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## The Death Knell and the Wild West: Two Dangers of Domestic Discovery in Foreign Adjudications

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## NOTE

# THE DEATH KNELL AND THE WILD WEST: TWO DANGERS OF DOMESTIC DISCOVERY IN FOREIGN ADJUDICATIONS

*Shay M. Collins\**

*Under 28 U.S.C. § 1782(a), parties to foreign legal proceedings can obtain discovery orders from United States federal courts. In other words, if a foreign party needs physical evidence located in—or testimony from a person residing in—the United States to support their claim or defense, they can ask a district court to order the production of that evidence. For almost two decades, § 1782(a) practice has operated as a procedural Wild West. Judges routinely consider § 1782(a) applications ex parte—that is, without giving the parties subject to the resulting discovery orders a chance to oppose them—and grant those applications at a staggering rate: more than 90% of the time. In its June 2022 decision in ZF Automotive US, Inc. v. Luxshare, Ltd., the Supreme Court transformed § 1782 jurisprudence for the worse. The Court held that private arbitral tribunals do not fall under § 1782(a)'s scope and that, as a result, parties cannot obtain discovery for use in foreign private arbitration under the provision. This Note argues that, after ZF Automotive, § 1782(a) jurisprudence contains two dangers: (1) it subjects some parties to burdensome discovery orders with few procedural safeguards, and (2) it prevents parties who have chosen to arbitrate rather than litigate from obtaining discovery entirely. This Note contributes to existing scholarship by proposing structural changes that would improve § 1782(a) practice. Specifically, it argues that courts cannot root out the procedural flaws that plague § 1782(a), and that, consequently, Congress should enact a new and improved § 1782 to address these manifold problems.*

### TABLE OF CONTENTS

INTRODUCTION .....	128
I. THE HISTORY AND CURRENT STATE OF § 1782(A) PRACTICE .....	130
A. <i>The Evolution of § 1782(a)'s Text</i> .....	131
B. <i>Notable Omissions from § 1782(a)</i> .....	132
C. <i>Intel Corp. and the Era of Unbounded Discretion</i> .....	133
II. A HOUSE OF CARDS ARGUMENT: THE SUPREME COURT'S ERRORS IN <i>ZF AUTOMOTIVE</i> .....	135

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A.	<i>Untethered Legal Formalism</i> .....	135
B.	<i>Using Circular Logic to Interpret the Word “Tribunal”</i> .....	137
C.	<i>The “Potential Governmental Connotations” Standard</i> .....	138
D.	<i>What the Court Did Not Say, and the Need for     Overarching Reform</i> .....	140
III.	THE NEW AND IMPROVED § 1782(A).....	141
A.	<i>Definitions</i> .....	142
B.	<i>Limitations on Ex Parte Orders</i> .....	143
C.	<i>Mandatory Stays Pending Appeal</i> .....	145
	CONCLUSION .....	147

#### INTRODUCTION

Imagine that you, “Lawyer X,” represent “Foreign Corp,” a corporation chartered outside of the United States, in a commercial dispute. A critical part of your argument depends on information in the business records of a bank chartered in the United States. A U.S. statute—28 U.S.C. § 1782(a)—permits you to ask the district court with jurisdiction over the bank to order a bank representative “to give [their] testimony or statement or to produce a document or other thing.”<sup>1</sup> The statute also states that the district court can only order discovery “for use in a proceeding in a foreign or international tribunal.”<sup>2</sup> So far, so good—until June 2022.

In *ZF Automotive US, Inc. v. Luxshare, Ltd.*, the U.S. Supreme Court held that private arbitral tribunals are not “foreign or international tribunal[s]” and directed district courts to deny foreign applications for discovery if the underlying dispute is in arbitration rather than litigation.<sup>3</sup> If Foreign Corp signed an arbitration agreement that covers the dispute—which it likely did<sup>4</sup>—it will need to arbitrate without access to key information. This is true even if Foreign Corp signed the arbitration agreement a few years ago, when it had no indication that doing so would prevent it from obtaining discovery assistance from U.S. courts.

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1. 28 U.S.C. § 1782(a).

2. *Id.*

3. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2092 (2022).

4. Arbitration is an overwhelmingly popular method of dispute resolution for companies that conduct any kind of cross-border business. *See, e.g.*, SCH. OF INT’L ARB. (QUEEN MARY UNIV. OF LONDON) & WHITE & CASE, 2021 INTERNATIONAL ARBITRATION SURVEY: ADAPTING ARBITRATION TO A CHANGING WORLD 5, [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) [perma.cc/YY5K-98D6] (“[A]n overwhelming majority of the respondent group (90%) showed a clear preference for arbitration as their preferred method of resolving cross-border disputes.”).

Now imagine Lawyer Y, who represents the U.S. bank, “Big Bank,” from which Foreign Corp seeks discovery. Big Bank first hears of the underlying dispute when it receives a subpoena ordering it to produce “all documents ever created relating to the billion-dollar acquisition of another bank, including documents about bank operations predating the purchase.”<sup>5</sup> To comply with the subpoena, Big Bank will need to commit a substantial amount of money and resources to produce the requested information. Big Bank’s directors turn to Lawyer Y for advice. But Lawyer Y has only bad news to share.

Lawyer Y must explain that Big Bank only learned about the underlying proceedings upon receiving a subpoena because federal courts have consistently held that district courts can consider § 1782(a) applications *ex parte*<sup>6</sup>—meaning that the subpoena may be granted without waiting for, or even requesting, a response from the other party. As a result, when the district court decided whether to grant Foreign Corp’s § 1782(a) application, and what information the resulting order could relate to, it did so solely based on Foreign Corp’s arguments about the scope and reasonableness of its request.

By now, Big Bank’s directors are fuming at Lawyer Y. They ask, “What about due process?” Lawyer Y does not have a satisfying answer. The district court may have reasoned (as other courts have) that it could consider Foreign Corp’s application *ex parte* without violating Big Bank’s due process rights because Big Bank can seek to have the motion quashed or vacated.<sup>7</sup> But this approach raises issues for clients in practice. Big Bank must convince either the district or circuit court to grant a stay of the order while it appeals the district court’s decision. Federal courts have held that parties in a similar position to Big Bank do *not* satisfy the standard for granting a stay pending appeal.<sup>8</sup> As a result, Big Bank faces a “comply or contempt” dilemma: if it cannot obtain a stay pending appeal, it must either expend significant funds to comply with the subpoena or risk being held in contempt of court.

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5. Brief of Inst. of Int’l Bankers as *Amicus Curiae* in Support of Petitioners at 4, *ZF Auto.*, 142 S. Ct. 2078 (Nos. 21-401 & 21-518) [hereinafter Brief of Inst. of Int’l Bankers] (citing *In re Kreke Immobilien KG*, No. 13 Misc. 110(NRB), 2013 WL 5966916, at \*7 (S.D.N.Y. Nov. 8, 2013), *abrogated in part by In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019)) (“For example, one applicant demanded all documents ever created relating to the billion-dollar acquisition of another bank, including documents about bank operations predating the purchase.”).

6. See, e.g., *In re Schlich*, 893 F.3d 40, 51 (1st Cir. 2018); *Gushlak v. Gushlak*, 486 F. App’x 215, 217 (2d Cir. 2012) (“[I]t is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*.”).

