020).

8. *See generally*, Hagit Muriel Elul & Rebeca E. Mosquera, *28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings*, *in International Arbitration in the United States* 393, 394-395 (2017).

9. *See* Sec. 9(a), § 1782, 78 Stat. at 997. It should also be noted that Congress did make minor changes to 28 U.S.C. § 1782 in 1996, however, these changes only added clarification that the statute may be used in criminal proceedings and are irrelevant as to the scope of this article.

10. *See, e.g*., *Servotronics, Inc.*, 954 F.3d at 215-16; *Abdul Latif Jameel Transp. Co.*, 939 F.3d at 717-18; *contra Rolls-Royce PLC*, 975 F.3d at 694-95; *Hanwei Guo*, 965 F.3d at 103.

11. *See, e.g., Rolls-Royce PLC*, 975 F.3d at 693 ("[T]he word 'tribunal' is not defined in the statute, and dictionary definitions do not unambiguously resolve whether private arbitral panels are included in the specific sense in which the term is used here.").

12. *See Hanwei Guo*, 965 F.3d at 109 (noting that the court's prior decision in *NBC* that Section 1782(a) did not broadly encompass private commercial arbitration was still good law); NBC v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999); *see also* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999) (stating that other opinions, primarily from the Second Circuit Court of Appeals, showed that "not every conceivable fact-finding or adjudicative body is covered . . . ."); *Rolls-Royce PLC*, 975 F.3d at 693

not have enacted a statute providing broader discovery rights to international arbitration than it would for domestic arbitration cases.[13] Finally, the three appellate courts opposed to Section 1782(a)'s use in private international arbitration all argue Section 1782(a) would be in direct conflict with Section 7 of the Federal Arbitration Act ("FAA").[14] Meanwhile, the Fourth and Sixth Circuits have constructed logically sound arguments to dismiss each of these in turn to justify their endorsement of Section 1782(a).[15]

For the reasons explained in Section Three of this article, the possibility of this issue coming before the Supreme Court is exceedingly high given the recent conflicting outcomes of the Fourth and Seventh Circuits.[16] If the Supreme Court decides that Section 1782(a)'s "foreign or international tribunals" phrasing does not include the term arbitration, then participants involved in the international arbitration realm will gain the ability to block broader discovery.[17] However, if the Supreme Court decides Section 1782(a)'s phrasing does apply, then international public policy will be upheld. Despite these fears that the arbitral system will come to a screeching halt, the process of international arbitration will carry on like normal.[18]

("All definitions agree that the word 'tribunal' means 'a court,' but some are more expansive, leaving room for both competing interpretations").

13. *See NBC* 165 F.3d at 191 (noting that allowing large amounts of discovery to occur in private arbitration of "foreign tribunals" as compared to the breadcrumbs of discovery allowed for domestic arbitration would be "devoid of principle."); *see also Biedermann Int'l*, 168 F.3d at 883 ("It is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart."); *Rolls-Royce PLC*, 975 F.3d at 695 (stating it would be irrational for "litigants in foreign arbitrations [to] . . . have access to much more expansive discovery than litigants in domestic arbitrations.").

14. *See NBC*, 165 F.3d at 188 (noting that if a broad interpretation of Section 1782(a) were adopted the court would have to decide whether Section 1782(a) or Section 7 of the FAA would be "exclusive," however, since the issue wasn't reached no ruling was made by the court); *Biedermann Int'l*, 168 F.3d at 883 (stating "there is . . . a possibility that Federal Arbitration Act § 7 and 28 U.S.C. § 1782 conflict . . . ."); *Rolls-Royce PLC*, 975 F.3d at 695 ("Reading § 1782(a) broadly to apply to all private foreign arbitrations creates a direct conflict with the [FAA] for this subset of foreign arbitrations.").

15. *See infra* notes 38-50 and accompanying text.

16. Both *Servotronics, Inc. v. Boeing Co.* out of the Fouth Circuit *and Servotronics, Inc. v. Rolls-Royce PLC* out of the Seventh Circuit stem from the same petitioner. However, the Fourth and Seventh Circuit Courts of Appeals have reached drastically different conclusions. The Fourth Circuit held that Section 1782(a) allows discovery to be compelled in private international arbitration while the Seventh Circuit held it does not. This creates a large issue because the motion for discovery came from the same private international arbitration agreement, leaving an unworkable outcome. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020).