7. See, e.g., *Gushlak*, 486 F. App’x at 217 (stating that the due process rights of the party subject to a § 1782(a) order are “not violated because he can later challenge any discovery request by moving to quash pursuant to Federal Rule of Civil Procedure 45(c)(3)”; *In re FourWorld Event Opportunities Fund, L.P.*, No. 22 Misc. 316(KPF), 2022 WL 17156111, at \*3 (S.D.N.Y. Nov. 21, 2022) (quoting *Gushlak*, 486 F. App’x at 217); *In re P.T.C. Prod. & Trading Co.*, No. 1:20-mc-00032-MR-WCM, 2020 WL 7318100, at \*1 (W.D.N.C. Dec. 11, 2020) (quoting *Gushlak*, 486 F. App’x at 217); *In re Fagan*, No. 19-mc-91210-ADB, 2019 WL 2267063, at \*2 (D. Mass. May 28, 2019) (quoting *Gushlak*, 486 F. App’x at 217).

8. See, e.g., *JSC MCC EuroChem v. Chauhan*, No. 18-5890, 2018 WL 9650037, at \*2 (6th Cir. Sept. 14, 2018).

In *ZF Automotive*, the Supreme Court failed to improve the current state of § 1782(a) practice. Following *ZF Automotive*, the availability of discovery turns arbitrarily on whether a foreign dispute is in arbitration or litigation. And while the Court's decision may help Big Bank avoid some burdensome discovery orders that relate to private arbitration, it in no way addresses the other problems that plague § 1782(a) discovery practice. As long as the order relates to a foreign lawsuit, administrative proceeding, or some other form of "official" adjudication, Big Bank and similar parties must still contend with the obstacles created by the district court's *ex parte* consideration, the unreliable process for obtaining a stay while appealing the order, and the fact that they bear the burden of persuasion on appeal.

This Note critiques the current state of § 1782(a) jurisprudence and argues that *ZF Automotive* has only complicated and worsened judicial practice regarding domestic discovery for use in foreign proceedings. As an analytical matter, the Court's decision in *ZF Automotive* depended on circular logic and weakly supported propositions. And as a policy matter, the piecemeal decisions governing § 1782(a) practice have created a system marked by unpredictability and unfairness both for parties seeking § 1782(a) orders and for parties subject to them. Part I provides a historical overview of § 1782(a)'s text and jurisprudence to demonstrate that the provision grants district courts an inordinate amount of discretion compared to the detailed rules governing discovery for use in domestic proceedings. Part II critiques the Supreme Court's decision in *ZF Automotive* and concludes that the Court adopted the wrong interpretation as a matter of law. Part III argues that the unfair and indeterminate case law governing § 1782(a) necessitates a legislative—rather than judicial—solution. Specifically, Congress should enact a new and improved § 1782 to both correct the Court's interpretation in *ZF Automotive* and create the procedural safeguards that current § 1782(a) practice lacks.

## I. THE HISTORY AND CURRENT STATE OF § 1782(A) PRACTICE

This Part first describes how Congress has modified § 1782(a) throughout the years. This historical account sets the stage for two decisions in which the Supreme Court interpreted the term "foreign or international tribunal" based on congressional amendments to the provision's text: *Intel Corp. v. Advanced Micro Derives, Inc.*<sup>9</sup> and *ZF Automotive*.<sup>10</sup> Next, this Part demonstrates that the plain text of the provision grants a vast amount of discretion to the federal judiciary, especially in terms of crafting—or rather failing to craft—procedural safeguards for parties subject to discovery orders. Finally, this Part discusses the factors that the Supreme Court laid out in *Intel Corp.* to govern district courts' § 1782(a) decisions<sup>11</sup> and argues that the *Intel Corp.* framework failed

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9. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 258 (2004) (quoting 28 U.S.C. § 1782(a)).

10. *ZF Auto.*, 142 S. Ct. at 2081 (quoting 28 U.S.C. § 1782(a)).

11. *Intel Corp.*, 542 U.S. at 264–65.

to require district courts to consider § 1782(a) applications with sufficient skepticism.

A. *The Evolution of § 1782(a)'s Text*

Congress enacted § 1782(a) as part of the statute that created Title 28 of the United States Code, which governs the federal judiciary.<sup>12</sup> The original 1948 version of the provision only authorized district courts to order depositions and restricted the provision's applicability based on three criteria.<sup>13</sup> First, the deposition could be used only in a civil action; second, the deposition could be used only in court proceedings, rather than other forms of adjudication; and third, the foreign court had to be located "in a foreign country with which the United States is at peace."<sup>14</sup> Congress has, however, amended § 1782(a) several times since its initial enactment. Each successive amendment broadened § 1782(a)'s scope by expanding the provision's coverage to more types of foreign legal proceedings and by authorizing district courts to order the production of more types of evidence.

Congress first amended § 1782(a) in 1949 to allow parties to multiple types of actions—rather than just civil actions—to seek discovery under the provision.<sup>15</sup> Specifically, this amendment authorized district courts to order depositions for use in any "judicial proceeding,"<sup>16</sup> and thereby substantially expanded § 1782(a)'s scope by permitting parties to request depositions for use in both civil and criminal proceedings at a minimum.

But the change brought about by the 1949 amendment pales in comparison to Congress's 1964 overhaul of the provision. The 1964 amendment broadened the provision's coverage and courts' discretionary powers in three ways. First, the amended provision promoted comity between U.S. and foreign courts by permitting—though not requiring—district courts to order that depositions be taken in accordance with the procedure of the jurisdiction where the requesting party intended to use the deposition.<sup>17</sup> Before the 1964 amendment, § 1782(a) had required that depositions be taken in a way that "conform[ed] generally" to U.S. practice and procedure.<sup>18</sup> Second, the 1964 amendment permitted courts to order the production of documentary and

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12. Act of June 25, 1948, ch. 646, 62 Stat. 869, 869 ("[T]itle 28 of the United States Code, entitled 'Judicial Code and Judiciary' is hereby revised, codified, and enacted into law . . .").

13. *Id.* § 1782.

14. *Id.*

15. Act of May 24, 1949, Pub. L. No. 81-72, § 93, 63 Stat. 89, 103.

16. *Id.*

17. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 995, 997.

18. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 869, 949 (amended 1959, 1964, 1996).

physical evidence.<sup>19</sup> Third, and most relevant to this Note, the 1964 amendment allowed courts to order the production of evidence for use in a “foreign and international tribunal,” rather than only in “judicial proceeding[s].”<sup>20</sup>

Congress amended the provision once more in 1996 to permit courts to order the production of evidence for use in “criminal investigations conducted before formal accusation” but left the language created by the 1964 amendment unchanged.<sup>21</sup> Thus, the 1964 amendment introduced almost the entirety of the current language of § 1782(a). The Supreme Court has therefore looked to the legislative history of the 1964 amendment in both of its major § 1782(a) decisions<sup>22</sup>: *Intel Corp.*<sup>23</sup> and *ZF Automotive*.<sup>24</sup> Yet despite substantially altering the scope of § 1782(a)’s application and coverage several times, Congress has failed to update the provision in one critical way: it has never established procedural protections for parties subject to § 1782(a) orders.

### B. *Notable Omissions from § 1782(a)*

The present version of § 1782(a) places few limitations on the type of discovery or discovery practice that district courts can order. Currently, § 1782(a) permits district courts to “prescribe the practice and procedure” that govern the deposition of parties and production of evidence under a given order.<sup>25</sup> If the district court does not expressly set out the governing practice and procedure, § 1782(a) provides that the Federal Rules of Civil Procedure (the “Federal Rules”) will apply. But if the district court *does* establish the applicable practice and procedure in its order, it has almost entirely unfettered discretion over the rules it chooses to apply. The provision includes only one universal protection for parties subject to § 1782(a) discovery orders: the district court cannot require parties to produce or testify about privileged information.<sup>26</sup> But aside from incorporating evidentiary privileges and specifying the Federal Rules as a default backstop, § 1782(a) grants district courts wide-ranging discretion. District courts’ discretionary powers cover when to order discovery, the extent of the information to be produced, and how to protect parties subject to those orders from far-ranging, expensive, and otherwise burdensome requests.<sup>27</sup>

The broad discretion that § 1782(a) grants district courts does not necessarily conflict with the discovery regime set out in the Federal Rules. Although

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19. Act of Oct. 3, 1964 § 9(a).

20. *Id.*

21. Act of Feb. 10, 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 485, 486.

22. See *infra* notes 40, 75–76 and accompanying text.

23. *Intel Corp v. Advanced Micro Devices*, 542 U.S. 241, 259 (2004).

24. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2088 (2022).

25. 28 U.S.C. § 1782(a).

26. *Id.* (“A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”).

27. See *id.*

the Federal Rules impose certain limitations on discovery requests, the Rules otherwise permit parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”<sup>28</sup> Additionally, the Federal Rules expressly state that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”<sup>29</sup> Thus, supporters of the current iteration of § 1782(a) might argue that the statute largely mimics the structure of the Federal Rules’ discovery regime: a general authorization conditioned by a small number of explicit rules and several discretionary factors to guide courts’ decisions.

In practice, though, district courts grant wide-ranging and exorbitant § 1782(a) orders and do so with almost unbounded regularity. For example, one court granted a request for documents “sufficient to disclose all assets exceeding Euros 10,000 *anywhere in the world*,” so long as the documents themselves were located in the United States.<sup>30</sup> Furthermore, district courts routinely consider and grant § 1782(a) orders *ex parte* and, as a result, parties subject to § 1782(a) orders are not guaranteed an opportunity to challenge the necessity or reasonableness of the underlying discovery request.<sup>31</sup> This structural flaw prevents courts from realistically assessing the factors set out in the Federal Rules, including “the importance of the discovery in resolving the issues” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>32</sup> While the Supreme Court clarified the factors that district courts should evaluate when considering § 1782(a) applications in *Intel Corp.*,<sup>33</sup> that decision largely failed to constrain district courts’ runaway practice of granting broad and burdensome discovery orders.<sup>34</sup>

### C. *Intel Corp. and the Era of Unbounded Discretion*

The Supreme Court articulated the extent to which district courts have discretion to rule on § 1782(a) orders in its 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>35</sup> The multi-factor framework laid out in *Intel Corp.*

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28. FED. R. CIV. P. 26(b)(1).

29. *Id.*

30. *In re Gorsoan Ltd. & Gazprombank OJSC*, No. 13 Misc. 397(PGG), 2014 WL 7232262, at \*9 (S.D.N.Y. Dec. 10, 2014), *aff’d sub nom.* *Gorsoan Ltd. v. Bullock*, 652 F. App’x 7 (2d Cir. 2016).

31. See Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089, 2110, 2123 tbl.4 (2020); Edward D. Cavanagh, *Discovery in Federal Courts in Support of Foreign Litigation: Lending a Helping Hand or Legal Imperialism?*, 13 FED. CTS. L. REV. 81, 84, 91 (2021); *Gushlak v. Gushlak*, 486 F. App’x 215, 217 (2d. Cir. 2012) (“[I]t is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*.”).

32. FED. R. CIV. P. 26(b)(1).

33. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004).

34. *E.g., In re Gorsoan*, 2014 WL 7232262, at \*9; see *infra* notes 41–42 and accompanying text.

35. *Intel Corp.*, 542 U.S. at 264–65.



remains good law to this day. The central issue in *Intel Corp.* concerned whether § 1782(a) contained a “foreign-discoverability rule” that would “categorically bar a district court from ordering production of documents” if the documents would not be discoverable under the rules of the jurisdiction from which the request had been made.<sup>36</sup> The Court determined that § 1782(a) did not impose such a rule<sup>37</sup> but then directed district courts to weigh five factors when ruling on § 1782(a) applications.<sup>38</sup>

Specifically, the Court instructed district courts to consider whether the application requested discovery from a party to the underlying proceeding or from a third party; the nature and character of the underlying proceeding; whether the foreign tribunal would be receptive to the district court’s assistance; whether the requesting party had used § 1782(a) to circumvent any jurisdiction’s restrictions on discovery; and whether granting the application would impose an undue burden on the party subject to the discovery order.<sup>39</sup> Writing for a six-justice majority, Justice Ginsburg pointed to a Senate report accompanying the 1964 amendment as evidence of the Senate’s decision to grant district courts discretion over whether to grant an order under the provision and what conditions to impose on their decisionmaking processes.<sup>40</sup>

But *Intel Corp.* failed to usher in an era in which district courts moderated their practice of routinely granting § 1782(a) orders. In the following years, district courts granted § 1782(a) applications at a staggering rate. Professor Yanbai Andrea Wang has estimated that, from 2005 to 2017, district courts granted § 1782(a) applications for use in civil proceedings more than 90% of the time.<sup>41</sup> When a foreign tribunal filed the § 1782(a) application, the estimated grant rate soared to an astounding 98.1%; when a party filed the application, the estimated grant rate remained above 85%.<sup>42</sup> District courts may have considered the *Intel Corp.* factors in the decision’s aftermath, but they have rarely concluded that those factors weighed in favor of denying an application.

The staggering rate at which district courts grant § 1782(a) applications may be traceable to the fact that district courts routinely consider those applications *ex parte*.<sup>43</sup> Critics have argued that parties seeking discovery have little reason to provide information that would lead a district court to deny their applications.<sup>44</sup> As a result, even when district courts nominally apply the *Intel Corp.* factors, they may not have the information needed to carry out the requisite analyses. District courts can weigh some of the *Intel Corp.* factors with

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36. *Id.* at 259–60.

37. *Id.* at 260–62.

38. *Id.* at 264–65.

39. *Id.*

40. *Id.* at 260–61 (citing S. REP. NO. 88-1580, at 7 (1964)).

41. Wang, *supra* note 31, at 2173 tbl.15.

42. *Id.*

43. *Id.* at 2094.

44. See, e.g., Brief of Inst. of Int’l Bankers, *supra* note 5, at 6.

little information from requesting parties. For example, they can easily ascertain whether a request seeks discovery from a third party or a party to the underlying action and can easily characterize the nature of that action. But requesting parties do not have an incentive to tell a district court that the presiding tribunal will resist the court's assistance, and they certainly do not have an incentive to disclose that they filed a § 1782(a) application to get around legal restrictions in their home jurisdiction.