17. *See generally* Elizabeth B. Sandza & Lindsay M. Bethea, *U.S. Court Assistance with Foreign Arbitration Discovery: Should it, Will It, Be Allowed?*, THE NATIONAL LAW REVIEW (Jul. 30, 2020), https://www.natlawreview.com/article/us-court-assistance-foreign-arbitration-discovery-should-it-will-it-be-allowed.

18. *See* An Act to establish a Commission and Advisory Committee on International Rules of Judicial Procedure, 85 P.L. 906, 72 Stat. 1743 (leading up to the 1964 amendments to 28 U.S.C. § 1782, Congress

III. BRIEF OVERVIEW: WHAT CAUSED THE CIRCUIT SPLIT

A. Pre-Intel Decisions by the Second and Fifth Circuits

The Second Circuit Court of Appeals decision in *NBC v. Bear Stearns & Co.* was the first appellate court to conclude that "Congress did not intend for [28 U.S.C. § 1782(a)] to apply to an arbitral body established by private parties."[19] NBC had entered an agreement with the broadcast company Azteca that was subject to arbitration of disputes under the International Chamber of Commerce ("ICC").[20] After the agreement fell through, NBC applied for discovery under Section 1782(a), which the district court granted.[21]

However, on appeal, the Second Circuit reversed.[22] The court determined that Section 1782(a)'s use of the phrase "foreign or international tribunal" was ambiguous, leading it to look to legislative history for a definition.[23] The court reasoned that Congress did not intend for the statute to apply to private arbitration.[24] Finally, the appellate court noted "the type of discovery sought by NBC . . . would undermine one of the significant advantages of arbitration, and thus arguably conflict with the strong federal policy favoring arbitration . . . ."[25]

The next court to make a ruling on Section 1782(a)'s use in private arbitration was the Fifth Circuit Court of Appeals in *Republic of Kazakhstan v. Biedermann Int'l*.[26] In *Biedermann*, the Fifth Circuit also reasoned that the term "tribunal" was vague and that

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created a commission to "examine judicial assistance and cooperation between the United States and foreign Countries . . . ."); *See also* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248 (2004) (noting that legislative history shows Congress created the 1958 Committee in response to how quickly transnational business was growing). Additionally, any worry that permitting discovery under Section 1782(a) will result in slower arbitration and excess costs fails to consider the discretion provided to district court judges as laid out in the Supreme Court's *Intel* decision. *Id*. at 262; *infra* note 34 and accompanying text.

19. *NBC*, 165 F.3d at 191.

20. *See id*. at 186.

21. *See id*.

22. *See id.* at 191.

23. *Id*. at 188 ("In our view, the term 'foreign or international tribunal' is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here.").

24. *See NBC* 165 F.3d at 190 (noting that the court believes Congress would have expressly mentioned arbitral panels created by private parties if it intended to lend "American judicial assistance").

25. *Id*. at 191.

26. *See Biedermann Int'l*, 168 F.3d at 880.

Congress did not intend for it to encompass arbitration.[27] Further, the Fifth Circuit noted that permitting Section 1782(a) to apply to private foreign arbitration would provide broader discovery in international arbitration than is permitted in domestic arbitration in the United States.[28] For those reasons, the court reversed, leaving the issue largely undisputed until the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc*.[29]

B. The Supreme Court and Intel

It is important to note that the Supreme Court's decision in *Intel* did not specifically deal with private foreign international arbitration; rather, it handled an issue arising from a foreign investigation commission seeking documents through Section 1782(a).[30] While the Court answered three questions in *Intel*, it was the first that caused the current circuit split based upon the Court's interpretation of the word "tribunal."[31] The first question answered by the Court, and the only one relevant in this article, was whether Section 1782(a) "contains a foreign-discoverability requirement."[32]

On this question, the Supreme Court held that there was no foreign-discoverability requirement contained in Section 1782(a).[33] The Court reasoned that the text of Section 1782(a) did not "limit[] a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there."[34] The Court also noted that concerns of equality between litigating parties do not justify the absolute bar to the discovery process that a foreign-discoverability requirement would impose.[35]

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27. *Biedermann Int'l*, 168 F.3d at 882 ("[T]he term 'tribunal' lacks precision . . . . 'Tribunal' has been held not to include even certain types of fact-finding proceedings . . . .").

28. *See id*. at 883.

29. *Intel*, 542 U.S. at 246.

30. *See generally id*. at 246-247 (the Supreme Court's *Intel* decision dealt with whether Advanced Micro Devices, Inc. was permitted to seek documents through 28 U.S.C. § 1782 to use in a European antitrust proceeding it had initiated).