As a result, while *Intel Corp.* properly appreciated the substantial discretion that Congress granted to district courts in § 1782(a), the Court's decision failed to set § 1782(a) practice on the right path for two reasons. First, the Supreme Court failed to prescribe appropriate safeguards to ensure that district courts gain the information they need to fairly consider § 1782(a) applications. And second, § 1782(a) itself, and Title 28 more broadly, fail to provide adequate protections for the rights and interests of parties subject to § 1782(a) orders.

Yet in the Court's next major § 1782(a) decision—*ZF Automotive*—the pendulum swung to the other extreme by categorically prohibiting district courts from granting discovery orders for use in private arbitration. *ZF Automotive* did not address the procedural flaws that pervade § 1782(a) practice, given that the only question before the Court concerned the meaning of the term “foreign or international tribunal.”<sup>45</sup> But the twin guideposts of *Intel Corp.* and *ZF Automotive* have shaped a § 1782(a) jurisprudence typified by unconstrained, burdensome discovery orders for use in foreign litigation and a complete lack of discovery assistance for use in foreign arbitration.

## II. A HOUSE OF CARDS ARGUMENT: THE SUPREME COURT'S ERRORS IN *ZF AUTOMOTIVE*

This Part critiques the Supreme Court's decision in the 2022 case *ZF Automotive US, Inc. v. Luxshare, Ltd.*<sup>46</sup> It first describes the ideological underpinnings of the Court's opinion: an unquestioning adherence to legal formalism and an approach to statutory interpretation that privileges dictionary definitions over practical realities. This Part then demonstrates that the Court's interpretation of the term “foreign or international tribunal” depends on weakly supported propositions and circular logic. Finally, this Part criticizes the Court for relying on the largely undefined and unlimited idea of “potential governmental connotations,” a term that does not appear in § 1782(a).

### A. *Untethered Legal Formalism*

Writing for a unanimous Court in *ZF Automotive*, Justice Barrett adhered to a strict form of textualism that privileges a statute's plain text over legislative

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45. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2086 (2022).

46. *ZF Auto.*, 142 S. Ct. 2078.

intent or policy considerations.<sup>47</sup> Several justices follow this form of “modern textualism,” expounded by former Justice Scalia, that almost entirely eschews the use of legislative materials when interpreting a statute.<sup>48</sup> In *ZF Automotive*, Justice Barrett cited § 1782(a)’s legislative history only once and did so to bolster an argument that she had already laid out in purely textualist terms.<sup>49</sup> As a result, the majority’s opinion largely amounted to what Professor Felix S. Cohen termed “transcendental nonsense.”<sup>50</sup>

In an influential article,<sup>51</sup> Professor Cohen contended that a legal argument that uses a formal legal statement—such as, “a labor union is a person”<sup>52</sup>—as its predicate will necessarily fall into “a vicious circle.”<sup>53</sup> He argued that basing legal arguments on formal statements relies on “asserting something that sounds like a proposition but which *can not be confirmed or refuted by positive evidence or by ethical argument.*”<sup>54</sup> In *ZF Automotive*, the Court’s interpretation of the term “foreign or international tribunal”<sup>55</sup> followed precisely this flawed argument structure. The Court justified its interpretation based on several dictionary definitions and interpretive rules, but nothing compelled the Court to use those definitions and rules rather than others that would have led to a different interpretation, nor did it have to base its argument on dictionary definitions at all.

Stated otherwise, the problem with the Court’s decision is not just that it was wrong but also that it was not justified by either the rules of its internal logic or by any policy. Textualists may argue that the Court’s duty was to determine a plausible interpretation of § 1782(a) and not to consider the systemic effects that its interpretation might have down the line. But accepting

47. Justice Barrett put forth arguments for the logical merit of textualism as a law professor before joining the Court. See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) (“Textualism . . . maintains that the statutory text is the only reliable indication of congressional intent. The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court.”).

48. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (“The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.”).

49. *ZF Auto.*, 142 S. Ct. at 2088.

50. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

51. While citations are an imperfect approximation of an article’s influence or importance, it bears noting that in a 2012 survey, Professor Cohen’s *Transcendental Nonsense and the Functional Approach* was one of the forty most-cited law review articles to date. Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 tbl.I (2012).

52. Cohen, *supra* note 50, at 814.

53. *Id.*

54. *Id.*

55. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2089 (2022).

this argument still leads to the same conclusion: the time has come for Congress to overhaul § 1782(a) to address persistent flaws in domestic discovery procedure.

B. *Using Circular Logic to Interpret the Word “Tribunal”*

The bulk of the Court’s opinion in *ZF Automotive* consisted of a close reading of the term “foreign or international tribunal” that the Court used to determine whether the term covered private arbitral tribunals. Stating that the word “tribunal” is ambiguous on its own,<sup>56</sup> Justice Barrett implicitly applied the semantic canon of *noscitur a sociis*—ambiguous words should be interpreted in the context of surrounding words<sup>57</sup>—to interpret it.<sup>58</sup> Rather than considering the phrase “foreign or international tribunal” as a whole, Justice Barrett parsed the phrase to interpret “foreign tribunal” and “international tribunal” separately.<sup>59</sup> Beginning with “foreign tribunal,” Justice Barrett wrote that “‘foreign’ takes on its more governmental meaning” when it “modif[ies] a word with potential governmental or sovereign connotations.”<sup>60</sup> She posited that “tribunal” does have potential governmental connotations and therefore concluded that “‘foreign tribunal’ more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation.”<sup>61</sup> Finally, she stated, “for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation.”<sup>62</sup>

Problems with the Court’s decision immediately arise from this first argument. At the outset, the Court’s interpretation of the phrase “foreign tribunal” largely relied on circular reasoning. Consider the bare structure of Justice Barrett’s argument: “tribunal” is ambiguous standing alone, so *noscitur a sociis* justifies looking to surrounding words. The word “foreign” takes on a governmental meaning when modifying a word with “potential governmental . . . connotations”; “tribunal” is a word with potential governmental connotations; and, as a result of the foregoing propositions, “foreign tribunal” refers to only governmental—that is, not private—tribunals.<sup>63</sup> The argument began by stating that “tribunal” is too ambiguous to be interpreted on its own but then relied on the purported meaning of “tribunal” alone to provide the governmental connotation necessary to impart a governmental meaning on “foreign.” The same word that is so ambiguous that it cannot be interpreted in a

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56. *Id.* at 2086.

57. *See, e.g., FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011) (“[T]wo words together may assume a more particular meaning than those words in isolation.”); *Yates v. United States*, 574 U.S. 528, 543 (2015) (describing the canon of *noscitur a sociis* as “a word is known by the company it keeps”).

58. *ZF Auto.*, 142 S. Ct. at 2086.

59. *See id.* at 2086–87.

60. *Id.* at 2086.

61. *Id.* at 2087.

62. *Id.*

63. *Id.* at 2086–87.

vacuum is somehow also clear enough to be solely determinative of the meaning of the phrase in which it appears. As a result, Justice Barrett's statement that "foreign" takes on a governmental meaning when it modifies a word with "potential governmental . . . connotations" is unnecessary; according to her argument, the interpretation of "foreign tribunal" turns solely on the meaning of "tribunal."

A supporter of Justice Barrett's argument might reply that the simplified version of the argument does not constitute circular logic, but rather that Justice Barrett identified two meanings of tribunal about which she had different levels of certainty. Justice Barrett did not want to proffer an authoritative definition of "tribunal" standing alone, but a reasonable interpreter should agree that at least some of the multiple possible definitions of "tribunal" have governmental connotations.<sup>64</sup> Even accepting this absurdity—a word whose own meaning is too unclear to determine on its own can clarify the meanings of other words—this counterargument does not address other issues with Justice Barrett's interpretation. Specifically, Justice Barrett failed to justify or limit the other key interpretive rule at play in her argument: that "foreign" assumes a governmental meaning when modifying a word with "potential governmental . . . connotations."<sup>65</sup>

### C. *The "Potential Governmental Connotations" Standard*

To support the proposition that "foreign" has a governmental meaning when it modifies a word with governmental connotations, Justice Barrett used examples from briefing and oral argument.<sup>66</sup> She accepted the argument that "'foreign' suggests something different in the phrase 'foreign leader' than it does in 'foreign films,'"<sup>67</sup> and that "'foreign leader' brings to mind 'an official of a foreign state, not a team captain of a European football club.'<sup>68</sup> This argument relied on inductive logic: Justice Barrett looked at examples of words that appear to confer a governmental connotation to "foreign" and words that do not, and compared those examples to derive a rule. But Justice Barrett failed to contend with the key issue before the Court because she drew on examples that clearly do, or clearly do not, have governmental connotations.

A plethora of words, however, fall into a third category that could easily take on either a governmental or nongovernmental meaning when modified

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64. Professor Gary S. Lawson has posited an analogous trend in legal reasoning—the "best-available-alternative standard"—where judges and scholars do not aim to show that a legal proposition must be absolutely correct, but rather to conclude that "a legal interpretation is correct if it is better than its available alternatives." Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 890 (1992).

65. *ZF Auto.*, 142 S. Ct. at 2086.

66. *Id.* at 2086–87.

67. *Id.* at 2086 (citing Brief for Petitioners at 20–21, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401)); Brief for Respondent at 7–8, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401)).

68. *Id.* at 2086–87 (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 17, *ZF Auto.*, 142 S. Ct. 2078 (Nos. 21-401 & 21-518)).

by “foreign.” “Foreign intel,” for example, could refer to intel gathered by a foreign government or to information gathered from private persons or entities in foreign nations; “foreign actors” could refer to foreign militaries, foreign nations, or simply foreign persons or entities. The term “foreign tribunal” fits in with these ambiguous terms more naturally than it fits in with something so obviously governmental as “foreign leader” or so obviously nongovernmental as “foreign films.” But rather than engage with the central, difficult question—*why* “foreign tribunal” necessarily indicates a tribunal imbued with governmental authority, if it necessarily indicates that at all—Justice Barrett simply stated her conclusion: “‘Tribunal’ is a word with potential governmental or sovereign connotations.”<sup>69</sup>

Furthermore, Justice Barrett articulated an interpretive standard that was so broad that it lacked a meaningful limiting principle. Critically, Justice Barrett stated that the meaning of “foreign” turns on whether the word it modifies has “*potential* governmental or sovereign connotations,” rather than just “governmental or sovereign connotations.”<sup>70</sup> Justice Barrett did not explain or delimit what constitutes a “potential” governmental connotation, and as a result the standard includes a vast number of terms. Even a foreign film—the purported example of a word that clearly lacks any potential governmental connotations<sup>71</sup>—could refer to a film commissioned or funded by a foreign government.

The “potential governmental connotations” standard obscured what may have been the actual basis of the Court’s interpretation. The Court’s discussion of “foreign leaders” and “foreign films” indicates that the Court was, in fact, simply sorting terms based on the justices’ intuitions.<sup>72</sup> But such an approach

69. *Id.* at 2087.

70. *Id.* at 2086 (emphasis added).

71. *Id.* (citing Brief for Petitioners at 20–21, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401); Brief for Respondent at 7–8, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401)).

72. Some scholars and judges have suggested that judges who purport to use strict textualism to derive a statute’s meaning from its plain text should introduce rigor to their technique by drawing on “corpus linguistics,” a method for studying linguistic patterns “through data derived from large bodies—*corpora*—of naturally occurring language.” Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788, 795 (2018). For other examples of scholars discussing the use of corpus linguistics to drive textualist interpretation, see Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 *BYU L. REV.* 1311, and Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 *COLUM. SCI. & TECH. L. REV.* 156 (2011). Even among the strict textualists currently serving on the Supreme Court, ideological divisions remain between the semantic textualists, like Justice Gorsuch, who analyze a given text word-by-word by defining each word in isolation, and pragmatic textualists, like Justices Alito and Kavanaugh, who analyze a given text term-by-term and seek to determine the meaning that a given term conveyed at the time of the text’s enactment. For a case study of this division, see Sam Capparelli, Comment, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of Bostock v. Clayton County?*, 88 *U. CHI. L. REV.* 1419, 1439–46 (2021). In *Bostock*, Justice Alito so disdained the semantic textualist approach taken by Justice Gorsuch in the majority opinion that he wrote a dissenting opinion that notoriously topped out at more than one hundred pages. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754–1823 (2020) (Alito, J., dissenting).

misses the key problem underlying the case: the central dispute of *ZF Automotive* arises from reasonable disagreement over whether “tribunal” necessarily refers only to governmental bodies. If this interpretive disagreement could be decisively resolved based on a handful of dictionary definitions, as the Court’s method suggests, then it is unclear why the federal judiciary would diverge so substantially over the term’s meaning.<sup>73</sup> But rather than engage with the circuit split that gave rise to *ZF Automotive*, the Court dispatched the disagreement with a single, conclusory sentence entirely lacking citation to case law, legislative history, or even a dictionary definition.<sup>74</sup>

#### D. *What the Court Did Not Say, and the Need for Overarching Reform*

While textualist arguments dominated the Court’s opinion, the Court included several nontextualist justifications. First, Justice Barrett invoked the provision’s congressional history and noted that the 1964 amendment changed § 1782(a) to refer to “foreign or international tribunal[s]” rather than “foreign courts.”<sup>75</sup> Justice Barrett also acknowledged that the 1964 amendment reflected the work of the congressionally created Commission on International Rules of Judicial Procedure, which Congress tasked with, inter alia, improving “the rendering of assistance to foreign courts and quasi-judicial agencies.”<sup>76</sup> As a result, Justice Barrett concluded that the 1964 amendment and the statutory language it created “did not signal an expansion from public to private bodies, but rather an expansion of the types of public bodies covered.”<sup>77</sup>

Next, Justice Barrett invoked the “animating purpose of § 1782”: comity.<sup>78</sup> Justice Barrett reasoned that providing judicial assistance to foreign governmental bodies “promotes respect for foreign governments and encourages reciprocal assistance” and stated that “[i]t is difficult to see how enlisting district courts to help private bodies would serve that end.”<sup>79</sup> Third, Justice Barrett highlighted discrepancies between the extent of discovery permitted by § 1782(a) and the extent of discovery permitted for use in domestic arbitration

73. *Compare* *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) (holding that § 1782(a) covered private arbitral tribunals), and *In re Application to Obtain Discovery for Use in Foreign Proc.*, 939 F.3d 710 (6th Cir. 2019) (holding the same), with *Republic of Kazakhstan v. Biederman Int’l*, 168 F.3d 880 (5th Cir. 1999) (holding that § 1782(a) did not cover private arbitral tribunals), and *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (holding the same).