31. *Id*. at 258 (quoting Smit, *International Litigation*, *supra* note 6, at 1026-27) ("'[t]he term "tribunal" . . . includes . . . administrative and arbitral tribunals . . . .'").

32. *Id*. at 259-60 ("Does § 1782(a) categorically bar a district court from ordering production of documents when the foreign tribunal or the 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction?").

33. *See id.* at 253.

34. *Intel*, 542 U.S. at 260.

35. *See Intel*, 542 U.S. at 262 (reasoning that concerns of equality among parties are remedied by the district courts' wide-ranging discretion, which would permit it to "condition relief upon that person's reciprocal exchange of information." Additionally, the court notes that a foreign tribunal would still maintain the freedom to reject any information gained by a party under Section 1782(a) stating "foreign tribunal['s] can

Additionally, the Court made two points before laying out the factors for a district court to consider when receiving a request under Section 1782(a). First, the Court noted that district courts may lend assistance in discovering relevant materials to the complainant but are not required to.[36] Second, the Court expressly rebuked the contention that materials sought should only be permitted for discovery if discovery would be allowed in an equivalent domestic proceeding.[37] Finally, the Court laid out the factors for a district court to consider when determining whether to permit a complainant to proceed under Section 1782(a). The first factor to consider is whether "the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[38] The second factor to contemplate is the "nature of the foreign tribunal, [and] the character of the proceedings . . . ."[39] Third, the courts should examine whether the request of documents through Section 1782 is "an attempt to circumvent . . . proof-gathering restrictions . . . ."[40] The fourth factor lower courts should consider is that requests which are extremely burdensome "may be rejected or trimmed."[41]

C. Post-Intel Decisions:

1. The Sixth and Fourth Circuit Courts of Appeal Go Against the Grain

Following the Supreme Court's decision in *Intel*, there was a fifteen-year period of silence on whether Section 1782(a) applied to private international arbitration. The first court to add to the circuit split was the Sixth Circuit Court of Appeals in the *Abdul Latif Jameel Transportation Co. v. FedEx Corp*. decision.[42] In *Abdul Latif Jameel Transportation Co.*, the dispute was triggered by allegations of material misrepresentations within an international contract, leading to arbitration proceedings.[43] Since FedEx

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place conditions on [their] acceptance of the information to maintain whatever measure of parity it concludes is appropriate.").

36. *See Intel*, 542 U.S. at 255 ("The statute authorizes, but does not require, a federal district court to provide assistance to a complainant . . . .").

37. *See id.* at 263 (noting that Section 1782(a) does not call for this comparison to be made, and that "[c]omparisons of that order can be fraught with danger").

38. *Id*. at 264.

39. *Id*.

40. *Intel*, 542 U.S. at 265.

41. *Id*.

42. *See Abdul Latif Jameel Transp. Co.*, 939 F.3d at 714-16.

43. *See generally id*. at 714-15.

Corporation is headquartered in the U.S., Abdul Latif Jameel Transport Company ("ALJ") filed for discovery under Section 1782(a), which the district court denied.[44]

On appeal, the Sixth Circuit reversed the lower court's decision, holding that the arbitral panel was a "tribunal" under Section 1782(a).[45] The court reasoned that, since Section 1782(a) was non-mandatory, it did not detract from the speedy dispute resolution sought by parties in arbitration.[46] The Sixth Circuit then determined that the legal use of the term "tribunal" supported a broad interpretation and that the congressional context of Section 1782(a) did not suggest otherwise.[47]

Several months after the Sixth Circuit's decision, the Fourth Circuit Court of Appeals joined the Sixth Circuit in holding that Section 1782(a) encompasses international arbitral panels in *Servotronics, Inc. v. Boeing Co.* ("*Servotronics I*").[48] *Servotronics I* involved a dispute over a settlement resulting from a faulty Servotronics part within a Rolls-Royce engine that caused damage to a Boeing aircraft.[49] Unable to reach an agreement, the parties' arbitration clause took effect, which was followed by Servotronics filing for discovery under Section 1782(a) "to obtain testimony" from several employees who were located where the accident had occurred.[50] However, the district court rejected Servotronics' application for aid under Section 1782(a).[51]

On appeal, the Fourth Circuit reversed the decision of the district court holding "the UK arbitral panel [that] convened to address the dispute . . . is a 'foreign or international tribunal' under § 1782(a) and . . . the district court has authority to provide . . . assistance . . . ."[52] The court rejected several arguments put forward by Boeing, the first of which was that "tribunal" only included "entit[ies] that exercise[] government-conferred authority."[53] The court reasoned, based on Congress's enactment of the FAA and judicial support for arbitration, that arbitration is considered a "government-conferred authority"

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44. *See Abdul Latif Jameel Transp. Co.*, 939 F.3d at 716.