74. *ZF Auto.*, 142 S. Ct. at 2087 (“‘Tribunal’ is a word with potential governmental or sovereign connotations, so ‘foreign tribunal’ more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation.”).

75. *Id.* at 2088.

76. *Id.* (citing Act of Sept. 2, 1958, Pub. L. No. 85-906, §§ 1–2, 72 Stat. 1743, 1743).

77. *Id.*

78. *Id.*

79. *Id.*

under the Federal Arbitration Act.<sup>80</sup> Specifically, Justice Barrett pointed out that § 1782(a) allows “foreign or international tribunals or any ‘interested person’” to make discovery requests while the FAA only permits *arbitrators* to make requests, and that § 1782(a) permits predispute discovery while the FAA prohibits it.<sup>81</sup> As a result, Justice Barrett concluded that allowing parties to access domestic discovery under § 1782(a) for use in foreign arbitration would “create a notable mismatch between foreign and domestic arbitration.”<sup>82</sup>

Yet beyond these three purposivist and structural arguments, the Court did not engage with the overall state of § 1782(a) jurisprudence despite extensive briefing on the topic.<sup>83</sup> As a result, the Court did not discuss the problems endemic to § 1782(a) practice: district courts’ routine practice of considering § 1782(a) applications *ex parte* and, thus, without complete information; the difficulty that many parties face when appealing § 1782(a) orders; and the fact that the information that parties need to successfully challenge or appeal § 1782(a) orders is often shrouded by confidentiality provisions in the underlying arbitration agreements.

The Court likely could not stamp out all the problems that typify current § 1782(a) practice in a single case even if it so desired. The structural problems that plague § 1782(a) practice come not from the statute itself but from the degree to which Congress has delegated decisions about judicial procedure to the judiciary. In practice, however, the Court’s textualist opinion represents another myopic and piecemeal decision that has, in combination with prior Court decisions and district court practice, brought § 1782(a) jurisprudence to a point where it requires large-scale reform. This Note therefore argues that, because these problems have become entrenched in § 1782(a) practice, the judiciary lacks an adequate mechanism to root them out on its own. Rather, Congress should address the problems in one fell swoop by revising § 1782(a) to create an overarching, structural solution.

### III. THE NEW AND IMPROVED § 1782(A)

This Part describes three ways in which Congress should amend § 1782(a) to address the judicial practices that have caused courts to grant § 1782(a) requests at stratospheric rates while failing to protect the interests of parties subject to their orders and categorically prohibiting discovery requests in arbitration. First, Congress should once again update the language defining the statute’s scope to address the question that the Supreme Court analyzed in

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80. *Id.*

81. *Id.* (quoting 28 U.S.C. § 1782(a)).

82. *Id.*

83. The case attracted a substantial amount of input from scholars and entities who filed amicus briefs to weigh in on current problems affecting § 1782(a) practice. *See, e.g.*, Brief of the Int’l Ct. of Arb. of the Int’l Chamber of Com. & the U.S. Council for Int’l Bus. as *Amici Curiae* in Support of Neither Party at 10–12, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401); Brief of Professor Yanbai Andrea Wang as *Amicus Curiae* in Support of Neither Party at 6–17, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401).



*ZF Automotive*: does § 1782(a) apply to private arbitral tribunals? This Part contends that including arbitral tribunals under the provision's coverage would bring § 1782(a) in accordance with the FAA's pro-arbitration stance. Next, this Part asserts that Congress should draw on limitations that already exist in the Federal Rules of Civil Procedure to curtail *ex parte* consideration of § 1782(a) applications. Finally, this Part argues that § 1782(a) should provide for either a mandatory stay of orders granted under the provision upon appeal or an automatic stay that applies in specified scenarios.

### A. Definitions

The Supreme Court's opinion in *ZF Automotive*, and the circuit split that preceded it,<sup>84</sup> are evidence that Congress should clarify the scope of § 1782(a)'s coverage. Congress's decision to broaden § 1782(a)'s coverage beyond "judicial proceeding[s]" through the 1964 amendment better accounted for the variety of adjudicative tribunals abroad. But arbitration's popularity as a dispute resolution method<sup>85</sup> calls for Congress, rather than the courts, to clarify whether the provision covers private arbitral tribunals.

Congress could promote several goals by amending § 1782(a) to specify that private arbitral tribunals qualify as "foreign or international tribunal[s]" under the provision. First, as the Court explained in *ZF Automotive*, "[p]ermitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance."<sup>86</sup> The Court questioned how "enlisting district courts to help private bodies would serve that end," but this proposition assumes that foreign governments lack interest in promoting and enforcing arbitration as a method of dispute resolution.<sup>87</sup> Yet arbitration presents the same benefits in other nations as it presents in the United States. Specifically, arbitration conserves judicial resources by providing parties with a route to adjudicate disputes outside of the court system;<sup>88</sup> it allows parties to protect information that they do not want disclosed through litigation;<sup>89</sup> and it permits parties to resolve disputes cost-effectively by agreeing to *ex ante* discovery and evidentiary limitations.<sup>90</sup>

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84. See *supra* note 73.

85. See, e.g., SCH. OF INT'L ARB. (QUEEN MARY UNIV. OF LONDON) & WHITE & CASE, *supra* note 4, at 5 (reporting that "an overwhelming majority of the respondent group (90%) showed a clear preference for arbitration as their preferred method of resolving cross-border disputes").

86. *ZF Auto.*, 142 S. Ct. at 2088.

87. *Id.*

88. See, e.g., John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187, 221–22 (2018).

89. See, e.g., Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1215 (2006).

90. See, e.g., Kiernan, *supra* note 88, at 210–11 ("Parties can further agree on rules that strictly constrain or eliminate expensive discovery, that substitute depositions with parties' advance presentation of their witnesses' direct testimony by written affidavit . . . , and that set strict timetables for written submissions and hearings (and sometimes even for decisions).").

Numerous countries have enacted statutes analogous to the United States' Federal Arbitration Act,<sup>91</sup> an act that evidences the United States' national interest in promoting arbitration abroad. Stated otherwise, directing federal courts to assist private bodies by granting discovery orders for use in arbitration would serve comity by respecting and supporting other nations' interests in promoting arbitration as a form of dispute resolution.