45. *Id*. at 716.

46. *See id*. 730 ("[A] district court can limit or reject 'unduly intrusive or burdensome' discovery requests.").

47. *See id*. at 719-23 (following thorough analysis of legislative history and definitions the court concluded "the text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract . . . .").

48. *See Servotronics, Inc.*, 954 F.3d at 216.

49. *See id*. at 210.

50. *Id*.

51. *See id.* at 210-11.

52. *Id*. at 216.

53. *Servotronics, Inc.*, 954 F.3d at 213.

within the United States.[54] Further, the court reasoned that Section 1782(a)'s application would not affect the core advantages parties bargain for in arbitration agreements since discovery under Section 1782(a) is far less broad than what the Federal Rules of Civil Procedure would permit.[55] Finally, the court addressed the argument that Section 1782(a) would effectively undermine the FAA by permitting broader discovery.[56] In response, the court stated that under Section 1782(a), "a district court functions *effectively as a surrogate* for a foreign tribunal . . . . When viewed in this light, the district court functions no differently than . . . an American arbitral panel."[57]

2. The Second Circuit Doubles Down and The Seventh Circuit Court of Appeals Decides Against Section 1782(a)

July of 2020 provided the Second Circuit an opportunity to re-establish and strengthen its position on Section 1782(a) in *Hanwei Guo v. Deutsche Bank Sec*.[58] In *Hanwei Guo*, the Second Circuit primarily discussed how their opinion in *NBC* was still good law considering the Supreme Court's *Intel* decision.[59] Here, the Second Circuit reasoned that the refusal in *NBC* to "read such a sweeping expansion into the statute in the absence of clear statutory language . . . or congressional intent [was] consistent with . . . *Intel*."[60]

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54. *Servotronics, Inc.*, 954 F.3d at 214 (after describing the overall nature of the FAA's enactment the court summarizes stating "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. . . . Thus, contrary to [the] . . . assertion that arbitration is not a product of 'government-conferred authority,' under U.S. law, it clearly is.").

55. *Id*. at 215 (rebutting the argument that discovery under Section 1782(a) would strip arbitration of its benefits the court stated, "the process must be administered in the discretion of the district court — not the parties, as is the case in discovery — to assist in the limited role of receiving evidence for use in the foreign tribunal proceeding.").

56. *See id*. ("Boeing . . . expresses concern that applying §1782(a) . . . would 'create a conflict with the FAA by authorizing discovery that the FAA does not contemplate,' . . . . Specifically, . . . that applying §1782(a) would broaden 'discovery' or access to information in foreign arbitrations to an extent not available in U.S. arbitrations . . . .").

57. *Id*. at 215 (emphasis in original).

58. *See generally Hanwei Guo*, 965 F.3d at 104-05 (stating that the courts previous holding in, *NBC*,165 F.3d, is still good law and that the Supreme Court's decision in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) did not overrule the court's prior opinion).

59. *See id*. at 104-07 (holding that the court's prior decision in *NBC,* 165 F.3d was not overturned).

60. *Id*. at 106; *but see* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'I L. & COM 1, 5 (1998) ("The substitution of the word 'tribunal' for 'court' was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions. Clearly, private arbitral tribunals come within the term the drafters used.").

The Seventh Circuit Court of Appeals issued an opinion about Section 1782(a) dealing with the same factual background as *Servotronics I*. This dispute arose from Servotronics applying for Section 1782(a) to a district court in Illinois, where Boeing is headquartered.[61] While the subpoena sought by Servotronics was initially granted, Rolls-Royce interjected and the district court granted a motion to quash the subpoena on the grounds that Section 1782(a) was not permitted for use in a private foreign arbitration setting.[62]

Servotronics appealed, and the Seventh Circuit affirmed the lower court's judgment, joining the Second and Fifth Circuits in concluding that "§ 1782(a) does not authorize the district courts to compel discovery for use in private foreign arbitrations."[63] The court began by examining the definition of the term "tribunal" before determining dictionaries to be of no aid and turning to statutory context.[64] The Seventh Circuit reasoned that Congress's creation of a 1958 committee, tasked to investigate judicial cooperation between the U.S. and other countries,[65] supported a narrow interpretation of the phrase "foreign or international tribunal."[66] Finally, the court discussed how interpreting Section 1782(a) to apply to private arbitration would permit unfairly expansive discovery when compared with domestic arbitration,[67] and place it in conflict with the FAA.[68]

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61. *Rolls-Royce PLC*, 975 F.3d at 691.

62. *See id*.

63. *Id*. at 696.

64. *Id*. at 692-95.

65. *See id*. at 694 ("The Commission shall investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.") (quoting Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743).

66. *Rolls-Royce PLC*, 975 F.3d 694-95 (noting that the instructions for creating the 1958 committee did not include "recommend[ing] improvements in judicial assistance to private foreign arbitration." The court then reasoned that because the phrase "foreign or international tribunal" is used in 28 U.S.C. §§ 1696 and 1781, which "are matters of comity between governments" this lends aid to the court's interpretation that Section 1782(a)'s use of the phrase should not encompass arbitration so as to be in harmony with these statutes).

67. *See id*. at 695 ("It's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations."); *but see* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246 (2004) ("The Court . . . rejects [the] suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Section 1782 is a provision for assistance to tribunals abroad. *It does not direct United States courts to engage in comparative analysis* to determine whether analogous proceedings exist here. *Comparisons of that order can be fraught with danger*.") (emphasis added).

68. *Id.* at 695-96 (stating that "the FAA permits the arbitration panel—but not the parties—to [seek discovery] . . . ." and that because "the FAA applies to *some* foreign arbitrations under implementing legislation for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . ." a broad reading would conflict with the FAA) (emphasis added).

IV. WHY SECTION 1782(A) SHOULD APPLY TO FOREIGN ARBITRATION

Given that some of the core benefits of arbitration sought by parties are lower costs and expeditious proceedings,[69] it is understandable that concerns arise when the possibility of expansive discovery in arbitration is mentioned. This section of the article will break down the reasoning of the Second, Fifth, and Seventh Circuits. The section begins with a discussion on why these Circuits have misinterpreted the statutory history regarding Section 1782(a) and laying out how the phrase "foreign or international tribunal" encompasses arbitral tribunals. Next, a rebuttal will be provided for the arguments that arbitral panels' inclusion as a tribunal will cause unequal discovery between domestic and international arbitration. Finally, this section will conclude by explaining that Section 1782(a)'s encompassing of arbitration panels aligns with the emphatic federal policy favoring arbitration and will have no detrimental effect on the operation of private international arbitration.

A. The Second Fifth and Seventh Circuits Misinterpret Statutory History

When the text of a statute is unclear, courts will engage in statutory interpretation in an attempt to decode Congress's intent at the point in time it enacted the law.[70] Discerning the true meaning of any statute that is over half a century old is not an easy task, which may explain why the Second, Fifth, and Seventh Circuits all concluded that the legislative history showed Section 1782(a) was not meant to apply to private foreign arbitration.[71] However, despite the inability of these courts to come to a definite conclusion on the legislative history, they all chose to gloss over one important scholar, Hans Smit.[72]

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69. *See* CARBONNEAU, *supra* note 2, at 4 ("[A]rbitral adjudication . . . is expeditious, efficient, economical, effective, and enforceable.").

70. *See Abdul Latif Jameel Transp. Co*.,939 F.3d at 717 (6th Cir. 2019) ("'In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning. . . .' And ordinary meaning is to be determined retrospectively . . . .") (quoting Artis v. District of Columbia, 138 S. Ct. 594, 603(2018)).

71. *See* NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999) (concluding Section 1782 did not encompass private arbitration after admitting that the legislative history and committees noted the "word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts . . . .") (internal citations omitted); *Hanwei Guo*, 965 F.3d at 102 ; *Biedermann Int'l*, 168 F.3d (after reviewing legislative history "elect[ing] to follow the Second Circuit[] . . . ."); *Rolls-Royce PLC*, 975 F.3d at 695 (concluding legislative history suggests a narrow reading of Section 1782).

72. *See NBC*, 165 F.3d at 190, n. 6 (acknowledging that the Senate Report relied on Hans Smit's work in 1962, and that Hans Smit also released a work later in life where he discussed the congressional intent at the time, but declined to find it persuasive); *Biederman Int'l*, 168 F.3d at 882, n. 5 (stating "[t]here is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration," but then commenting in note five that Hans Smit, one of the individuals who helped the Committee draft changes to Section 1782, recounted that "private commercial arbitrations are within §1782."); *Rolls-Royce PLC*, 975 F.3d at 696 (writing off the Supreme Court's own noting of Hans Smit's inclusion of arbitral tribunals within Section 1782 because it occurred in a "explanatory parenthetical" and "[t]here is no indication that 'arbitral tribunals' includes *private* arbitral tribunals.") (emphasis in