As several scholars argued in an amicus brief filed in *ZF Automotive*, the Supreme Court's eventual decision in the case marked a break from the way that numerous foreign court systems treat their equivalents to § 1782(a) requests.<sup>92</sup> Specifically, these scholars noted that the United Kingdom, New Zealand, France, Germany, Sweden, and Switzerland all, as a matter of statutory law, permit domestic courts to order discovery "for use by foreign-seated international commercial arbitral tribunals."<sup>93</sup> The scholars specified that "[m]any of those statutes also include safeguards that prevent overbroad requests."<sup>94</sup> Thus, several other nations, which include "some of the most important arbitration jurisdictions,"<sup>95</sup> have already enacted statutory provisions, analogous to a new and improved § 1782, that balance the country's interest in promoting reciprocal support for arbitration with the interests of parties subject to discovery orders.<sup>96</sup>

#### B. *Limitations on Ex Parte Orders*

Perhaps the issue currently affecting § 1782(a) practice the most is the astounding rate at which district courts grant § 1782(a) applications.<sup>97</sup> This extraordinary grant rate may be largely attributable to the fact that courts routinely consider § 1782(a) applications *ex parte*. As a result, courts decide whether to grant a discovery order based solely on arguments made by the party seeking discovery. Several federal courts have held that district courts

91. See GLORIA MICCIOLI, AM. SOC'Y OF INT'L L., INTERNATIONAL COMMERCIAL ARBITRATION, [https://www.asil.org/sites/default/files/ERG\\_ARB.pdf](https://www.asil.org/sites/default/files/ERG_ARB.pdf) [perma.cc/ARL6-HMD9] (providing a compendium of more than eighty national arbitration statutes comparable to the Federal Arbitration Act).

92. Brief of Professors Tamar Meshel, Crina Baltag, Fabien Gélinas & Janet Walker as *Amici Curiae* in Support of Respondent Luxshare, Ltd. at 12–15, *ZF Auto.*, 142 S. Ct. 2078 (No. 21-401).

93. *Id.*

94. *Id.* at 15.

95. *Id.*

96. See, e.g., Arbitration Act 1996 c. 23, §§ 2(3), 44(2)(a) (Eng., Wales & N. Ir.); Evidence Act 2006, pt 4, ss 182, 184–185 (N.Z.); CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] arts. 1469, 1506 (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 1025, 1050, [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) [perma.cc/ACN5-ECQ9] (Ger.); 26, 50 §§ LAG OM SKILJEFÖRFARANDE (Svensk författningssamling [SFS] 1999:116) (Swed.); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IRPG] [FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 17, 1987, SR 291, art. 185a, para. 2 (Switz.).

97. See Wang, *supra* note 31, at 2173 tbl.15 (estimating that district courts granted § 1782(a) applications more than 90% of the time between 2005 and 2017).

can properly consider § 1782(a) applications ex parte,<sup>98</sup> and federal statutes and procedural rules place few concrete restrictions on courts' abilities to consider and grant motions ex parte. The Federal Rules of Civil Procedure mention ex parte motions several times but do not expressly state which motions courts may or may not consider ex parte, nor do they offer a standard governing when courts may conduct business or grant motions ex parte.<sup>99</sup>

Instead, the jurisprudence that governs ex parte judicial practice focuses on the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and has developed largely in the criminal, rather than civil, arena.<sup>100</sup> Based on that strand of due process jurisprudence, federal courts have held that they can consider § 1782(a) applications ex parte because other procedures safeguard the due process rights of parties ordered to produce discovery.<sup>101</sup> Typically, courts point to Federal Rule 45, which directs courts to quash or modify a subpoena that "requires disclosure of privileged or other protected matter" or that "subjects a person to undue burden."<sup>102</sup> Yet parties face an uphill battle when attempting to persuade appellate courts to reverse district courts' decisions regarding § 1782(a) orders.

Furthermore, regardless of the burdens that § 1782(a) orders can impose on those required to produce evidence or provide testimony, the routine practice of considering § 1782(a) applications ex parte prevents district courts from completing the inquiry required by *Intel Corp.*<sup>103</sup> accurately and thoroughly. Parties have no incentive to candidly inform district courts whether their home tribunal would be receptive to the district court's assistance or tell the district court that they are filing a § 1782(a) application to evade domestic

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98. Many courts cite a 1976 decision that concerned a district court's issuance of subpoenas based on a letter rogatory rather than a § 1782(a) request. *In re Letters Rogatory from Tokyo Dist., Tokyo*, 539 F.2d 1216 (9th Cir. 1976). Letters rogatory essentially constitute a subset of the requests addressed in 28 U.S.C. § 1782; a judge from one nation can send a letter rogatory to a judge in another nation to request that judge take an action voluntarily when, if taken without the foreign judiciary's consent, the action would violate the receiving nation's sovereignty. U.S. DEP'T OF JUST., CRIM. RES. MANUAL § 275 (2020). Title 28 authorizes the Department of State to facilitate the execution of letters rogatory by transmitting requests to the governmental body in the United States to which they are addressed. 28 U.S.C. § 1781(a)(1).

99. See FED. R. CIV. P. 5(a)(1)(D), 6(c)(1)(A), 6(c)(1)(C), 53(b)(2)(B), 77(b).

100. Much of the jurisprudence regarding whether ex parte communications violate the Due Process Clause concerns judges' ex parte communications with jurors during criminal trials, rather than a judge's ex parte consideration of a motion or application in a civil proceeding. See, e.g., *Young v. Herring*, 938 F.2d 543, 557 (5th Cir. 1991) (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985), for the proposition that ex parte communication amounts to a due process violation only to "the extent that a fair and just hearing would be thwarted by [the defendant's] absence, and to that extent only" (alteration in *Young v. Herring*)).

101. See, e.g., *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012) ("The respondent's due process rights are not violated because he can later challenge any discovery request by moving to quash pursuant to Federal Rule of Civil Procedure 45(c)(3).").

102. FED. R. CIV. P. 45(d)(3)(A)(iii)–(iv).

103. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004).

restrictions on evidence-gathering.<sup>104</sup> Thus, by restricting courts from considering § 1782(a) applications *ex parte*, Congress would both protect the interests of parties subject to § 1782(a) orders and ensure that district courts base discovery orders on complete and accurate information. Finally, if Congress prefers to give district courts some discretion to grant § 1782(a) orders *ex parte* in rare and pressing circumstances, Congress could, for example, incorporate the Federal Rules' standard for issuing temporary restraining orders *ex parte* into § 1782(a).<sup>105</sup>

### C. *Mandatory Stays Pending Appeal*

Currently, parties subject to § 1782(a) orders not only lack a guaranteed opportunity to challenge the propriety of the order before a district court grants it; they also frequently face an uphill battle to have the order quashed or vacated after the district court issues its decision. Part of this uphill battle results from the difficulty that parties face when trying to obtain a stay pending appeal of the district court's order. While parties can immediately appeal final district court decisions under 28 U.S.C. § 1291,<sup>106</sup> courts have broad latitude regarding whether to stay a court order while the party subject to it appeals the district court's decision. Specifically, district and appellate courts have the power to stay a court order while a party appeals under the All Writs Act, which places few limitations on, and offers little guidance as to, when federal courts should stay an order.<sup>107</sup>

In the § 1782(a) context, federal courts use a four-factor test created by the Supreme Court<sup>108</sup> to determine whether to issue a stay while the party subject to the discovery order appeals.<sup>109</sup> The four-factor test directs courts to analyze (1) the applicant's likelihood of success on the merits, (2) whether the applicant will suffer an irreparable injury without a stay, (3) whether issuing a stay will substantially injure other parties to the proceeding, and (4) any impact that stay might have on the public interest.<sup>110</sup>

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104. Brief of Inst. of Int'l Bankers, *supra* note 5, at 6 ("For example, under *Intel*, a significant consideration in whether to grant § 1782 discovery is the foreign tribunal's receptivity to the evidence sought. Of course, the applicant's *ex parte* application will rarely highlight the possible unwillingness on the part of the foreign tribunal to consider discovery obtained abroad.")