Hans Smit is perhaps the most insightful source to discover the legislative intent of the 1964 amendments to Section 1782(a).[73] While it is conceded that secondary authorities should be given less weight than that which Congress explicitly states or what a court rules are the proper interpretations of the law, the disagreement over Section 1782(a) presents a unique case.[74] Further, while Hans Smit's opinions on their own likely are not dispositive of the issue, the Supreme Court's reference to Hans Smit's work should add considerable weight to them. While it is true that the Court referred to Hans Smit in a parenthetical explanation, this cursory glance is not nearly enough to close the investigation.[75] *Intel* was a Supreme Court decision written by Justice Ginsburg, the same Justice who had previously referred to Hans Smit as the "dominant drafter" of Section 1782 and its amendments.[76] Therefore, it seems likely that the Supreme Court, having relied on Hans Smit's interpretations previously, would give deference to them again should the occasion arise.

Next, the phrase "foreign or international tribunal" should be interpreted to encompass private international arbitration for two reasons. First, having established Hans Smit's importance in aiding Congress's 1964 amendments to Section 1782, his comments should be viewed as closely aligned with congressional intent at the time. This point is further exemplified by Hans Smit's law review article published just a year after the 1964 amendments, which states "[t]he term tribunal encompasses all bodies that have adjudicatory power, and is intended to include . . . arbitral tribunals or single arbitrators."[77] Additionally, Hans Smit's immediate and detailed release of comments and background purpose on the 1964 amendments strikes directly against the Second Circuit's claim that "Professor Smit's recent article does not purport to rely upon any special knowledge concerning legislative intent . . . ."[78] Second, it is important to note that Congress removed

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original); *but see* CARBONNEAU, *supra* note 2, at 2 ("[A]rbitration is *generally private and confidential*. Arbitral proceedings are not open to the public . . . . The recourse to arbitration, therefore allows commercial parties to maintain their commercial reputation . . . .") (emphasis added).

73. *See* Hans Smit, *Article: American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 154 (1997) ("My role in the development of the measures that were adopted by Congress has led both courts and commentators to place heavy reliance on my published writings in this area.").

74. The Second, Fifth, and Seventh Circuits all refuse to provide any authoritative weight to Hans Smit's work or comments on the Amendments to Section 1782(a). *Accord Biederman Int'l*, 168 F.3d at 882, n.5. Additionally, the Second Circuit notion that Hans Smit did not adopt his opinion on whether "tribunal" is included within Section 1782 for nearly three decades is patently false. *See NBC*, 165 F.3d at 190, n.6. Hans Smit had supported this assertion in his 1965 Columbia law review article which states, "The new legislation also authorizes assistance in aid of international arbitral tribunals." Hans Smit, *International arbitration*, 65 COLUM. L. REV. 1015, n.73.

75. *See Intel*, 542 U.S. at 258.

76. In Re Letter of Request From the Crown Prosecution Service of the United Kingdom (Ward), 870 F. 2d 686, 689 (D.C. Cir. 1989); *see also* Smit, *supra* note 73, at 154.

77. Smit, *International Litigation*, *supra* note 5, at 1021.

78. *See NBC*, 165 F.3d at 190, n.6; *see also* Smit, *supra* note 73, at 154.

restrictive verbiage when making their 1964 amendments to Section 1782.[79] While it is true that not every deleted word was explained, many of the removals were explained in a Senate Report after the Section 1782 amendments became law.[80] With such broad language being recognized by the then-contemporary Senate, the legislative history seems to suggest that arbitral tribunals would be encompassed within Section 1782.[81] It would be quite a discrepancy for Congress to specifically note that it did not want the proceedings confined to conventional courts only to then exclude a quasi-judicial proceeding such as arbitration.[82]

B. Irrelevant Discovery Arguments and a Harmonious Relationship with the FAA

It is undisputed that there are major differences between domestic arbitration within the United States and international commercial arbitration.[83] In fact, these differences can be rather substantial, ranging from initiation of arbitration to discovery.[84] These differences should alert the courts to the notion that, while international arbitration is similar to its domestic cousin, it is in a different category, and the two should not be compared for a variety of reasons.

The Second, Fifth, and Seventh Circuits have all relied heavily on the notion that permitting Section 1782(a) to encompass private international arbitration would unfairly permit more discovery to occur than is allowed in domestic arbitration.[85] However, the

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79. *See Intel* 542 U.S. at 248-49 (noting that "Congress deleted the words 'in any judicial proceeding pending in any court in a foreign country,' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal.'").

80. *See id*. at 249 (discussing how the Senate Report "explains that Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'") (quoting S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964)).

81. *See Abdul Latif Jameel Transp. Co.*, 939 F.3d at 728 ("The facts on which the legislative history is most clear are that the substitution of 'tribunal' for 'judicial proceeding' broadened the scope of the statute . . . .").

82. *See id*. ("[T]he legislative history does not indicate that the expansion stopped short of private arbitration. . . ."); *Intel* 542 U.S. at 249.

83. *See generally* Daniel B. Swaja, *Global Construction Disputes – Basics on U.S. Domestic Versus International Arbitration* (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/domestic-versus-international-arbitration/. This article highlights the primary differences between domestic and international arbitration ranging from cost savings being magnified, to different discovery processes. To remain transparent, it is conceded by this author that this source notes "[d]iscovery tends to be much more limited in international arbitration than in U.S. domestic arbitration." However, extending the discovery aid of Section 1782 will still comport with established standards and is further discussed below.

84. *See* Albert Bates Jr. & R. Zachary Torres-Fowler, *Internationalizing Domestic Arbitration: How International Arbitration Practices Can Improve Domestic Construction Arbitration*, 74 DIS. RES. J., no. 3, Jun. 2020, at 8-16, 22-26.

85. *See NBC*, 165 F.3d at 191 ("[B]road discovery . . . before 'foreign or international' private arbitrators would stand in stark contrast to . . . domestic arbitration panels . . . ."); Republic of Kazakhstan v. Biedermann

rationale put forward by the appellate courts is explicitly rebutted by the Supreme Court in *Intel*.[86] The Supreme Court went so far as to warn the lower courts that "[c]omparisons of that order can be fraught with danger."[87] Such comparisons are improper primarily due to the extensive differences that typically exist between international and domestic arbitration. For example, it is common for international arbitration to be a front-loaded process with specific pleadings that are more customary in civil law.[88] Furthermore, the very nature of "discovery" in international arbitration is typically a limited process.[89] The Second, Fifth, and Seventh Circuits would all likely consider the limited nature of discovery in international arbitration to aid their reasoning.[90]

However, the lack of allowable discovery should begin to ease appellate court fears that international arbitration will allow parties to engage in excessively more discovery than domestic arbitration. This argument is bolstered by the fact that the initial pleadings phase of international arbitration allows disputing parties to pinpoint exactly what documents they need to obtain, if any.[91] Should the parties seek aid under Section 1782(a), it will likely only be to obtain previously identified documents or witness statements.[92] Thus, the suggestion by the Second and Fifth Circuits that parties will self-destruct into overindulgent discovery-seeking saboteurs if Section 1782(a) were read to encompass international arbitration, does not seem likely to occur.[93]

Int'l, 168 F.3d 880, 883 (5th Cir. 1999) ("It is not likely that Congress . . . authorize[d] federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart."); *Rolls-Royce PLC*, 975 F.3d at 695 (stating it would be irrational to give "private foreign arbitrations . . . broad access to federal-court discovery . . . while precluding such discovery assistance . . . in domestic arbitrations").

86. *See Intel*, 542 U.S. at 263 (noting "[Section 1782(a)] does not direct . . . courts to engage in comparative analysis to determine whether analogous proceedings exist here."); *see also Abdul Latif Jameel Transp. Co.*, 939 F.3d at 729.

87. *Intel*, 542 U.S. at 263.

88. *See* Bates Jr., *supra* note 84, at 15 (noting that early "particularized pleadings" typically negate the need for long excessive discovery that can be found in regular litigation, and sometimes in domestic U.S. arbitration).

89. *Id*. at 23. ("[G]iven the prominent influence of civil law legal traditions in international arbitration, it is well accepted, . . . that expansive document disclosure (like that seen in the United States) is inappropriate in international arbitration."); *See also* Swaja, *supra* note 83 ("Discovery tends to be much more limited in international arbitration than in U.S. domestic arbitration.").

90. *See supra* note 85 and accompanying text.

91. *See* Bates Jr., *supra* note 84, at 15 ("[B]ecause the parties have already laid out their cases in detail and supplied much of their supporting evidence, the parties are typically better able to understand what the crucial issues . . . are and what additional documentary evidence they require. . . .").

92. *Id*.