105. FED. R. CIV. P. 65(b)(1)(A) (permitting courts to issue temporary restraining orders *ex parte* "only if . . . specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition").

106. 28 U.S.C. § 1291.

107. 28 U.S.C. § 1651(a) (stating that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions").

108. *Hilton v. Braunkill*, 481 U.S. 770, 776 (1987).

109. See, e.g., *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121, 1127 (D. Colo. 2011); *In re Application of Procter & Gamble Co.*, 334 F. Supp. 2d 1112, 1117–18 (E.D. Wis. 2004).

110. *Hilton*, 481 U.S. at 776.

Parties who seek to obtain a stay pending appeal typically fare poorly when attempting to satisfy the “irreparable injury” factor. Despite the substantial costs that parties can incur from complying with a § 1782(a) order, federal courts have been hesitant to hold that a party’s anticipated costs of compliance constitute an “irreparable injury.”<sup>111</sup> Additionally, parties cannot easily satisfy the “likelihood of success on the merits” factor because they bear the burden of persuasion upon appeal.<sup>112</sup> As a result, courts frequently discount the party’s likelihood of having the § 1782(a) order vacated because the party must convince an appellate court to overturn the district court’s decision based on a deferential “abuse of discretion” standard of review.<sup>113</sup> In a sense, the burdens that parties face upon appeal create a harmful feedback loop. The likelihood of convincing an appellate court to overturn a district court’s § 1782(a) order on appeal is so low that federal courts invoke that difficulty as a reason to deny a party’s motion for a stay pending appeal. But parties’ inability to obtain a stay of the § 1782(a) order pending appeal in turn forces the party into a “comply or contempt” dilemma, in which it must either expend large sums to comply with the subpoena or risk being held in contempt of court.<sup>114</sup>

To mitigate the burdens that parties face after a district court grants a § 1782(a) order, Congress should amend the provision to require courts to stay the order when the party required to produce evidence files an appeal of the order. Federal courts’ decisions regarding when to grant a stay pending appeal may represent a trade-off between the cost of delay and the cost of compliance, but importantly, in the § 1782(a) context, the trade-off balances the cost of delay and the cost of *unnecessary* compliance. A party that (1) appeals a § 1782(a) order, (2) fails to obtain a stay pending appeal, (3) begins production while the appeal is pending, and then (4) has the order quashed or vacated, will have borne the cost of gathering evidence that it ultimately does not have to produce. A policy placing the costs of delay or production on the party

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111. See, e.g., *JSC MCC EuroChem v. Chauhan*, No. 18-5890, 2018 WL 9650037, at \*2 (6th Cir. Sept. 14, 2018) (citing *Mich. Coal. Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)) (holding that a party’s “assertions of harm are largely speculative or uncertain, and his expenditure of resources, without more, does not rise to the level of irreparable harm”); *Bjorkman*, 801 F. Supp. 2d at 1127–28; see also *In re Application of Procter & Gamble*, 334 F. Supp. 2d at 1117–18 (reversing the analysis and holding that granting a stay would irreparably injure the party seeking to obtain discovery under § 1782(a)).

112. See, e.g., *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir. 2011) (“Once a section 1782 applicant demonstrates a need for extensive discovery for aid in a foreign lawsuit, the burden shifts to the opposing litigant . . .”).

113. See, e.g., *In re Application of Procter & Gamble*, 334 F. Supp. 2d at 1117 (“[B]ecause my decision to grant P & G’s application will be reviewed for an abuse of discretion, . . . it is unlikely that [the movant] will succeed on the merits of its appeal.”) (citing *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 81 (2d Cir. 2004)); see also *Bjorkman*, 801 F. Supp. 2d at 1128 (disregarding the likelihood-of-success-on-the-merits factor after holding that “the Movants have failed to show how they will be harmed (irreparably or otherwise) absent a stay”).

114. See Brief of Inst. of Int’l Bankers, *supra* note 5, at 7 (“Without such a stay, the respondent must comply with the subpoena—upon risk of contempt—before the appeal can be heard.”).

that has commenced the discovery proceedings accords with basic notions of fairness.

Congress could enact a simple fix by amending § 1782(a) to include a rebuttable presumption in favor of granting a stay pending appeal. By structuring the amended language as a rebuttable presumption, Congress would preserve courts' discretionary powers while requiring the party who filed the § 1782(a) application to bear the burden of persuading the court to reverse course. And preserving a discretionary element would allow courts to refuse to grant a stay when the movant can convince the court that the party opposing the order does so without good cause, or for an improper purpose like delaying arbitration. Both suggested structural amendments—creating a general prohibition on *ex parte* consideration with an emergency exception and shifting the burden of persuasion for stays pending appeal—acknowledge that federal courts need some discretion to respond to frivolous and bad faith arguments and exigent circumstances. But the extraordinary rate at which district courts have granted § 1782(a) applications in recent years indicates that the current iteration of § 1782(a) grants the judiciary far too much latitude.

Amending § 1782(a) to expressly address whether the provision applies to private arbitration, to generally prohibit courts from considering applications *ex parte*, and to shift the burden of persuasion regarding stays pending appeal would promote two goals that the provision should effectuate. First, these changes would promote comity and reciprocity by preserving a path in the federal courts for parties to obtain necessary evidence for use in foreign arbitration proceedings. Second, these changes would provide the structural safeguards—which are absent currently—for protecting the rights and interests of parties subject to § 1782(a) orders.

#### CONCLUSION

Imagine that Congress enacts the amendments described above and creates the new and improved § 1782. How would things change for our aforementioned cast of characters: Lawyer X, Foreign Corp, Lawyer Y, and Big Bank? This Note contends that the amendment would promote and protect all their interests. If Congress abrogated *ZF Automotive* by expressly stating that parties can use § 1782(a) to obtain discovery for use in private arbitration, Foreign Corp could obtain the discovery it needs to resolve its disputes efficiently and accurately through arbitration. As a result, Foreign Corp may continue to use arbitration agreements with its counterparties going forward, which would in turn effectuate the interest of Foreign Corp's home jurisdiction in promoting arbitration to conserve judicial resources. At the same time, Big Bank would receive notice and an opportunity to challenge § 1782(a) applications and would be able to proactively convince the district court to deny or limit those applications. Limiting district courts' abilities to consider § 1782(a) applications would not only protect Big Bank from unnecessary and expensive discovery but would also ensure that district courts reached their decisions based on complete and accurate information. As for Lawyer X and Lawyer Y, they would no longer have to navigate a system of judicial practice

that created substantive and procedural obstacles to vigorously representing their clients' needs and interests at every turn. Viewed on a systemic level, amending § 1782(a) to cover discovery requests relating to private arbitration and to impose procedural safeguards would bring consistency and transparency to an area of judicial practice that has long operated as a procedural Wild West.