93. *Compare NBC*, 165 F.3d at 191 (implying that parties to arbitration will take advantage of and destroy the benefits arbitration stating that, "[o]pening the door to the type of discovery sought . . . would undermine

C. Including Arbitration Under Section 1782(a) Comports with the Emphatic Federal Policy Favoring Arbitration

Finally, for any rule or interpretation of arbitration to stand the test of time, it is important that it aligns with the emphatic federal policy favoring arbitration. The Second Circuit has reasoned that permitting private international arbitral tribunals to seek discovery under Section 1782(a) would "conflict with the strong federal policy favoring arbitration as an alternative means of dispute resolution."[94] However, the Second Circuit's contention does not withstand scrutiny when examined next to the Supreme Court's history of favoring arbitration, or while examining Section 1782(a) within the scope of the Supreme Court's *Intel* decision.

To begin, it may be said that actively attempting to narrow Section 1782(a) is a direct strike against the emphatic federal policy favoring arbitration.[95] Thus, the arguments by the appellate courts, such as broader discovery being permitted than in domestic arbitration, seem hostile to international arbitration,[96] a procedure with major differences from its domestic counterpart.[97] Next, the Supreme Court's factors in *Intel* aid the idea that Section 1782(a)'s inclusion of arbitral tribunals furthers the policy favoring arbitration.[98] The first factor comports with ensuring the arbitral process can run successfully because,

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one of the significant advantages of arbitration[] . . . ."); *and Biedermann Int'l*, 168 F.3d at 883 ("Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. . . . Resort[ing] to § 1782 in the teeth of such agreements suggests a party's attempt to manipulate United States court processes for tactical advantage."); *with Intel Corp.*, 542 U.S. at 262 (noting that should the district court permit discovery under Section 1782(a) "the foreign tribunal . . . [could] place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate."); *and* Smit, *supra* note 73, at 156 ("[I]nternational tribunals are . . . free to shape their procedures. . . . This means . . . [the parties] can ask for assistance from an American court only when the arbitral tribunal has ruled this to be permissible.").

94. *NBC*, 165 F.3d at 191.

95. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) ("Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.' . . . The Act, this Court has said, establishes 'a liberal federal policy favoring arbitration agreements.'").

96. *See* Smit, *supra* note 73, at 161 ("[P]recluding any recourse to Section 1782 by a private foreign or international arbitral tribunal reflects an attitude hostile to international arbitration that is at odds with the legislatively and judicially repeatedly expressed favor of arbitration as a socially desirable alternative form of dispute settlement.").

97. *Supra* note 83 and accompanying text.

98. *See* Intel Corp., 542 U.S. at 264-65 ("First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. . . . Second, . . . a court . . . may take into account the nature of the foreign tribunal, the character of the proceedings . . ., and the receptivity of the foreign government or the court or agency . . . . [Third], a district court [may] consider whether the § 1782(a) request conceals an attempt to circumvent . . . proof-gathering restrictions . . . [Fourth], unduly intrusive or burdensome requests may be rejected or trimmed.").

as the Court states, "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."[99] The second factor of *Intel* further ensures the policy favoring arbitration is upheld because it permits the district courts to look to the type of proceeding before it while considering how to apply Section 1782(a), rather than being forced to blindly grant all requests.[100] *Intel*'s third factor provides the district court further discretion by allowing the court to examine whether the requesting party is trying to undermine the proceeding it is involved in, and if so, the court may deny the request.[101] This allows the arbitral process to be preserved by preventing parties from engaging in acts that may diminish the reliability of arbitration. Finally, *Intel's* fourth factor directly aligns with the idea that arbitration is meant to be an expedited cost-effective process by permitting courts to outright deny requests that are "unduly intrusive or burdensome."[102]

V. CONCLUSION

Arbitration, whether domestic or international, is supposed to be an expeditious cost-effective procedure when compared to traditional litigation. Nevertheless, these attributes still apply when reading Section 1782(a) to include private international commercial arbitration. As discussed, Section 1782(a) has an immense number of safeguards ranging from the discretion of district courts in approving the request to the parties' own reluctance to strike against the arbitral panel. Further, having access to documents potentially guaranteeing accurate results within the arbitral process is imperative if companies and parties are to continue utilizing arbitration to resolve their disputes. The ability to block relevant documents from being discovered through Section 1782(a) simply because it will permit more discovery than is allowed in domestic arbitration not only has nationalistic undertones but will also end up undermining the national policy favoring arbitration that the Supreme Court has sought to bolster. In closing, the legislative history, congressional intent, and Supreme Court precedent in *Intel* all support Section 1782 permitting discovery in private international arbitration.

99. *Intel*, 542 U.S. at 264.

100. *See id.*

101. *Id.* at *265*.

102. *Id.*